

themis Pharmaceuticals and ors. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-26-2003

Reported in : (2003)(157)ELT569Tri(Mum.)bai

Judge : K Kumar, S T C.

Appellant : themis Pharmaceuticals and ors.

Respondent : Commissioner of Central Excise

Judgement :

1. These 17 applications involve a common issue: Whether the Tribunal can grant stay beyond a period of 180 days. The newly-inserted sub-section (2A) of Section 35C of the Central Excise Act, 1944 reads as under: - " The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date in which such appeal is filed: Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order; Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated." The learned J.C.D.R as well as the learned counsels appearing for various applicants inform us that there are as yet no decisions of the Apex Court or any of the High Courts on this issue. They also inform us that the Department, in consultation with the Ministry of Law and the Solicitor General of India, has taken a view that the Tribunal cannot give stay beyond 180 days and SLP filed in the Apex Court is

pending.

Since a decision by the Apex Court is likely to take some time and numerous applications for extension of stay are being filed before us, we proceed to decide these applications.

2. Though there is no direct judicial pronouncement on this issue, we find that in the context of time limit of six months specified in Article 164(4) of the constitution, in the case of S.R. Chaudhuri Vs.

State of Punjab, the Apex Court has rendered a decision on 17/08/2001 (2001 SOL case No. 469). It was pleaded in that case that the plain language of Article 164(4) did not prohibit re-appointment of a Minister without being elected, even repeatedly. This was not accepted by the Apex Court which ruled to the effect that Article 164(4) provides a restriction, re-appointment beyond a period of six months would be an abuse of the said provision, permitting repeated appointments would not only make the Article nugatory but would also be inconsistent with basic premise. Constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit political expediency, and that the clear mandate of Article 164 cannot be allowed to be frustrated by giving a gap of a few days and making a re-appointment. The apex Court also opined, "The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve." 3. In the light of the aforesaid pronouncement of the Apex Court when we look at the language of sub-section (2A) of Section 35C of the Central Excise Act, 1944, the legislative intent of the said sub-section clearly emerges as follows:- (i) Where possible, the Tribunal shall decide every appeal within a period of 3 years.

(ii) Cases where stay is granted shall be decided within 180 days, and (iii) failing which stay order shall stand vacated on expiry of 180 days.

The question is, can the Tribunal grant further extensions of stay beyond a period of 180 days if the appeal is not decided by then? Respectfully following the principles underlying the Apex Court decision cited above, we observe that:- (a)

second proviso to sub-section (2A) of Section 35C provides a restriction on the continuance of stay beyond 180 days.

(b) Permitting extension and repeated extensions beyond 180 days would make the said provision nugatory and frustrate its clear mandate, (c) The legislative change made by the Parliament through the Finance Act, 2002 would become redundant if such extensions beyond 180 days are to be granted by the Tribunal.

(d) Legal restraints placed by the said sub-section (2A) should not be ignored or bypassed on grounds of convenience or expediency.

4. We are aware of the fact that there are nearly 20,000 appeals and several thousands of stay applications pending before the Tribunal Benches at Mumbai and that appeals filed in 1997/1998 are being presently heard. However, the Benches at Calcutta and Delhi have no mounting pendency and they are hearing current cases. In our view, the solution to the problem of some of the Mumbai Benches not being able to decide appeals within a period of 180 days of granting stay does not lie in ignoring a specific legal restraint imposed under the said sub-section (2A) and in granting extensions beyond 180 days, but perhaps in initiating urgent administrative and structural reforms such as:- (i) Urgent Recruitment of Additional Members and creation of Additional Benches by the Government at Mumbai for a period of 2-3 years. Section 129 (1) of the Customs Act, 1962 allows the Central Government to appoint as many Members as it thinks fit.

(ii) Urgent filling of vancancies of Members and temporary shifting of Members and supporting staff to Mumbai from Zones of low pendency.

(iii) Notifying and giving urgent effect to proviso (d) to sub-section (1) of section 35B inserted by Finance (No.2) Act, 1998 five years ago shifting thousands of pending Modvat appeals for decision by Joint secretary (Revision Application). a few JCDRs may be diverted to hear and decide these cases.

(iv) Out of turn hearing of appeals by Tribunal within 6 months where stay has been granted.

(v) computerisation of the Tribunal Registry to enable bunching of similar appeals for expeditious disposal.

In highlighting possible reforms as above, it is certainly not our intention to venture into the administrative domain. We are merely pointing out that with such and other reforms, the legislative intent of the said sub-section (2A) can be fully carried out and pendencies reduced and that there is, therefore, even no need to ignore or bypass the specific legal restraint placed on granting stay beyond 180 days on grounds of convenience or expediency. In view of our observation as above, we hold that the Tribunal has no power to grant extension of stay beyond 180 days after enactment of the Finance Act, 2002.

5. While holding that the Tribunal does not have power to grant extension of stay beyond 180 days, we hasten to add that the power to dispense with pre-deposit of duty and penalty under section 35F is a distinct and separate power and the same is not affected by amendment made to Section 35C. In the absence of specific amendment to Section 35F, we are of the view that where waiver of pre-deposit is granted, the same will continue and the appeals will not be dismissed even though order of stay of recovery will automatically lapse on the expiry of 180 days as provided under sub-section (2A) of Section 35C. We are making a distinction between waiver of pre-deposit and stay of recovery as the power to dispense with pre-deposit is a statutory power under Section 35F whereas the power to stay recovery is an incidental power of the Tribunal which is now restricted by the said sub-section (2A) of Section 35C. The vires of such restriction imposed under the statute cannot of course be questioned by the Tribunal, being a creature to the same statute.

