(2014) 09 BOM CK 0005

In the Bombay High Court

Case No : Writ Petition Nos. 9142 and 9308 of 2011

Jindal Drugs Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Citation : (2014) 310 ELT 654

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : V. Sridharan, Senior Advocate, Prakash Shah and Jas Sanghavi i/b. PDS Legal, Advocate for the Appellant; R.V. Desai, Senior Advocate, R.B. Pardeshi, Danesh Shah, G.R. Sharma and A.S. Rao, Advocate for the Respondent

Judgement

A.K. Menon, J.—Rule. Respondents waive service. By consent, Rule made returnable forthwith. This judgment deals with the issues arising in both the above matters. Essentially, the controversy arises as a result of a claim for export benefits for the period from 1st April, 2004 onwards under the Vishesh Krishi Upaj Yojana (''the Yojana/VKUY'') declared under the Trade Policy for the period from 2004-2009 ("Policy"). The Yojana proposed to grant duty credit scrips equivalent to 5% of the FOB value of exports for each licensing year commencing from 1st April, 2004. The scrips and the items imported under them were to be freely transferable. The petitioners who are exporters of Menthol and Mentha Oil have been denied the benefit of the said Yojana inter alia as a result of the impugned circular dated 28th February, 2006 on the principal grounds raised in the petitions.

2. The Petitioners are limited companies and doing the business of export of Menthol and Mentha Oil and the Respondents are the Union of India and Joint Director of the Foreign Trade and the concerned officers of the Director General of Foreign Trade (DGFT).

3. Few facts in the first petition may be adverted to prior dealing with the issue at hand:- The petition impugns an order dated 9th August, 2011 by which the

Respondent No. 1 clarified that the Petitioners are entitled to benefits under policy circular dated 28th February, 2006 as a result of which, the Petitioners were permitted the benefit of the Yojana only from 1st April, 2007 as against 1st April, 2004 when the Yojana was first announced. According to the Petitioners, they are entitled to the benefit of export of Menthol and Mentha Oil exported even during the period from 1st April, 2004 to 31st March, 2007 by operation of law.

4. Before proceeding further, it would be appropriate that we examine the features of the Yojana which was introduced with the stated objective of promoting exports of fruits, vegetables, flowers and minor forest produce in the year 2004. As a matter of policy, in each subsequent year, the items eligible for the benefits under the Yojana were increased or altered. In some cases, it became more descriptive. The Petitioners were given benefit of the Yojana only from 1st April, 2007 as a result of the fact that the product exported by the Petitioners was specified for the first time vide policy circular dated 28th February, 2006.

5. It is the Petitioners'' case that they are entitled to the benefit of the Yojana irrespective of the impugned circular by virtue of the fact that the relevant foreign trade policy came into effect from 1st April, 2004 and under the said policy the generic description of the product was mentioned under the description "Minor Forest Produce and their value added products....." and that the specific products came to be set out only pursuant to the impugned notification. The Petitioners, therefore, contend that they are entitled to the benefit under the policy and the yojana as against the impugned notification. In order to quickly grasp the changes to the items eligible for benefit under the Yojana, the following table will be useful.

6. It is the Petitioners'' case that under the Policy effective from 1st April, 2004, the Yojana initially provided for inclusion of items fruits, vegetables, flowers and minor forest produce. Thereafter, in each year the number of items covered by the Yojana was increased by amendment to the Yojana and the Appendix 37A to the Handbook of Procedures. Under the umbrella Policy for 2004-09, the Petitioners'' products were covered by Appendix 37A under the general heading Mentha (Japanese pudina) Mentha Arvensis under product code 08.106 which classifies "Minor Forest Produce" at serial No. 106.

7. Some of the other features of the Yojana are as follows:

Under paragraph 3.8.3 of the Yojana duty credit may be used for import of inputs or goods including capital goods as may be notified provided the same is importable under ITC (HS). Paragraph 3.8.4 provided that additional custom duty/excise duty paid in cash or through debit under Vishesh Krishi Upaj Yojana shall be adjusted as Cenvat credit or Duty drawback as per rules framed by the Department of Revenue. Under paragraph 3.8.5 the Government reserved the right, in public interest, to specify from time to time, the export products which shall not be eligible for calculation of entitlement. This provision assumes significance in the facts of the present case.

