

(1990) 07 MP CK 0008
In the Madhya Pradesh High Court
Case No : M.P. No. 405 of 1988

Jayant Vitamins Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-07-1990

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Central Excises and Salt Act, 1944 — Section 11A, 3
Constitution of India, 1950 — Article 26

Citation : (1992) 38 ECC 199 : (1991) 53 ELT 278

Hon'ble Judges : Y.B. Suryavanshi, J; A.G. Qureshi, J

Bench : Division Bench

Advocate : Atul Sitalwad, Sandeep Thakur, A.K. Chitale and S.M. Dagaonkar, for the Appellant; B.G. Neema, for the Respondent

Judgement

A.G. Qureshi, J.—The petitioner No. 1 is a public limited company having their registered office at Ratlam. The company is engaged in manufacture of drugs and Pharmaceuticals including Vitamin C and Sorbitol. The petitioner No. 2 is a shareholder of the petitioner No. 1. The company is situated in the backward area so declared by the Government of M.P. in the Industrial Area of Ratlam. The petitioners are aggrieved by the show cause notice dated 24th February, 1988 demanding from the petitioners duty of excise on the removal of one of the products of the petitioners viz. "Sorbitol". According to the petitioners, the demand made in the impugned notice is illegal, without authority of law, barred by limitation and without jurisdiction: The petitioners contend that Sorbitol 70 per cent and Sorbitol powder BP is produced by the petitioners which conform to the pharmacopoeial standards. They are bulk drugs and classifiable under residuary Item No. 29.24 of Chapter 29 of the Schedule to the Central Excise Tariff Act, 1985 (hereinafter called the Act) which came into force from 1-3-1986.

2. After the coming into force of the Act from 1-3-1986, the petitioners Company filed a classification list classifying the said products under the above Chapters and cleared the products after payment of duty of excise on removal of the said

products at the rate of 15 per cent ad valorem. Thereafter by Notification dated 3-4-1986, the Central Government, in exercise of its powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 exempted bulk drugs falling under Chapter 28 or Chapter 29 of the Schedule to the Act from the whole of the duty of excise leviable thereon u/s 3 of the Central Excises and Salt Act, 1944 on the terms and conditions mentioned therein. The Notification of the Govt. of India granting exemption reads as under:

"In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excises Rules, 1944, the Central Government hereby exempts bulk drugs, falling under Chapter 28 or Chapter 29 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon u/s 3 of the Central Excises and Salt Act, 1944 (1 of 1944):

Provided that the manufacturer furnishes to the proper officer, a certificate from the Drugs Controller to the Government of India, within such period as the said officer may allow, to the effect that the drugs of chemicals which are claimed for exemption under this notification are the bulk drugs within the meaning of the bulk drugs given in the Explanation to this notification, and are normally used for the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals, and used as such or as an ingredient in any formulation.

Explanation. - In this notification "bulk drugs" means any chemical or biological or plant product conforming to pharmacopoeial standards, normally used for the diagnosis, treatment, mitigation or prevention of disease in human beings or animals, and used as such or as ingredient in any formulation."

After the notification the petitioners applied for a certificate from the Drugs Controller of India as per the requirement of the said Notification and pending the receipt of the certificate they continued to clear the aforesaid products on payment of duty of excise until the last week of April, 1986. Thereafter a certificate was issued by Deputy Drugs Controller of the Government of India to the effect that the product in question Sorbitol 70 per cent solution U.S.P. and Sorbitol powder B.P. along with other products enumerated in the certificate was eligible for exemption under the Ministry of Finance Notification dated 3rd April, 1986 from Central Excise duty. The company has filed the said certificate with the respondents and as a result the petitioners were permitted to clear the said products without payment of duty in terms of the said notification on the strength of the aforesaid certificate.