6. We also note in this regard the Apex Court's observation in C.C.Bombay Vs. Krishna Sales (P) Ltd. - 1994 (73) E.L.T. 519 (SC) that, "As is well-known, mere filing of an Appeal does not operate as a stay or suspension of the order appealed against." This observation supports our view that an appeal can be filed and heard without making a pre-deposit. If the same is dispensed with by the Tribunal under section 35F, whereas stay of recovery and stay of operation of the order appealed against requires application of Tribunal's incidental power which now stands

restricted by the said sub-section (2A).

7. In this context, we also refer to the decision of the Orissa High Court in the case of CCE & C Vs Golden Hind Shipping (India) Pvt Ltd -1993 (68) ELT 739 (Ori). After referring to the Apex Court decision in the case of ITO Vs M K Mohammed Kunchi-1969 (71) ITR 815, the High Court has concluded as follows : (1) The appellate powers of ITAT are wider than of CEGAT. The view expressed by CEGAT that its powers are similar in nature to the power of ITAT under Section 254 of the Income Tax Act is clearly wrong.

(ii) CEGAT has no inherent powers. It being a creature of statute, it can exercise such powers only which have been conferred by the statute.

8. The learned counsels for the applicants have also brought to our notice a decision of a three-Member Bench in the case of Himalaya International Ltd Vs CCE, Chandigarh which reads as follows : "Heard both sides. Interim stay is extended till the disposal of the appeal." In this regard, we are guided by the Apex Court decision reported in AIR 1967 SC Samaroa Vs State of Pondicherry, PG 1680, which declares : "It is true to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles laid down therein. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be a declaration of or authority of a general nature binding as a precedent." Following the Apex Court decision, we are unable to follow the said non-speaking order of the three-Member Bench as well as non-speaking orders of other coordinate Benches. We, in fact, note a contrary decision rendered by a three-Member Bench in the case of CCE, Bhubaneswar Vs Oripof Industries -2003(155) ELT 278 (Tri-LB) in the context of another amendment made through the Finance Act, 2001 to the effect that after a conscious interference by the legislature to do away with a specific power, the Tribunal will not be justified to given an interpretation holding retention of the said power as an inherent power. The Bench also held that reference to Notes on Clauses to the Finance Bill is permissible to ascertain the intention of the amendment brought in by the Finance Bill. We find that according to Notes on Clauses to the Finance Bill, 2002, amendment of Section 35C seeks to provide that in cases where stay order has

been passed by the Tribunal, time-limit for disposing of the appeal shall be 180 days and also to provide for automatic vacation of the stay order in the case of non-disposal of such appeals. The ration of the aforesaid order of the Larger Bench and reference to the Notes on Clauses to the Finance Bill, 2002, also support the view that after enactment of the Finance Act, 2002, on 11/05/2002, the Tribunal does not have power to extend stay orders beyond 180 days.

9. The learned counsels for the applicants have also cited Tribunal's order in the case of Kumar Cotton Mills Vs CCE, Ahmedabad-2002 (146) ELT 438 before us. The said order in paragraph 33 clearly states that the issue related in that case to grant of stay before insertion of sub-section (2A) of Section 35C. Yet, the Tribunal proceeded to give a finding that stay granted after insertion of sub-section (2A) can also be extended, though there was no such case before the Tribunal to decide upon. We are unable to agree that such a decision given in a vacuum in the absence of a dispute becomes a binding precedent for coordinate Benches.

(i) Section 35F requires pre-deposit of duty and penalty pending appeal.

(ii) Proviso to the said section 35F gives statutory power to the Tribunal to dispense with such pre-deposit in suitable cases.

(iii) Since no amendment has been made to Section 35F, Tribunal's power to waive pre-deposit during the pendency of appeal remains unaltered.

(iv) Power of the Tribunal to stay recovery and to grant stay of an order appealed against is incidental to exercising its appellate function.

(v) Amendment of Section 35C by the Finance Act, 2002, places a specific legal restraint on exercise of such incidental power beyond 180 days as per clear wordings of sub-section (2A) of the said Section 35C. (vi) Tribunal being a creature of the same statute cannot question the vires of the said sub-section (2A).

The provisions under sub-section (2A) of Section 129B of the Customs Act, 1962 being similar, our findings as above also applies to one application filed under the said Act. Accordingly, we reject the miscellaneous applications seeking extension of stay orders earlier granted by the Tribunal. However, we clarify that waiver of

pre-deposit granted earlier will continue. We also direct the Registry to fix regular hearing of the connected appeals out of turn in these cases.

11. We also think it fit to direct the Registry to send a copy of this order to the Revenue Secretary who is in-charge of the overall administration of this Tribunal to consider implementation of the suggestions made by us in paragraph 4 for administrative/ structural changes so that impediments in the implementation of legislative changes made by Finance Act 2002 and Finance (No 2) Act, 1998 can be ironed out.

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