
(1993) 06 BOM CK 0076
In the Bombay High Court
Case No : Writ Petition No. 1182 of 1993

Cipla Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-06-1993

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)

Citation : (1993) 49 ECR 38 : (1993) 67 ELT 61

Hon'ble Judges : M.L. Pendse, J;A.P. Shah, J

Bench : Division Bench

Advocate : Shri C.M. Korde, instructed by Ramesh Shroff and Co, for the Appellant; Shri J.P. Deodhar, for the Respondent

Judgement

Pendse, J.—Petitioner No. 1 is a joint stock company incorporated on August 17,1935 under the provisions of the Companies Act. The company runs its factory at Bombay and manufactures medicines known as "Patent and proprietary medicines" falling under Tariff Item No. 14E of the First Schedule of Central Excise Act and the goods are liable to pay excise duty at prescribed rate. The excise duty on patent and proprietary/medicinal preparations was imposed with effect from March 1,1961. The medicines manufactured by the company are not advertised but it is customary that free supply of medicinal preparations and drugs is made to hospitals, nursing homes and medical practitioners to enable them to get familiarise with such preparations. The samples handed over to the hospitals and medical practitioners are free and the company does not recover any charges for the value thereof.

2. The Government of India, Ministry of Finance (Department of Revenue) published exemption notification dated April 1,1977 in exercise of sub-rule (1) of Rule 8 of Central Excise Rules, 1944 exempting clinical samples issued by any manufacturer of patent or proprietary medicines falling under Tariff Item No. 14E of the First Schedule of the Central Excise Act from the whole of the duty of excise leviable thereon. The notification provides that the manufacturer is

entitled to the benefit of exemption notification provided :-

(a) such clearances in any month are limited to a quantity not exceeding four per cent by value of the total duty paid clearances during the preceding month of all types of patent or proprietary medicines;

(b) samples are intended for free supply to hospitals, nursing homes or medical practitioners; and

(c) the samples are packed in a form distinctly different from regular trade packing and each smallest packing is clearly and speciously marked "Physician's sample, not to be sold".

The explanation to the exemption notification reads as under :-

"In this notification, "manufacturer" means

(a) where it is a company within the meaning of the Companies Act, 1956(1 of 1956), a company..... (i)which does not hold any share in the capital of any foreign company, and (ii)no part of the capital of which is held by foreigner or a foreign company;

(b)where it is firm..... (i)the firm has no interest in any foreign firm; and (ii)no interest in the firm is held by a foreigner or a foreign company, and

(c)where it is an individual, such individual is not a foreigner."

3. The dispute in this petition filed under Article 226 of the Constitution centres around to the applicability of the explanation to the petitioner company. It is required that to be stated that the validity of the explanation was challenged before Gujarat High Court and by judgment reported in 1980 (6) E. L. T. 759(Guj.) Suhrid Geigy Ltd. v. Union of India and Another, the Division Bench of the Gujarat High Court held that clause (a) to the explanation is ultra vires under Article 14 and Rule 8 of Central Excise Rules and it has no nexus with the object which the notification seeks to serve. The appeal preferred by the department before the Supreme Court is pending final disposal.

Shri Korde, learned counsel appearing on behalf of the petitioners, submitted that in the present case, even accepting the validity of the explanation, the department is in error assuming that the benefit of exemption notification is not available to the company in view of the explanation. The company had entered into correspondence with the Assistant Collector of Central Excise, Bombay claiming benefit of exemption notification and the department declines to accept the claim. Ultimately, while approving the classification list filed by the company, the Assistant Collector of Central Excise by order dated March 17,1982 held that the company is not entitled to exemption under the notification dated April 1,1977. The company therefore preferred the present petition to challenge the order of the Assistant Collector and denial of benefit of exemption notification.

4. In answering to the petition, Shri Sadanand A. Marballi, Assistant Collector,

Central Excise has filed return sworn on January 23,1987 and claimed that the company is not entitled to the benefit of exemption notification in view of the explanation. In view of the rival contentions, a short question which falls for determination is whether the benefit can be denied to the company on the ground that the company is a manufacturer which holds share in the capital of foreign company and part of the capital of the petitioner company is held by a foreigner.

