(2017) 10 BOM CK 0118

In the Bombay High Court

Case No : 1342 of 1999

DWD Pharmaceuticals Ltd. — APPELLANT

Vs

State of Maharashtra, & Ors. — RESPONDENT

Date of Decision : 13-10-2017

Acts Referred:

Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Section 2(h) - Definitions

Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, Rule 128

Citation : (2017) 10 BOM CK 0118

Hon'ble Judges : Vasanti A Naik, Riyaz I. Chagla

Bench : SINGLE BENCH

Advocate : Abhinav Chandrachud, Aniket Mokashi, Haresh Mehta

Judgement

1. The Petitioners have challenged an order passed by Respondent no.5 upholding the order of Respondent no.4 dated 28th October 1997 and order passed by Respondent no.3 dated 1st July 1998 respectively. By the impugned order, Respondent no.5 has held articles contained less than 135 mg Dextropropoxyphene to be correctly taxable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (for short "M & TP Act"). The brief background of the facts are necessary.

2. The Petitioners are carrying on business of manufacturing medicinal preparations and for the purpose of present petition, the product bearing the name "Lobain" is concerned.

3. The Petitioners are registered with Central Government department and have been granted licenses for manufacturing the product Lobain. The Petitioners were paying Central Excise Duty to the Central Government on the said product as according to the Petitioners, the product was not a narcotic drug and did not fall under the definition of "Narcotic Drug" as defined under Section 2- (h) of the M & TP Act. A show cause notice was issued on 26th June 1997 to the Petitioners by

the Inspector State Excise "N" Division. The Petitioners were summoned to attend the office of the Inspector State Excise for hearing. The Petitioners replied to the show cause notice contending that the Petitioners were not liable to pay the duty under the M & TP Act. On 20th September 1997, the Superintendent of State Excise (Respondent no.4) issued show cause notice to the Petitioners. The Petitioners replied to the show cause notice and a personal hearing was given to the Petitioners on 27th October 1997. The Respondent no.4 by order dated 28th October 1997 rejected the Petitioners case and directed the Petitioners to pay a sum of Rs.8,71,202/- as excise duty on their product Lobain and to obtain licence as provided for under the M & TP Act. The Petitioners thereafter filed an appeal being Appeal No. 261 of 1997 before the Commissioner of State Excise (Respondent No.3). By order dated 1st July 1998, the Commissioner of State Excise rejected the appeal and confirmed the demand of excise duty and called upon the Petitioners to pay excise duty within 30 days from the receipt of the order and apply for licence under the M & TP Act. The Petitioners challenged the decision of the Commissioner of State Excise by filing Writ Petition no. 1789 of 1998 in this Court. The Petition was disposed of by this Court on 8th October 1998, holding that the Petitioner had alternate remedy by way of Revision Application to the Central Government under Rule 128 of the MTRP (Excise Duties) 1956. The Petitioners thereafter preferred a revision application before Respondent no.5 on 10th November 1998. The impugned order dated 13th April 1999 was passed by Respondent no.5 after hearing the Petitioners and by which the revision application was rejected and the stay initially granted by Respondent no.5 was vacated. Hence this petition. The Petition came up before this Court in June, 1999 when this Court passed an interim order dated 21st June, 1999 by which the Petitioners were directed to pay duty at the rate of 20% advalorem to the State Government under M & TP Act and not the authorities under the Central Excise Act, 1944, provided they resumed manufacture. For past dues, the State Government was to find out the differential amount payable by the Petitioners undder the M & T P Act over and above the duty paid under the Central Excise Act. This shall be intimated to the Petitioners who was to deposit the said amount with the Prothonotary & Senior Master of this Court within four week of such intimation from the offices of the State Government. By the said order this Writ Petition was tagged with the Writ Petitions in the matter of M/s. USV Limited Vs. State of Maharashtra - Writ Petition No. 2348 of 1999 and Macledos Pharmaceuticals Ltd. Vs. The Union of India - Writ Petition No. 2527 of 1999.

4. Mr. Abhinav Chandrachud, the learned counsel appearing for the Petitioners has submitted that the issue arising in present petition viz. whether formulations containing less than 135 mgs i.e. 65 mg of Dextropropoxyphene can be classified as Narcotic Drug or Narcotic within the meaning of Section 2 (h) of the M & TP Act and liable to State Excise duty is no longer res integra. The issue has been decided by this Court in two matters, in M/s. USV Limited Vs. State of Maharashtra & Ors., Writ Petition No. 2348 of 1999 decided on 22nd August 2017

and in Macleods Pharmaceuticals Ltd. Vs. The Union of India & Ors., Writ Petition No. 2527 of 1999 decided on 12th September 2017 in favour of the Petitioners. These matters were although tagged along with this Petition by the interim order, but were heard separately. He has contended that it has been held in the said decisions that the subject formulations of the Petitioners containing less than 135 mgs i.e. 65 mgs of the Dextropropoxyphene are excluded from being classified as Narcotic Drug under Section 2 (h) of the M & TP Act. He has, therefore, contended that this petition should also be disposed off on the same terms.

