

(1992) 02 CAL CK 0038
In the Calcutta High Court
Case No : C.O. No. 14000 (W) of 1985

G.D. Pharmaceuticals Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 12-02-1992

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14F
Constitution of India, 1950 — Article 226
Drugs and Cosmetics Rules, 1945 — Rule 103(3)

Citation : (1992) 60 ELT 205

Hon'ble Judges : Suhas Chandra Sen, J

Bench : Single Bench

Advocate : Bhaskar Gupta and Samir Chakraborty, for the Appellant; N.C Roy Chowdhury and S.K. Sengupta, for the Respondent

Final Decision : Allowed

Judgement

Suhas Chandra Sen, J.—The petitioner has moved this writ petition challenging the decision contained in the letter dated 21-3-1985 issued by the Superintendent, Central Excise, Range C/4, Calcutta "C Division wherein he stated that "your product "BOROLINE"" is classified under Cosmetics and Toilet Preparation falling under T.I. 14F(1). The Form 1 and Price list submitted by the petitioner were returned for re-submission after suitable amendment at an early date.

2. It may be mentioned that there is a long standing dispute between the petitioner and the respondents as to the manner in which Boroline is to be classified. The petitioner's case is that in 1948 licence was granted to G.D. & Company to manufacture and sell Boroline as a drug and medicine under the Drugs Act, 1940 (now known as Drugs and Cosmetics Act, 1940) and the Rules made thereunder being Drug Licence No. D.L. 36/M. The said Licence has from time to time been renewed under the said Act. As per the requirement of Rule 103(3) of the Rules framed under the Drugs Act, 1940 the true formula and

details of ingredients of Boroline have been also printed and written in in-deliable ink or the outer label of every package containing Boroline being a proprietary medicine.

3. According to the petitioner Boroline is an Antiseptic Boric Ointment the Chemical composition of which is as follows :

Boric Acid I.P. 1% Zinc Oxide I.P. 3% White Petroleum Jelly I.P. & Lanoline Anhydrous I.P. Q.S.

4. There were earlier disputes between the petitioner and the respondents and in April, 1961 the Central Excise Authorities started contending that Boroline was a face cream and was to be assessed at 25% as Cosmetic under Tariff Item 14F and not at 10% as Patent and Proprietary Medicine under Tariff Item No. 14E. The aforesaid dispute i.e., whether Boroline was a Cosmetic falling under the said Tariff Item 14F or a Proprietary Medicine falling under the said Tariff Item No. 14E became the subject matter of a writ petition filed by the petitioner No. 1 in this Hon"ble Court being Matter No. 348 of 1962 (G.D. Pharmaceuticals (P) Ltd. v. Collector of Central Excise, Calcutta and Orissa and Ors.). The said Matter No. 438 of 1962 was finally disposed of by an order dated 18th January, 1963 in accordance with the terms of settlement filed by the parties therein whereby it was held that Boroline was to be assessed as Patent and Proprietary Medicine under the said Tariff Item 14E. Therefore, the Central Excise Authorities have levied, assessed and collected excise duty on Boroline on the basis of the same being classified under Tariff Item No. 14E of the First Schedule to the Central Excises and Salt Act, 1944 as Patent and Proprietary Medicine. Tariff Item 14F in the First Schedule to the Central Excises and Salt Act, 1944 was amended by the Finance Act, 1964. By such amendment the definition of Cosmetics was enlarged. Thereupon the respondent Union of India claimed and contended again that the petitioner No. 1 was liable to pay Central Excise Duty on Boroline as on Cosmetic under the said amended Tariff Item No. 14F. The respondent Union of India also issued Challans for payment of several lakhs of rupees at differential duty and Special Excise Duty alleged to be payable on Boroline as a Cosmetic. The petitioner refuted such claims and contentions. As a result, by its letter dated the 25th November, 1964 the respondent Union of India informed the petitioner that the Board of Revenue had decided that:

"Notwithstanding the change in the Tariff description made by the Finance Act, 1964, "Boroline" by virtue of its composition having Boric Acid (1%) and Zinc Oxide as ingredients will continue to be treated as "Patent or Proprietary Medicine" and shall be assessed as such.

The product "Boroline" manufactured by your factory will be assessed as "Patent or Proprietary Medicine" under T.I. 14E and the demand so far raised for realisation of differential duty treating the product as "Cosmetics and Toilet Preparation" under T.I. 14F is treated as null and void".