3. Thereafter on 27-5-1986 the petitioners filed a refund claim in respect of the duty paid from 3-4-1986 to 26-4-1986. The then Assistant Collector of Central Excise passed an order dated 18/21-7-1986 granting a refund of Rs. 5,78,355.24 out of the total refund as claimed by the petitioners. The remaining claim was disallowed on the ground that the petitioners have already realised the duty from their customers. After the aforesaid order of refund having been passed, a notice was issued on 29-6-1987 to the petitioners by the Central Excise Authorities to

show cause as to why the order earlier passed for refund be not quashed in view of the fact that the petitioners had suppressed facts; to which the petitioners filed a reply, but the Assistant Collector rejected the contention of the petitioners. The petitioners have already preferred an appeal to the Collector Central Excise (Appeals) against that order. According to the petitioners the said products are bulk drugs and they have been certified as bulk drugs by the Drugs Controller as goods classified for exemption under the said notification. The said products were removed from time to time with the approval and full knowledge of the officers of the respondent No. 1 without payment of any duty of excise and the petitioners have also not recovered any duty from its customers. As such they have not unjustly enriched themselves nor have they included any duty amount in their invoice prices.

4. Thereafter notices were served on the petitioners for furnishing certain information. An endorsement was also made in the classification list by the Excise Authorities and in accordance with their endorsement the petitioners started paying the duty under protest and on 28th February, 1987 they also made a refund claim of duty paid between 1st March, 1986 to 2nd April, 1986 and on 18th March the said claim was sanctioned in full after deducting a claim relating to non-pharma users which had been included in the claim by the petitioners. According to the petitioners the aforesaid endorsement on the classification list is inconsistent with the notification. It takes away the exemption granted thereunder quite considerably. As such the endorsement is without jurisdiction. The interpretation placed by the Adjudicating Authority is erroneous and against the principles of natural justice.

5. On 24th February, 1988 the petitioners received the impugned show cause notice stating therein that the petitioners have wrongly enjoyed the exemption under the Notification by way of mis-statement claiming the product as bulk drug and also availed of exemption wrongly because these goods have been sold to such manufacturers who do not manufacture medicines and pharmaceuticals and the petitioners were, therefore, called upon to pay duty of excise of Rs. 2,45,47,111.50 as indicated in the Annexures annexed to the show cause notice. The petitioners challenge the aforesaid notice on the ground that the statement of fact in the notice that the drugs concerned have been sold to those manufacturers who do not manufacture medicine and pharmaceuticals is without any basis and is mis-leading. According to the petitioners the goods cleared openly in pursuance to the certificate issued from the Dy. Drugs Controller of India. The removal was also approved by the respondents and a question of user having been raised and endorsement to that effect being made on the classification list on 6-7-1989, the question of issuing the impugned show cause notice does not arise, Actually, the removal was effected after the approval from the office of the respondents. The allegations are baseless and do not attract the provisions of Section 11A of the Central Excises and Salt Act at all.. From a perusal of Section 11A of the Central Excises and Salt Act itself it is clear that beyond the period of 6 months a notice u/s 11A could not be issued unless there

would have been some evidence of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any of the provisions of the Act or Rules made thereunder with intent to evade payment of duty. None of the aforesaid ingredients being present in the instant case the notice is without jurisdiction and should be quashed.

6. By way of amendment the petitioners have further clarified that some goods which were sent to Hindustan Lever Limited and Colgate Palmolive Limited who were obviously not engaged in the manufacture of pharmaceuticals but cigarettes,, paints and paper etc. were clearly mentioned by the petitioners in gate passes which were checked and cleared by the authorities. Therefore, there is no case of suppression, mis-statement, fraud, collusion or violation of any law or Rules. It has also been averred that the impugned show cause notice has been issued on the basis that the petitioners have sold the products to those manufacturers also who do not manufacture medicines and pharmaceuticals alone. According to the petitioners the language of the Notification of exemption of the product from the excise duty nowhere lays down that the products should exclusively be used for medicines and pharmaceuticals. The words used are "normal use of the product" and the product, undisputedly, is normally used for manufacture of medicines and pharmaceuticals. Therefore, it is manifest that the respondent No. 2 has overlooked the word "normally" as it appears in the Explanation as also in the proviso to the exemption notification. Even assuming that the goods were sold to non-pharma users is subject to levy of the duty, the notice could not include a demand in respect of the quantities sold for pharma users. This shows that the notice has been issued without application of the mind. The petitioners had sold only 46,47,523 kgs to non-pharma users as against 56,09,652 kgs to the pharma users because it cannot be disputed that the quantity sold to pharma users are eligible for exemption under the said notification and on the same ground a refund was granted to the petitioners on 19th March, 1988 on the quantity sold to pharma users during the period 1-3-1986 to 2-4-1986 and even today the petitioners are allowed to clear quantities sold to pharma users without payment of duty in terms of the said notification.

