(1988) 04 BOM CK 0064

In the Bombay High Court

Case No : Writ Petition No. 653 of 1982

Griffon Laboratories Private Ltd. APPELLANT

Vs

State of Maharashtra and others RESPONDENT

Date of Decision : 12-04-1988

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(1), 4(4)

Citation : (1988) 36 ELT 7

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Judgement

1. This petition raises the question of the interpretation of Section 4(1) of the Central Excises and Salt Act, 1944, hereinafter referred to as "the Central Act". Only few facts are necessary to be mentioned. The petitioners are a limited company engaged in the manufacture of medicines and pharmaceutical formulations. Two of these products contain alcohol and they are hereinafter referred to as "the said products". All the products, including the said products, manufactured by the petitioners are sold through another private limited company called Franco Indian Pharmaceuticals Private Limited, hereinafter referred to as "Franco Limited". This latter company has been treated, as least for the purpose of the proceedings culminating in this writ petition, as a related person within the meaning of Section 4(4)(c) of the Central Act. Approximately 4 per cent. of the annual production of the medicinal preparations of the petitioners are distributed free of charge as samples to medical practitioners.

2. Though excise duty is normally leviable under the Central Act, in view of the fact that some of the products of the petitioners contain alcohol, they are also assessable to excise duty under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, hereinafter referred to as "the Act of 1955". The Act of 1955 is administered by the State of Maharashtra, which is the first respondent in this petition. The second respondent is the Commissioner of Prohibition and Excise while the third respondent is the Collector of Bombay (Prohibition and Excise).

Though the Act of 1955 is administered by the State of Maharashtra, the basis for calculation of the excise duty is the one which is provided by Section 4 of the Central Act.

3. As already mentioned, Franco Limited is the sole distributor through whom the petitioners shell their products to the wholesalers. Again as already mentioned, the said Franco Limited is to be treated as a related person for the purpose of the levy of excise duty, the basis of which is provided in Section 4 of the Central Act. It has been mentioned in the petition, and it has not been denied by the respondents in a belated affidavit dated 10th of April, 1988 filed on their behalf, that the price at which Franco Limited sells the products of the petitioners to the wholesalers is the basis on which excise duty is levied by the respondents. However, the petitioners are distribution certain percentage of their production as free samples to the physicians. The question arose as to whether the samples so distributed are liable to excise duty and if so at what rate. The petitioners, at least at this stage, are proceeding on the basis that they are liable to excise duty. However, they insist that the prices of their products which are distributed as free samples to the physicians should not be higher than the prices at which Franco Limited is selling such products to the wholesale dealers. In other words, the basis for the levy of excise duty by the respondents on the products distributed by the petitioners as free samples to the medical practitioners cannot be higher than the one at which excise duty is levied on the sales made by Franco Limited.

4. On or about 23rd August, 1979, a notice was received from a Prohibition and Excise Officer who demanded excise duty from the petitioners on the basis that the samples given to the medical practitioners are sales and secondly the price of the products distributed as free samples should not be reduced by the trade discount which was made available to Franco Limited''s sales. The petitioners gave a reply to this notice, but ultimately a demand notice was issued against the petitioners on 23rd of August, 1979, by the said Inspector of Prohibition and Excise. Against this demand notice, the petitioners preferred an appeal which was heard and dismissed by the Commissioner of Prohibition and Excise, Maharashtra State, by his judgment and order dated 27th August, 1981, which is the subject-matter of challenge in this petition under Article 226 of the Constitution of India.

5. Several arguments were advanced before the Commissioner of Prohibition and Excise, hereinafter referred to as "the Commissioner". Mr. Korde, the learned Advocate appearing in support of the petition, has, however, not pressed all the arguments which were advanced before the Commissioner. He has invited my attention to the last paragraph of the order of the Commissioner wherein the Commissioner refused to give the trade discount, which was given by the department to the sales effected by Franco Limited to the wholesale traders, because the Commissioner thought that the free samples given to medical practitioners by the petitioners do not fall within the meaning of the wholesale

trade and therefore the Commissioner said that the trade discount claimed was not admissible.

6. The facts so far narrated show that the point involved in this petition is a narrow one. Mr. Korde has pointed out that since Franco Limited is treated as a related person, the price at which the said related person is selling the products to the wholesale traders alone could be the basis on which excise duty could be levied by the respondents. It is so provided in Section 4(1)(a) read with the third proviso to sub-clause (a) of the Central Act. I will shortly refer to the said provision and point out how the contention of Mr. Korde is well-founded.