8. As can be seen from the table above each year the provisions of the Yojana included more an increasing number of products within its fold. Each succeeding year annual supplements were issued to the Policy with intention of incentivizing exporters of specified products. Appendix 37A of handbook was notified on or about 11th July, 2005 vide Public notice No. (RE-2005)/2004-2009 and contained a list of export items notified under 8 Product Codes. The Petitioners contend that their product fell under description of Serial No. 106 under Product Code 8. According to the Petitioners although the specific item fitting the exact description of their product was for the first time notified on or about 11th July, 2006 their product was eligible for benefit from 1st April, 2004 itself since the source "Mentha Arvensis" constituted minor forest produce and was covered under product code 08 which included value added products of minor forest produce per item 8.106 listed in Appendix 37A.

9. According to the respondents it is these value added products that the Petitioners have been exporting since 1st April, 2004 under the description "Mentha Arvensis" and in respect of which the Petitioners claim benefits under the Yojana from 1st April, 2004. It is necessary to mention here that each year Appendix 37A with modification was published as annual supplements. The description VKUY product code ITC (HS) code description and duty on export from which benefits will be admissible were specified.

10. It is not necessary to deal with each of the annual supplements to the policy for the five years period in question since there is no dispute apropos the contents of the policy, save and except for the narrow controversy whether the export benefit would inure to the Petitioners product prior to its specific notification in Appendix 37A published on 1st April, 2007 which admittedly for the first time specifically mention the Petitioners'' products, namely, Menthol Crystals and Mentha Oil. For avoidance of doubt we may clarify that the dispute is restricted to whether the Petitioners'' products are entitled for benefit from 1st April, 2004 under the general heading Mentha Arvensis although the products were for the first time notified under Appendix 37A under heading value added extract of herbs under product code 11.111, 11.112 and 11.113. All of these were described under the heading "value added products of Mentha" for the first time in the supplement of 2007-08.

11. It is the case of the Respondents that the Petitioners are not entitled to claim the said benefits with effect from 1st April, 2004 because according to the Respondents, the Petitioners'' products of the herb Mentha were not notified under Appendix 37A under product code 08.106 or any other product code shown under head minor forest produce till the circular/notification was issued effective from 1st April, 2007.

12. Mr. Sridharan Learned Senior Counsel strenuously urged that the Petitioners''

product, value added products of Mentha were already covered under product code 8 general description Mentha Arvensis. He submitted that Vishesh Krishi Upaj Yojana was part of the foreign trade policy itself. The trade policy categorically mentions that the benefits would be available from 1st April, 2004. The details of which were thereafter provided under the handbook of procedures under paragraph 3.19. It was submitted that objective of the Yojana was to promote exports of the items mentioned in paragraph 3.8.1 of the notebook which list was expanded from year to year as seen from the table set out above and that the description "minor forest produce and their value added products" which covered the petitioners'' products was all times part of the items listed under paragraph 3.8.1. and therefore was always eligible for such benefits.

13. Mr. Sridharan drew our attention to the fact that under list at Appendix 37A first published on 11th July, 2005 various types of minor forest produce were listed which include various special items of lac, gums, resins, Vegetables saps and extracts, mucilages, derivatives of vegetable product oil cake, etc. Item No. 08.106 Mentha (Japanese Pudina) Mentha Arvensis. He further submitted that it could never be the intention of the policy makers not to cover the product manufactured by the Petitioners in view of the fact that the general description of minor forest produce covers all products of the Petitioners including the value added variants. Mr. Sridharan stressed upon contents of the paragraph 3.8.2 of the Yojana which provided that exporters of all eligible items including value added variants are eligible for benefits. According to Mr. Sridharan the products in question were covered by the chapter of promotional measures under the Policy.

14. Mr. Sridharan submits that if benefit was not to be extended with effect from commencement of the policy, the policy would have stated so. He, therefore, claims to be covered by the policy and submitted that once you specify "value added product" of any item mentioned in the policy or that Appendix, the legal effect of the same is that you cannot disallow benefits to the Petitioners'' products. According to Mr. Sridharan law takes over upon announcement of the policy and since the objective of the foreign trade policy under paragraph 3.8.1. is to promote minor forest produce and value added products by the exporters of covered and entitled to such benefits.

15. He further submits that notwithstanding the fact that the Respondents have taken time to identify the value added products including by categorising the value added extracts of herbs under product code 11 and which specifically includes value added products of Mentha only on or about 1st April, 2008 in the supplement to the Handbook applicable from 1st April, 2007, the Petitioners are entitled to the benefits commencing from 1st April, 2004.

