
(2000) 01 DEL CK 0013

In the Delhi High Court

Case No : Civil Writ Petition No. 2705/99

Charak Pharmaceuticals (I) Ltd

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-01-2000

Acts Referred:

Finance Act, 1962 — Section 86, 87, 88, 89, 90

Citation : (2000) 2 AD 363 : (2000) 52 DRJ 544 : (2000) 67 ECC 749

Hon'ble Judges : D.K. Jain, J;Arun Kumar, J

Bench : Division Bench

Advocate : Mr. A.R. Madhav Rao and Mr. K. Srinivasan, for the Appellant; Mr. U. Hazarika, Central Govt. Standing Counsel, for the Respondent

Judgement

D.K. Jain, J.—Rule D.B.

2. Since a short question of law is involved and there is not much controversy on facts, with the consent of counsel for the parties, we proceed to decide the petition finally at this stage itself.

3. By this petition under Article 226 of the Constitution of India, the petitioner questions the legality and validity of : (i) a letter dated 9th March, 1999 issued by the Assistant Commissioner (T), Central Excise, Delhi - respondent No. 3 herein, returning the declaration dated 21st January 1999, pertaining to the additional excise duty demand (Rs.19,29,642/-) for the period from 1st September, 1995 to 31st January, 1998, filed by the petitioner under the provisions of the Kar Vivad Samadhan Scheme, 1998 (for short "the KVSS") on the ground that no show cause notice had been issued to the petitioner for the amount mentioned in the declaration and (ii) a demand cum show cause notice dated 16th March, 1999 issued by the Superintendent, Central Excise Range Panipat for recovery of the said duty amount of Rs.19,29,642/-. The petitioner seeks a direction to the Commissioner Central Excise - the designated authority under the KVSS, to consider the said declaration and restrain the Superintendent from proceeding further in the matter of recovery.

4. The petitioner, an incorporated company, is engaged in the manufacture of P.P. Ayurvedic Medicines falling under Chapter Heading No. 3003.30 of the Central Excise Tariff Act, 1985. They were clearing the physicians samples of the said ayurvedic medicines on payment of duty at the assessable value equivalent to the cost price. The Central Excise Department disputed the basis adopted by the petitioner for determining the assessable value equivalent to the cost of production. Accordingly, vide letter dated 26th July, 1995 the Superintendent, Central Excise, Panipat - respondent No. 5 herein, directed the petitioner to clear the samples by adopting a higher assessable value on pro-rata basis of the assessable value of the regular trade packs sold commercially, with a further direction to execute B-13 bonds for provisional assessments to be made in respect of further clearances. Immediately thereafter, on 28th July, 1995, a show cause notice was issued to the petitioner by the Assistant Commissioner Central Excise, Division Sonapat - respondent No. 4 herein, demanding duty difference for the period from January, 1995 to April, 1995, calculated on the affronted basis. Subsequently, on 25th October, 1995, yet another show cause notice, on the same ground, was issued by the said respondent for the subsequent period from May, 1995 to August, 1995, raising an additional demand. The petitioner filed replies to the show cause notices. Contesting the stand of the department that the assessable value of the physicians samples had to be determined in accordance with Rule 6(b) (i) of the Valuation Rules, it was pleaded that the samples were not liable to any excise duty as these were neither marketed nor marketable; the samples were nothing but advertisement material; cost of samples formed a component of the sale value of the medicines sold and this component of sale value bore excise duty as the other component and, Therefore, charging of excise duty on the samples would amount to double taxation, which is not permitted under Article 265 of the Constitution.

5. Pursuant to the aforementioned directions, the petitioner executed B- 13 bond with bank guarantee, which was accepted on 31st October, 1995 with effect from 1st September, 1995. Thereafter, monthly returns, filed by the petitioner in the form of RT-12 were assessed provisionally by the Superintendent, Central Excise and provisional assessment bonds with bank guarantees for the additional amounts were executed by the petitioner, which were duly accepted. The show cause notices dated 28th July, 1995 and 25th October, 1995 were finally adjudicated by respondent No. 4 vide order dated 16th March, 1998, rejecting all the contentions urged by the petitioner. While confirming the additional amount of duty demanded in terms of the said notices, the adjudicating authority also levied penalty on the petitioner under Rule 173-Q of the Central Excise Rules, 1944.