7. Mr. Chogle, the learned Government Pleader appearing for the respondents, however, has contended that the free samples which are given to the medical practitioners cannot be assessed on the basis of the price at which Franco Limited sells the products to the wholesale traders for the simple reason that the said samples are not given, as rightly pointed out by the Commissioner, in the course of wholesale trade. He has contended that even if large proportion of the production of a particular assessee are given away as free samples or otherwise disposed of, the said assessee is liable to pay excise duty on the said portion because they are after all capable of being sold. He has relied upon some observations contained in The Province of Madras v. Boddu Paidanna and Sons (1942) F C R 90 : 1978 ELT 272, wherein there Federal Court has observed as follows :-

"There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away."

He also referred to a judgment of this Court in Queen''s Chemists Mfg. Department Vs. G. Koruthu and Another, , wherein the nature of the trade discount was discussed. Mr. Chogle also wanted to take me through the judgment of the Supreme Court in Bombay Tyres International''s case 1983 (14) ELT 1896, for the purpose of pointing out that discount in the instant case, which can be regarded as post-manufacturing expenses, was not allowable as far as the free samples to the physicians are concerned. I have not availed of the assistance thus offered by Mr. Chogle because, in my opinion, these judgments are not relevant to the determination of the question which is clearly and in a straight-forward manner arising in this case. Incidentally I may mention at this stage that both the petition and the affidavit in reply have clearly mentioned that a trade discount of 8 per cent is allowed by the department in the wholesale price which Franco Limited uses as the basis for selling the products. In the light of this I do not see how Mr. Chogle can contend that in view of the judgment of the Supreme court in Bombay Tyres International''s case trade discount could not be permitted.

8. Be that as it may, I will proceed on the basis that it is the contention of Mr.

Chogle, and probably it is the basis of the order of the Commissioner, that trade discount cannot be allowed in so far as the free samples to the physicians are concerned. The Commissioner has said, and Mr. Chogle has repeated, that giving free samples to physicians are not in the course of wholesale trade and, therefore, trade discount could not be allowed. Trade discount is allowable, and has been allowed by the respondents, in the case of the sales made by Franco Limited to the wholesalers. A similar facility, say the respondents through Mr. Chogle, cannot be allowed in the price of the products distributed as free samples to the physicians.

9. In my opinion, the stand taken by the respondents and put forth by the learned Government counsel before me discloses an unawareness of the relevant provisions contained in Section 4 of the Central Act. In this petition I am not called upon to determine what the post-manufacturing expenses are and which of them, if any, should be allowed or disallowed. I am proceeding on the basis, which basis has been adopted by the respondents themselves, that when Franco Limited is selling the products to wholesalers trade discount of 8 per cent is allowable and has in fact been allowed by the respondents. Thus there is a price at which Franco Limited is selling the products of the petitioners to the wholesalers and this price has been accepted by the respondents themselves as the basis for levy of excise duty. The respondents have not taken the price at which the petitioners are selling their products to Franco Company as the basis for levy of excise duty. This is for the obvious reason that Franco Limited has been treated as a related person and in view of the provision contained in Section 4(1)(a)(iii) of the Central Act, the price at which the related person sells the products to the wholesalers is to be treated as the normal price on which excise duty is leviable u/s 4 of the said Act. Unfortunately, the respondents have missed this elementary principle which can be easily gathered by a careful reading of the provisions of the said Section. It has thus become necessary for me to reproduce the relevant part of Section 4 of the Central Act. Sub-section (1) of Section 4 is as follows :-

"Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be, -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that, -

(i) .....

(ii) ....

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;."

10. From this it should be clear that when an assessee sells his goods only through a related person to the wholesale trade, then the price at which that related person in turn sells the goods in the course of wholesale trade is to be regarded as the normal price on which excise duty is chargeable u/s 4 of the Central Act. If this is firmly understood, it is easily seen that the price at which Franco Limited sells the products of the petitioners to the wholesalers would be the value on which excise duty can be levied by the respondents. The question whether trade discount is allowable in the case of free samples to the physicians or in the case of the samples is wholly irrelevant. What is the cost of manufacture and what are the other post-manufacturing expenses which are to be added to the price to be determined for the purpose of levy of excise duty on the facts of this case are wholly irrelevant, because the respondents themselves have accepted the price at which Franco Limited is selling the products in the course of wholesale trade as the correct price by excluding 8 per cent of the discount allowed to them for levying excise duty u/s 4 of the Central Act. If this is so whether part of the products is given by the petitioners or their distributors, namely Franco Limited, as free samples to physicians or at a lower price to some others, even in the course of retail sale, and the price at which it is sold are all totally irrelevant. The only basis which can be adopted for levy of excise duty in a case where an assessee sells all his goods in the course of wholesale trade through a related person is the one provided in Section 4(1)(a)(iii) of the Central Act. The view taken by the respondents in this case, therefore, is clean contrary to law and must be set aside.

11. In the result, the petition is allowed. The case is remitted to the Commissioner of Prohibition and Excise, Maharashtra State, Bombay, for decision in accordance with the law pointed out in this judgment.

12. There will be no order as to costs in this petition.