7. Therefore, a writ of prohibition is sought prohibiting the respondents or their agents, servants or officers from in any manner acting in furtherance of or in implementation of the impugned show cause notice dated 24th February, 1988 and also quashing the aforesaid notice. A further prayer has been made that the endorsement on the classification list be declared as illegal.

8. The petition has been opposed by the respondents on the ground that the impugned show cause notice is legal, issued under the vested authority of law and not at all time barred and without jurisdiction being fully covered by Section 11A of the Central Excises and Salt Act as it is issued by the Collector of Central Excise M.P. Indore who is empowered to issue such a notice. The respondents have admitted that the certificate Annexure-B is good only in case of bulk drugs

used for pharmacopoeial uses whereas Sorbitol the product under dispute was used in various other items of manufacture such as tooth paste, cigarettes, foods, textiles, ink etc., the list being exhaustive. The certificate in question covers only one aspect of the notification. Actually the product of the petitioners are being used not only for pharmacopoeial uses but for different other items which is evident from the contracts of the petitioner company with other manufacturers. The petitioners have not given the certificates of end use of the products and, therefore, it is not possible for the respondents to know as to what use actually the products cleared from the factory are being put. The petitioners are withholding that information from the respondents, and are not furnishing a reply to the show cause notice and for want of the actual details about the end use the entire quantity cleared has been taken into account for the purposes of action u/s 11A. Actually, previously refund was granted erroneously and the petitioners have wrongly availed the exemption under notification 234/86 and this has occasioned because of suppression of facts on behalf of the petitioners. It appears that the petitioners have collected the duty from the manufacturers. This itself shows that the petitioners are not certain about their stand about the goods being exempt from the levy of excise duty. The endorsement was made in view of the terms of the notification and if the party was aggrieved they should have gone long back in appeal against that order which they have not done. The exemption is not available for the non-pharma uses.

9. Thereafter by way of an affidavit the petitioners have averred that the duty collected from the customers was only from 1-3-1986 to 24th April, 1986 the rate of 15 per cent and the same duty was paid to the respondents. The exemption notification came into force from 3-4-1986 under which the petitioners were required to obtain a certificate from the Drug Controller which they obtained and submitted to the respondents on 26-5-1986. As soon as the exemption of duty of excise became available to the petitioners they stopped recovering duty from the customers. After receiving the refund the petitioner company passed on the same to its customers by issuing credit notes in their favour. The petitioners have also filed documents to support their contention.

10. By way of reply to the rejoinder the Central Excise Authorities have again reiterated their earlier stand and have added that the certificate procured from the Drugs Controller certifies that 70 per cent solution USP and Sorbitol powder B.P. are eligible for exemption under Notification No. 234/86. The certificate does not debar the implementing authorities to investigate whether the conditions laid down under the notification was fulfilled or not. The explanation appended to the notification emphatically stresses the use of bulk drug for pharma purposes. The notice impugned was issued as a result of the investigation revealing that the goods meant for the purpose was not made use of for that purpose. Although clearance was made after filing the C.L. and under gate pass, but the concerning bills/invoices raised from their sales depot were not made available. The invoices by which the petitioners have despatched the goods to non-pharma manufacturers are not in possession of the department. By the show cause

notice dated 24-2-1988 the petitioners were asked to produce the documents and evidence in support of their contention. The petitioners have only filed some documents which are Annexure R-I. The endorsement was rightly made on the classification list for clarifying the position under the notification. However, if the petitioners were aggrieved they could have filed an appeal. The word "normally" used in the notification would be construed to mean that it will ignore use of bulk drugs for other purposes in stray instances but not to the extent that sizable clearances were made for other purposes not covered under the ambit of notification referred to above. The refund was erroneously granted and that is why proceedings of recovery were initiated. It has also been pleaded that the petitioners have equally efficacious remedy available to them and they can avail of that remedy after the adjudication. The matter has not been adjudicated upon and an investigation may also be necessary after the reply of the petitioner. Therefore, it is in anticipation of a decision against them that the petitioners have filed this petition. It, therefore, should be dismissed.