6. According to the petitioner, since a dispute with regard to the correct assessable value of the samples manufactured and distributed to the physicians by the petitioner was pending adjudication by the Revenue authorities in pursuance of the affronted two show cause notices, covering the period from January, 1995 to August, 1995, all future similar clearances were being assessed

as provisional, subject to the outcome of the said show cause notices; the said dispute for the period from January, 1995 to August, 1995 was finally adjudicated by the Assistant Commissioner only on 16th March, 1998; Making a pointed reference to the two show cause notices and relying on the said adjudication order, the Assistant Commissioner finalised the assessment for the period in question, namely, from 1st September, 1995 to 31st January, 1998 vide his order dated 17th September, 1998; the differential duty, quantified at Rs.19,29,642/-, required to be paid by the petitioner, over and above the duty paid by virtue of provisional assessments, constitutes the subject-matter of demand notices in the form of provisional assessments, made prior to 31st March, 1998 and remained unpaid and was, thus, "tax arrear" within the meaning of Section 87(m)(ii) of the Finance (No. 2) Act, 1998 (for short 'the Finance Act').

7. The petitioner filed an appeal against the order, dated 17th September, 1998, which is stated to be pending. However, in order to put an end to the litigation, the petitioner filed the declaration in question for settlement of the amount of Rs.19,29,642/-, demanded vide order dated 17th September, 1998. As noted above, the said declaration has been returned to the petitioner on the ground that the scheme does not apply to the case as no show cause notice had been issued on or before 31st March, 1998. It is also pleaded that pending appeal, a demand-cum-show cause notice dated 16th March, 1999 for recovery of Rs.19,29,642/- along with interest and penalty u/s 173-Q of the Central Excise Rules, 1944 has also been issued to the petitioner.

8. In response to the show cause notice issued to the respondent a common affidavit in opposition has been filed on behalf of the Commissioner of Central Excise and Assistant Commissioner (T) Central Excise Delhi. In the reply affidavit it has been stated that the petitioner is not entitled to any relief under the KVSS because : (i) there was no tax arrear due or payable as on 31st March, 1998 as per the provision of Section 87(m)(ii)(a) of the Finance Act; (ii) there was no show cause notice issued in respect of the duty amount of Rs. 19,29,642/- on or before 31st March, 1998, as required under the provisions of Section 87(m)(ii) (b); (iii) petitioner's reliance on the show cause notices dated 28th July, 1995 and 25th October, 1995 is misconceived as these did not relate to the duty amount of Rs.19,29,642/-, in respect whereof the petitioner had claimed settlement, and (iv) the said two show cause notices having been settled under the KVSS under a separate declaration dated 28th December, 1998 these cannot be considered as show cause notices in respect of duty amount of Rs. 19,29,642/-. In nutshell, the case of the respondents is that since no show cause notice had been issued to the petitioner on or before 31st March, 1998 in respect of the amount of duty of Rs. 19,29,642/-, due to the provisional assessment being made during the period from 1st September, 1995 to 31st January, 1998 under Rule 9-B of the Central Excise Rules and no tax arrear being due or payable as on or before 31st March, 1998, in the absence of demand notice/show cause notice, declaration dated 29th January, 1999 in respect of the said amount

could not be entertained under the KVSS.

9. We have heard Mr. A.R. Madhav Rao, learned counsel for the petitioner and Mr. U. Hazarika, Central Government Standing Counsel, on behalf of the respondents.

10. It is submitted by Mr. Rao that though no separate show cause notice was issued to the petitioner for the additional demand pertaining to the period from 1st September, 1995 to 31st January, 1998 but the provisional assessments for this subsequent period, on the basis of RT-12 returns, were being made only because of pendency of dispute with regard to the assessable value of the physicians samples of P.P. Ayurvedic Medicines, subject- matter of show cause notices dated 28th July, 1995 and 25th October, 1995, and it was only after the final adjudication of the said show cause notices on 16th March, 1998 that final differential amount due and payable for the period in question was determined on 17th September, 1998 by following the adjudication order dated 16th March, 1998 and, Therefore, it could not be said that the subject demand did not remain unpaid before 31st March, 1998 as stipulated in Section 87(m)(ii) of the Finance Act. In support of his argument that the petitioner was contesting the demand of Rs.19,29,642/- it is pointed out that an appeal against the said order was pending before the Commissioner of Central Excise (Appeals) on 29th January, 1999, when the declaration under the KVSS was filed. On the other hand, it is reiterated by Mr. Hazarika that a provisional assessment could neither be treated as a show cause notice nor a demand notice in terms of Section 87(m)(ii)(b) of the Finance Act and, Therefore, the declaration was rightly returned to the petitioner.