5. We have carefully considered the submissions. We find that the issue arising in this Petition has been dealt with and has answered in favour of the Petitioners in M/s. USV Ltd. (Supra) and followed in Macleods Pharmaceuticals Ltd. (Supra). We are of the view that the impugned order is erroneous as was similarly been held in the said decisions of this Court. The substances contained less than 135 mg of Dextropropoxyphene is not taxable under the M & TP Act. The impugned order has erroneously held that preparations containing Dextropropoxyphene in such minimal quantity although not being a narcotic drug or narcotic by itself, but does not cease to be a preparation containing a narcotic drug or narcotic. The decision of the Supreme Court relied upon in the impugned order viz. M/s. Baidynath Ayurved Bhavan P. Ltd. Vs. Excise Commissioner, U.P., AIR 1971 SC 378. has been dealt with in M/s. USV Ltd. (Supra). In the said decision, the Division Bench of this Court in paragraphs 13 and 15, held thus:-

Plain reading of the Notification dated 12th June 1986 would disclose that any medicinal preparations containing Dextropropoxyphene base per dosage unit not more than 135 mg are excluded from being classified as narcotic drug or narcotic within the meaning of the said expression under Section 2 (h) of the said Act. Once the product of the Petitioners discloses Dextropropoxyphene-HCL which in terms contains Dextropropoxyphene base to the extent of 70 mg, which fact has not been disputed by the respondents at any stage of the proceedings, even in the affidavit in reply filed by them, obviously such a product would stand exempted in terms of the said notification and would not be classifiable as narcotic drug or narcotic under the said Act.

15. The decision of the Apex Court in M/s. Baidyanath Ayurved Bhawan Pvt. Ltd. , Jhansi Vs. The Excise Commissioner, U.P. and others, reported in (AIR 1971 SC 378) was on totally different issue where the quantity of Dextropropoxyphene or any similar such product was not in issue. The issue in that case was, whether the medicinal preparations contain alcohol or not. The quantity of alcohol was not subject matter to adjudicate. In the matter in hand, the quantity of Dextropropoxyphene is most relevant factor to decide, whether the product can be called as narcotic drug or narcotic under the said Act and as already seen above, the product of the Petitioners cannot be considered as containing narcotic drug or narcotic.

6. We find that from a plain reading of the Notification dated 14th November 1985, wherein the subject preparation viz. Dextropropoxyphene has been

referred, it is clear that only where the preparation contains in excess of 135 Mgs of Dextropropoxyphene would be considered to be a narcotic drug. The relevant entry 87 in the said Notification reads thus:-

(87) (+) - 4- dimethylamino - 1, 2-diaphenyl - 3- methyl - 2 - butanol propionate, (the international non-proprietory name of which is Dextropropoxyphene), and its sales preparations, admixtures, extracts and other substances containing any of these drugs, except preparations for oral use containing not more than 135 milligrams of Dextropropoxyphene base per dosage unit or with a concentration of not more than 2.5 per cent in undivided preparations, provided that such preparations do not contain any substances controlled under the convention on psychotropic substances, 1971.

7. It is thus clear from the said entry in the Notification that the formulation of Dextropropoxyphene containing less than 135 mgs viz. 65 mg. would stand exempted and not classified as narcotic drug or narcotic under the M & TP Act. In the present case admittedly the subject formulations contained less than 135 mgs, i.e. 65 mg of Dextropropoxyphene and hence cannot be classified as a narcotic drug or narcotic in view of the said notification. We are, therefore, of the view that apart from the issue in this petition being squarely covered by the decision of this Court in M/s. USV Ltd. (Supra) followed in Macleods Pharmaceuticals (Supra), the subject formulations containing less than 135 mgs would by the Notification itself be not included as a narcotic drug or narcotic.

8. We accordingly pass the following order disposing of this Petition:-

(a) We hold and declare that the subject formulations of the Petitioners containing less than 135 mgs viz 65 mgs of Dextropropoxyphene are excluded from being classified as narcotic drug under the M & TP Act.

(b) We quash and set aside the impugned order of Respondent no.5 dated 13th April 1999 as well as the order of Respondent no.4 dated 20th October 1997 and order passed by Respondent no.3 dated 1st July 1998.

(c) The Petitioners are permitted to withdraw the amounts, if deposited with the Prothonotary and Senior Master of this Court, pursuant to the interim order dated 21st June 1999 together with interest, if any, accrued thereon.

(d) Rule is made absolute in the above terms. There shall be no order as to costs.