11. The learned counsel for the petitioner Shri Sitalwad has mainly assailed the impugned notice on the ground that this notice is barred by limitation as the provisions of Section 11A of the Central Excises and Salt Act are not applicable to the facts of the present case as there is no suppression, mis-statement, fraud or collusion on the part of the petitioners. The Supreme Court has repeatedly held that unless the aforementioned misstatement or suppression of fact etc. are not on the record, provisions of Section 11A of the Central Excises and Salt Act shall not be attracted. The second contention is that the notification does not prohibit the sale of the products in question to non-pharmacopoeial manufacturers. It only says that for attracting the exemption normally the product should be used for diagnosis, treatment, mitigation or prevention of diseases in human beings or animals and used as such or as ingredient in any formulation. Therefore, the words "normally used" are of great significance and they do not totally debar the use of the products for non-pharma purposes for attracting the exemption. The third argument is that the endorsement in the classification list causing a change thereunder could not be made without show cause notice.

12. On the other hand the learned counsel for the Government of India Shri B.G. Neema argues that the matter is yet sub judice and the information of the end use of the products has not been made available to the authorities by the petitioners which was caused the issuance of this notice pertaining to the products irrespective of their end use in view of the fact that without the information about the end use of the products the department has no way to know as to what products are actually used for the purposes of manufacture of pharmaceutical products and how much material is used for non-pharma products. Shri Neema further argues that the words "normally used" in the notification cannot be construed to mean that the manufacturer is entitled to exemption of those products which are used for manufacture of non-pharma goods. The words "normally used" has to be construed in the facts and circumstances of the case and if there may be some deviation from the normal

use in stray cases, then only such use can be ignored. But in the instant case it appears that a substantial percentage of the product is being diverted for non-pharma products and such practice cannot be construed to mean that because the goods are normally used in pharmacopoeial products the manufacturers are entitled to exemption of such products although a substantial amount of the product is used for non-pharmacopoeial purpose.

13. The learned counsel for the petitioner Shri Sitalwad, has in support of his contention that the notice cannot be issued beyond the period of 6 months because once classification list discloses the items produced by the manufacturer with clarity and the same is approved, it cannot constitute suppression or mis-statement of any of the facts. Therefore, the larger period of 5 years u/s 11A is not available to the Revenue cited the following authorities (1) Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI) and Others, (2) Nat Steel Equipment Pvt. Ltd. Vs. Collector of Central Excise, (3) Collector v. Kosen Metal Products Ltd. (1984 ECR 30). It has also been argued that the evasion is not intentional and if it is not intentional the provisions of Section 11A of the Excise Act are not attracted. Reliance has been placed on Tata Yodogwa Limited Vs. Asstt. Collector of Central Excise and Others,

14. In the case of Tata Iron & Steel Co. Ltd. v. Union of India and Ors. (supra) the Supreme Court has held that when the appellant was filing classification lists containing the description of the items and showing them liable to the payment of excise duty only under Item 26AA(ia) and these lists were accepted and approved by the Excise Authority, it cannot be said that the appellant was guilty of any suppression or misstatement of facts, fraud, collusion or contravention of provisions of Excise Act. In view of this the period of limitation would clearly be only six months and the extended period of five years is inapplicable.