11. The Finance Act introduced a Scheme, christened as KVSS, consisting of Sections 86 to 98 (both inclusive) as also a Schedule with a view to provide a quick and voluntary settlement of tax arrears outstanding as on 31st March, 1998 and locked up in litigation, by offering waiver of a part of the arrear and interest besides immunity from penalty and prosecution. The provisions of the Scheme, being benevolent in nature, are not to be construed in a restricted and mechanical manner. The Scheme has to be construed purposefully and beneficially to achieve the object behind it. One of the salient features of the scheme, is that only tax arrear, as defined in the Scheme, and not specifically kept outside the purview of the Scheme, determined on or before 31st March, 1998 and remaining unpaid on the date of filing of declaration is covered under the Scheme. Section 87 defines various terms. Sub-section (m) of Section 87 defines the expression "tax arrear". It reads as follows :

"(m) "tax arrear" means :

(i)

(ii) in relation to indirect tax enactment;

(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as duty

or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making declaration u/s 88; or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty) cesses, interest, fine or penalty which constituted the subject-matter of a demand notice or a show cause notice issued on or before the 31st day of March, 1998, under that enactment but remaining unpaid on the date of making a declaration u/s 88, but does not include any demand relating to erroneous refund and where a show cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified.

Explanation:Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him u/s 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause."

12. Thus, "tax arrear" in case of indirect tax enactment includes : (i) Duties (including draw back of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined, as due or payable under that enactment as on 31st March, 1998; but remaining unpaid on the date of declaration or (ii) the amount of duties etc. referred above in (i) as per a demand notice or show cause notice, which is issued on or before 31st March, 1998 and remaining unpaid on the date of declaration.

13. Therefore, the basic and crucial requirement to fall within the ambit of the scheme is that the various components of "tax arrear" must have been determined as due and payable as on 31st March, 1998 but remain unpaid as on the date of making of declaration under the scheme; or it should be the subject-matter of a demand notice or show cause notice issued on or before 31st March, 1998 but remaining unpaid on the date of making declaration under the scheme. Section 95(ii) of the Finance Act also places an embargo in respect of certain items of tax arrear and excludes the following type of cases from the scope of the scheme:

"(a) in a case where a prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration u/s 88, in respect of any tax arrear in respect of such case under such indirect tax enactment;

(b) in a case where show cause notice or notice of demand under any indirect tax enactment has not been issued;

(c) in a case where no appeal or reference or writ petition is admitted and

pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made u/s 88."

From a conjoint reading of Section 87(m)(ii) and Section 95(ii) of the Finance Act, it is evident that for a "tax arrear" to be eligible for being declared under the KVSS, the condition precedent is that: tax arrear must have been determined on or before 31st March, 1998; must have remained unpaid either in full or in part on the date of making declaration; or in respect of such tax arrear a demand notice or a show cause notice has been issued; and in respect of tax arrear an appeal or reference etc. has been admitted and is pending.

14. Therefore, the prime question for consideration in the present case is whether the differential amount of duty of Rs.19,29,642/- for the period from 1st September, 1995 to 31st January, 1998, falling due for payment in terms of final assessment on 17th September, 1998, could be said to be the subject-matter of a demand notice or a show cause notice within the meaning of Section 87(m)(ii) (b) of the Act.

15. To appreciate the rival submissions on the question, it will be expedient to extract the relevant portion of the order dated 17th September, 1998, whereby the said amount was determined to be due and payable by the petitioner.

"The clearances were made provisional w.e.f. 1.9.95 Show Cause Notices No. V(39)300-127/94/9668 dt. 29.9.94, No. V(40)30/343/95/2335 dt. 28.7.96 & No. Ce- 20/demand/Charak/PNP/95/10473 dt. 24.10.96 were issued which dealt with issue of valuation of physicians samples. The subject S.C. Ns. have since been adjudicated by the Dy. Commissioner vide O-in-O No. 2/98 dt. 19.2.98 and 209/97 dt.16.3.98 issued vide C. No. V(30)15/70-CE/96/226 dt.19.2.98 and C. No. V(40) 30/343/952335 and it has been decided that assessable value of physicians samples has to be on pro-rata basis and not the cost price as contended by the party.