Before examining the factual aspect of the matter, it is necessary to set out that the exemption notification was issued by the Central Government in pursuance of formulating drug policy and with the desire that the indigenous pharmaceutical company would create and reduce the predominance of corporations having foreign interest in the pharmaceutical industry in India. To achieve this object, the exemption notification deprives the manufacturing company which holds share in the capital of any foreign company or the part of the capital of the manufacturer is held by a foreigner. It is not in dispute that the petitioner company which was incorporated on August 17,1935 is purely an Indian company and none of the foreign company has any interest in its share capital.

5. Shri Deodhar, learned counsel appearing on behalf of the department, submitted that the petitioner company is not entitled to advantage of exemption notification because the petitioner company holds share in the capital of foreign company. It is not in dispute that the petitioner company in pursuance of encouragement given by the Central Government has started a joint venture in Malaysia with a total investment of Rs. 2,55,2100/-. The joint venture or collaboration was with the company registered in Malaysia known as Barbet Pharma Sandirian Gerhad. The petitioner company held certain shares in the collaborator's company. It is not in dispute that the collaboration agreement came to an end in March 1981. We are unable to accede to the submission of Shri Deodhar that in view of the collaboration agreement which the petitioner company had entered with the Malaysian company in pursuance of the encouragement given by the Central Government, the benefit of exemption notification should be denied under the explanation (a)(i) on the ground that the petitioner company held shares in the capital of the foreign company.

6. Shri Deodhar then submitted that in any event, the advantage of exemption notification is not available because the part of the capital of the petitioner company is held by a foreigner. The factual data in this respect is set out in the annexure to affidavit dated June 16,1993 sworn by P. Venkitasubramani, the Company Secretary. The perusal of the annexure indicates that on January 1,1980 the issued capital of the petitioner company was to the extent of Rs. 18,77,300/- equity and Rs. 6,00,000/- preference shares. Out of this, the capital of 628 equity and 137 preference shares of value of Rs. 76,500/- vested in the custodian of enemy property of India under the provisions of Evacuee Property Act. The property of the holding vested in the custodian was only 3.09%. One Shri J. A. Parkar, residing at Singapore and a British national had expired and at

time of demise, was holder of 14 equity shares of value of Rs. 1,400/-. The legal heirs of Shri Parkar did not seek transfer of shares. Shri Deodhar submitted that as 3.09% of issued capital was held by custodian and 0.05% by Shri Parkar, a British national, it must be concluded that the part of the capital of petitioner company was held by a foreigner. We are unable to accede to the submission of the learned counsel. The vested interest in favour of custodian under the Evacuee Property Act was by operation of law and merely because the holders of equity and preference shares holding 3.09% of the issued capital had left the country after partition in the year 1948 that cannot lead to the conclusion that the petitioner company is not entitled to the benefit of exemption notification. It is incorrect on the part of the department to overlook the object of issuance of the notification and deny the advantage on such technical grounds. Same is the case in respect of 14 equity shares of face value of Rs. 100/- each held by a British national prior to his demise. In our judgment, the percentage of issued capital held by the custodian and Shri Parkar is negligible that the denial of advantage of exemption notification would defeat the object with which the Government issued the notification. The object of encouraging indigenous industries in respect of manufacture of patent and proprietary medicines would stand defeated if advantage of exemption notification is denied to the petitioner company on the facts and circumstances of the case. In our judgment, the Assistant Collector was in error in passing the impugned order dated March 17, 1982, copy of which is annexed at Exh "N" to the petition. The company is entitled to advantage of the benefit of exemption notification which is still in operation.

7. Accordingly, petition succeeds, Rule is made absolute in terms of prayers (d) and (e) only. We are not examining the question of legality and validity of the explanation to the exemption notification in the present proceedings. As regards the claim for refund made in prayer (f), it is not possible to pass order in favour of the petitioner company in the present proceedings as the claim has not been verified by the department. The Assistant Collector of Central Excise, Bombay, Division VII is directed to verify the claim for refund within a period of 12 weeks and then pay the amount of refund to the company forthwith. It is required to be made clear that as the samples were handed over free the hospitals and medical practitioners the application of Section 11B of the Central Excise Act does not come into play. In case the department fails to make the refund alongwith interest at the rate of 15% p. a. from today till the date of payment. In the circumstances of the case, there will be no order as to costs.