15. In the case of Nat Steel Equipment Private Ltd. v. Collector of Central Excise (supra) the Supreme Court has held that the extended period of 5 years is inapplicable in the absence of proof of suppression of fact and the demand for levy could be held sustainable only for a normal period of 6 months prior to the issue of show cause notice. u/s 11A of the Central Excises and Salt Act, 1944, it has further been held that if all the details are given in the classification list and the Revenue has accepted the same, subsequent notification by the Revenue can be effective only prospectively and not retrospectively. No intent to evade can be inferred in such circumstances. When the classification list has been filed by the manufacturer setting out all the details in that list and the Department has accepted such a list, then there is no scope to allege that there was an intention to evade payment of duty. In such circumstances the notification of the classification list could be only prospective and not retrospective.

16. In the case of Collector of Central Excise, Baroda v. M/s Kosan Metal Products Ltd, (supra) it has been held by the Supreme Court that only in cases of fraud, collusion, wilful mis-statement, suppression of fact or contravention of any of the provisions of this Act or Rules made thereunder with intent to evade payment of

duty, the provisions of Section 11A shall be applicable; otherwise the period of a notice cannot extend beyond six months in case where the duty of excise has not been levied or paid or has been short paid or erroneously refunded.

17. A Division Bench of the Patna High Court in the case of *Tata Yodogwa Limited Vs. Asstt. Collector of Central Excise and Others*,] has taken the view that the limitation of five years will apply only in cases of intentional evasion and not mere evasion. Therefore, if an asscssee bonafide dispute the classification of goods for the purpose of payment of duty, it cannot be said that there is intentional evasion of payment of duty.

18. Now, in the light of the aforesaid authorities of the Supreme Court and the Patna High Court if we examine the facts of this case, we find that the petitioner had filed the classification list on 1-3-1986 and cleared the products after payment of duty of excise at the rate of 15 per cent ad valorem. Thereafter on 3-4-1986 the Central Government exempted the bulk drugs falling under Chapter 28 or Chapter 29 of the Schedule to the Act from the whole of the duty of excise leviable u/s 3 of the Central Excises and Salt Act, 1944 on the terms and conditions mentioned in the notification itself. The condition of exemption was that the manufacturer furnishes to the proper officer, a certificate from the Drugs Controller to the Government of India, within such period as the said officer may allow, to the effect that the drugs of chemicals which are claimed for exemption under this notification are the bulk drugs within the meaning of the bulk drugs given in the Explanation to this notification and are normally used for the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals, and used as such or as an ingredient in any formulation. In the Explanation to the notification it has again been stated that the bulk drugs means any chemical or biological or plant product conforming to pharmacopoeial standards, normally used for the diagnosis, treatment, mitigation or prevention of disease in human beings or animals, and used as such or as ingredient in any formulation. Therefore, what was necessary for seeking the exemption was to obtain a certificate from the Drugs Controller to the Govt. of India to the effect that the product in question is a bulk drug and is used for diagnosis, treatment, mitigation, or prevention of diseases in human beings or animals and used as such or as an ingredient in any formulation. The Dy. Drugs Controller of the Government of India issued a certificate certifying the products in question along with other drugs eligible for exemption from the Central Excise Duty under the notification. Thereupon the company filed the certificate to the Authority concerned and were accordingly permitted to clear the said products without the payment of duty in accordance with the exemption notification. Thereafter a claim for the refund of the amount of the duty paid between 3-4-1986 to 26-4-1986 was made and a part of the refund claimed was also allowed by the Assistant Collector, rejecting the other part of the claim on the ground that the duty was already realised by the petitioners from the consumers. Thereafter the Revenue proposes to quash the earlier order of refund also and a show cause notice was issued to the company which has already been challenged by the

Company before the Collector, Central Excise (Appeals).