In accordance with the above order-in-originals, I order that the assessment of the subject samples should be made on pro-rata basis for the period 1.9.95 to 31.1.98. Since the differential duty amounting to Rs.19,29,642/- on physicians samples has been worked out by the Range Office, Panipat, after adjusting the duty provisionally assessed against the duty finally assessed which is recoverable from the party as differential duty as detailed in the Annexure "A" attached. Hence I order for the final assessment of the said provisional assessment of the party for the period 1.9.95 to 31.1.98 subject to the recovery of the differential duty of Rs.19,29,642/- for the above said period which was assessed provisionally."

16. From the facts in hand it is clear that the dispute with regard to the valuation of physicians samples originated on 26th July, 1995, when the petitioner was directed to clear the samples by adopting a higher assessable value. The first show cause notice, dated 28th July, 1995 covering the period from 1st January,

1995 to 30th April, 1995 and the second, dated 25th October, 1995 covering the period from 1st May, 1995 to 31st August, 1995, were ostensibly issued to raise and keep alive the demand for differential duty for the period which was already over. Since for the subsequent period commencing 1st September, 1995 the assessments on the basis of RT-12 were being made provisionally and the petitioner had started executing B-13 bonds with bank guarantees, pursuant to the directions contained in notice dated 26th July, 1995 and the same had been accepted by the department, it is axiomatic that it was not felt necessary to either issue show cause notices or raise additional demands for the subsequent period pending adjudication on the two show cause notices for the earlier periods. As a matter of fact, the letter/notice dated 26th July, 1995 by itself is tantamount to a show cause notice because it was by means of this letter/notice the department had objected to the method of valuation being adopted by the petitioner and had directed them to determine the assessable value of physicians samples on a different basis. The issue raised in the letter got crystalised in three orders - two passed on 16th March 1998 and the third on 17th September, 1998, when additional demands, for the differential duty covering the entire period from 31st January, 1995 to 31st January, 1998 were raised. It is evident from the order, dated 17th September, 1998, that provisional assessments were being made for the period commencing 1st September, 1995 and the petitioner was asked to furnish B-13 bonds and bank guarantees because of the pendency of final adjudication on the two show cause notices. Pending resolution of the stated dispute, all provisional assessments made under Rule 9B of the Central Excise Rules, 1944 in respect of all clearances between the period from 1st September, 1995 to 31st January, 1998 for which the petitioner had filed RT-12 returns, for whatever reason, were provisional for all intents and purposes and the issue in dispute was alive till final assessment in respect of the said period, as required to be made under Rule 173-I, was made on 17th September, 1998. The mere fact that order dated 17th September, 1998 was passed without any fresh show cause notice to the petitioner amply lends support to the stand of the petitioner that the letter issued on 26th July, 1995 by respondent No.5 (Superintendent, Central Excise, Range Panipat) directing the petitioner to pay duty on samples on the value thereof on pro-rata basis on the assessable value of regular trade packs, which were being sold commercially with immediate effect was in fact in the nature of a show cause notice as postulated in Section 87(m)(ii)(b) of the Finance Act in respect of all the clearance, including the period in question namely; from 1st September, 1995 to 31st January, 1998. Admittedly, the differential duty amounting to Rs.19,29,624/- for the said period was assessed finally vide order dated 17th September, 1998 and it remained unpaid on the date of making the declaration.

17. We are, Therefore, of the considered view that the amount of differential duty of Rs.19,29,642/- was "tax arrear" within the meaning of Section 87(m)(ii)(b) of the Finance Act and the petitioner having fulfilled all other requisite conditions, the designated authority was not justified in directing the return of

declaration on the aforestated ground.

18. Accordingly, we accept the petition and quash the impugned letter and direct the designated authority to process afresh the declaration submitted by the petitioner on 21st January, 1999 in accordance with law. Consequently, the demand-cum-show cause notice dated 16th March, 1999 is also quashed. The rule is made absolute. There will, however, be no order as to costs.