5. In spite of the aforesaid pronouncement, the petitioner No. 1 received a letter

dated 29th July, 1982 from the respondent Superintendent, Central Excise, Division II, Ghaziabad directing the petitioner No. 1 to clear Boroline under Tariff Item 14F of the First Schedule to the Central Excises and Salt Act, 1944 on the basis of purported Tariff Advice No. 39/82, dated 15th July, 1982 of the Government of India. The purported letter also directed the petitioner No. 1 to pay the alleged differential duty amounting to Rs. 4,17,056.25 on the misconceived basis alleged therein. Thereafter, the petitioners obtained copy of purported Tariff Advice No. 39/82 dated 16th July, 1982 issued by the respondent Board directing the concerned authorities that Boroline would merit classification under Tariff Item 14F as Cosmetic and not under Tariff Item 14E as Patent or Proprietary Medicine.

6. The petitioner moved this court under Article 226 of the Constitution of India challenging the validity and correctness of the aforesaid Tariff Advice dated 16th July, 1982. A Rule Nisi was issued by this Court. During the pendency of the aforesaid Rule the respondents by a Trade Notice No. 212/P or P Medicine - 3/CE/WB/82, dated 20-10-1982 withdraw the earlier Trade Notice No. 173/Cosmetics & Toilet Preparation 3/CE/82, dated 18-8-1982. In view of the subsequent Trade Notice hereto annexed and marked with the letter "L" confirming that BOROLINE merits classification as Patent or Proprietary Medicine under Item No. 14E of the First Schedule to the Central Excises and Salt Act, 1944, the petitioner was advised not to proceed by further with the said application and by an order made in the said C.R. No. 10211 (W) of 1982 on 24th December, 1982 the said Rule was discharged for non-prosecution.

The dispute, however, did not end here. On the strength of a Notification being D.O.C. No. U(50) 7/Budget/Tech/85, dated 17th March, 1985 issued from the Central Excise Collectorate, Meerut, the respondents contend that in view of amendments made in Tariff Item No. 14F of the First Schedule to the Central Excises and Salt Act, 1944 by the Finance Bill introduced in Lok Sabha on March 16, 1985 BOROLINE would merit classification under the said amended Tariff Item 14E chargeable to duty at 105% ad valorem and also instructed that all pre-budget stocks should be cleared only on payment of the revised rate of duty under Item No. 14E.

7. On behalf of the respondents my attention was drawn to the provision of the Finance" Bill, 1985 and in particular to the Explanation-II of Tariff Item 14F which is as follows:

"Explanation-II. - This item includes cosmetics and toilet preparations whether or not they contain subsidiary pharmaceutical antiseptic constituents, or are held out as having subsidiary curative or prophylactic value".

8. It was contended on behalf of the respondents that this has brought about a change in the law and Boroline will have to be classified as a cosmetic or a toilet preparation. It has been contended that in view of the explanation which has been newly introduced Boroline cannot be regarded as anything but "Cosmetic

and Toilet Preparation". In my view, the explanation has not changed the law in any way. Whether Boroline was to be classified as a Cosmetic and Toilet Preparation or not has been gone into at great length between the parties at various stages. The petitioner's writ application has also been disposed of on the basis of the agreement upholding the petitioner's contention that the Boroline is a drug. This decision was given having regard to the essential ingredient of Boroline and its character. My attention was drawn to a judgment of Allahabad High Court in the case of Abdul Moid and Others Vs. The State, where it was held that Boroline was a drug. That was a case decided under the Drug and Cosmetic Act, 1940. In that case it was observed as follows :-

"It appears that the Act wanted to classify articles in two parts, namely, cosmetics and drugs. It is evident that Boroline is not recommended to be used by the makers thereof for beautifying or promoting attractiveness, nor can it be used for cleansing any part of the human body. It is, therefore, very difficult to say that it can be classified as a cosmetic. It is true that prevention of disease is not quite the same thing as prevention-of infection. But prevention of infection is certainly a prevention of disease in another form, simply because disease follows infection. Boroline does claim to cure certain skin ailments, such as, sores and it of course cannot be denied that it claims to be an "antiseptic" and is recommended to be used for preventing of infection in cases of minor cuts and minor skin injuries. From the formula as mentioned on the carton, it prima facie appears that Boroline contains certain medicines. Boroline is, therefore, a drug".

9. In view of this judgment it must be held that Boroline is essentially a drug. Therefore, the newly introduced explanation II to Section 14F cannot have any bearing on the question whether Boroline is a drug or cosmetic product. That question has been gone into at great length by and between the parties before the departmental authorities and also before this Court.

10. In view of the aforesaid judgment of the Allahabad High Court, the writ petition succeeds. There will be an order as prayed in terms of prayers (a), (b) and (c) of the writ petition.

There will be no order as to costs.

Stay of operation of this order is granted for a period of three weeks from date. The interim order will continue.

The department is directed to supply xerox copy of this order to the learned Advocates appearing for the parties on usual charges and on an undertaking to apply for and obtain certified copy of this order.