19. The challenge to the notice u/s 11A is, therefore, on the ground that there was no suppression, mis-representation, fraud or collusion on the part of the Company because the Company has complied with the conditions of the notification for seeking exemption and the classification list was approved by the Authorities and the goods were also cleared on the basis of that classification list. The Company has also filed the copies of some of the gate passes to demonstrate that while clearing the goods there was no suppression of any fact. The gate passes show that the Company while clearing the goods has mentioned the goods and the names of the companies to which they were sold. The controversy, however, arose because of the interpretation of the word "normally used". According to the Company the words "normally used" in the notification cannot be construed to mean that the commodity should "wholly or exclusively" used for the pharmacopoeial purposes in terms of the notification, whereas the stand of the Revenue is that the Company could not claim exemption in respect of those products which were not used for pharmacopoeial purposes but were put to other uses for manufacturing cigarettes, cosmetics etc. As such there is a controversy about the interpretation of the words "normally used" between the company and the Revenue. However, in the instant case the crucial point is whether the Company suppressed any facts or cleared the goods by misrepresentation, fraud or collusion. The facts placed before us which are not in dispute clearly show that the company initially paid the excise duty before the exemption notification. After the notification it again continued to pay the duty on the goods cleared by it till it obtained the necessary certificate from the Drug Controller to the Government of India, It was only when the Drugs Controller, Govt. of India gave a certificate to the effect that the products in question of the company are liable for exemption from excise duty under the notification of the Govt. of India exempting bulk drugs, then only the company cleared the goods without payment of excise duty. In the gate passes no suppression was made and clearly the names of the companies to which the consignments were to be delivered have also been mentioned. Therefore, if the company bona fide believed that their product is a product which is covered by the exemption notification on the strength of the certificate from the Drugs Controller and cleared those goods without payment of excise duty without suppressing any fact and the authorities accepted the classification list filed by the Company and acted upon that, then the petitioner cannot be held guilty of any suppression, mis-statement of facts, fraud, collusion or contravention of the provisions of the Excise Act in view of the dictum of the Supreme Court in *Tata Iron & Steel Co. Ltd. v. Union of India and Ors.* (supra). The same principle has been enunciated in *Nat Steel Equipment Private Ltd. v. Collector of Central Excise* (supra) by the Supreme Court. As such we hold that the extended period of 5 years is inapplicable in the instant case as prima facie there is no proof of suppression of facts, mis-statement, collusion and contravention of law or rule. The notice impugned issued u/s 11A of the Central Excises and Salt Act by the Collector,

Central Excise is without jurisdiction.

20. Now it is a well-settled principle of law that when any action of the Executive or Administrative Authority is without jurisdiction, then availability of an alternative remedy is no bar to the exercise of the jurisdiction of this Court under Article 26 of the Constitution.

21. The other point canvassed by the learned counsel for the petitioner is that the endorsement on the classification list is also illegal because no opportunity was given to the petitioner before making the endorsement in the accepted classification list. The aforesaid endorsement was made by the respondent No. 3 on 6-7-1987. Since then the goods are cleared in accordance with the classification list with endorsement. The petitioners have not challenged the aforesaid endorsement before any Authority. According to the petitioners themselves they have been paying duty on non-pharma consignments to avoid any controversy, under protest. Decision of this question shall lead to the interpretation of the term "normal use" and the interpretation of that term would depend on the volume of the products used respectively for the pharmacopoeial uses and non-pharma uses. We do not have the whole record before us and we are not in a position to say as to what percentage of the consignments are sold for non-pharma uses and what percentage of the consignments are sold for pharmacopoeial uses. Therefore, firstly in view of the fact that this Court was not approached immediately after the endorsement by the petitioners and instead they cleared the goods on the aforesaid endorsement and secondly the decision of the question involves decision on question of fact, we refrain from passing any order on this issue. The petitioners are, however, free to approach the authorities for redressal of their grievance and we hope and expect that the authorities shall take a judicious view in the matter after considering all the facts and going through the documents which may be filed before the Authority.

22. In view of the aforesaid, the petition is partly allowed. The impugned notice dated 24th Feb. 88 issued u/s 11A of the Central Excises & Salt Act, 1944 by the Collector, Central Excise Indore is quashed being without jurisdiction and beyond the period of limitation. The respondents and their agents, servants or officers are prohibited from in any way acting in furtherance of or in implementation of the show cause notice aforesaid and they are further prohibited from demanding any duty of excise in pursuance of the aforesaid notice. The prayer made by the petitioners in respect of the endorsement is, however, disallowed. In the circumstances the parties shall bear their own costs as incurred.