16. A mere time gap in identifying different products and enlisting them in Appendix 37A does not alter the fact of policy which according to Mr. Sridharan is effective from 1st April, 2004. He further submits, apropos that the different dates of export which benefits will be admissible, namely, the date of 1st April,

2004 being commencement of the policy in licensing year 2004 and 1st April, 2007 the date from which the Respondents have now conceded such benefits to the Petitioners is discriminatory and violative of Article 14. No such cutoff date of 1st April, 2007 can be prescribed when policy came in effect from 1st April, 2004 and the general description of Mentha (Japanese Pudina) Mentha Arvensis (which included final value added products under Product code 11.111, 11.112 and 11.113) could be imposed. He thus challenges the imposition of cutoff date as arbitrary.

17. Mr. Sridharan contended that the plant Mentha Arvensis has no export potential at all. He further submitted that farmers themselves extract the oil from Mentha in crude form which itself has no export market. The Petitioners purchase this crude oil which is thereafter processed. The process involves purification of raw Mentha oil till value added product is made.

18. Mr. Sridharan also relied upon the principles of statutory interpretation and submitted that the legislature sometime uses superfluous words in provisions because as ignorance of law or as a matter of abundant precaution. The learned counsel quoted Lord Herschell as stating that such specific exemption are often introduced ex majorie cautela to quieten the fears of those whose interest are engaged or sympathies aroused in favour of some particular institution. Thus according to learned counsel the inclusion of words "and their value added products" in paragraph 3.8.2 clearly applies to the Petitioners'' product notwithstanding that there is no specific mention of the same effective on 1st April, 2004 and specific mention came with effect from 1st April, 2007. He submitted quoting from the Law and Practice of Income Tax by Kanga and Palkhivala that it is a well settled rule of construction that the courts must disregard any assumption of the legislature as to the prevailing law, if it is mistaken, though the result might be that the legislative provision cannot be given the effect intended by parliament.

19. Mr. Desai, learned Senior Counsel on behalf of the Respondents disputes the Petitioners'' contentions. He refers to the Petitioners'' submission made in Writ Petition No. 1665 of 2006 filed by the very same Petitioners, in which the submissions of the counsel have been recorded to that effect. He also refers to the written submissions made by the Petitioners to DGFT wherein in paragraph 14, the Petitioners has contended that Mentha Arvensis is a plant and a plant is never exported as a plant. The Petitioners have stated that it is only the farmers who extract oil which is processed by Petitioners and thereafter subjected to steam distillation followed by partial removal of menthol by refrigeration and fractional distillation, resulting in (i) menthol crystals which contain a higher concentration of menthol, and (ii) mentha oil in a refined form, for which an export market exists. These are two products. Apart from these two products the Petitioners has also indicated fractional distillation of Mentha oil. Mr. Desai controverts this contention by stating that the Plant itself is exported. He submits that what was permissible for export under Product Code 08.106 was the

physical plant itself which is described as Mentha Arvensis. Mr. Desai contends that Mentha Arvensis plant is also exported as a whole.

20. Mr. Desai then sought to rely upon meaning of "mentha arvensis" to mean "mentha plants which grew in fields". He therefore submitted that the expression "mentha arvensis" mentioned in the policy refer to plant and not value added product which were subsequently notified by way of clarification that with effect from 1st April, 2008 eligibility for effect from 1st April, 2007. Mr. Desai further submitted that from the shipping bills enclosed by the Petitioners along with the letter dated 8th December, 2008 addressed to Joint Director General of Foreign Trade the Petitioner had sought benefits by describing the product exported under the heading item description Mentha, Japanese Pudina, Linn, Mint, Pudina. This according to Mr. Desai was misrepresentation since the plant was not what the Petitioners actually exported. On this basis the Respondents submit that the Petitioners are not entitled to relief in the petition and that effect of policy can only be availed from 1st April, 2007.

21. We do not propose to enter upon this controversy as it is not necessary to do so for the purposes of these petitions, apart from being drawn into considering disputed factual contentions. We agree that not all minor forest produce would get benefit. The DGFT in the said order clarified that 600 products were listed in Appendix 37A included the following with the name:-

The order dated 9th August, 2011 passed by the Director General of Foreign Trade (Exhibit H) specified that the policy was announced with intention of the Government to promote export of fruits, vegetables, flowers, minor forest produce and their value added products to be notified at a future date, by incentivizing exporters of such products. It also refers to the notification under 15/(RE/2004)/2004-2009 issued on 4th January, 2005 which clearly specified that "not all minor forest produce would get the benefit". The exclusion implied in this quoted portion, in our view includes the value added products of minor forest produce which are not specifically listed in Appendix 37A. The affidavit in reply filed on behalf of Respondent No. 2 also clearly sets out that minor forest produce which qualify for exports to be notified separately.

22. We find that the DGFT also considered the Petitioners submission that the intention of the policy must have been to incentivizing exports of Menthol crystals and also extracts. This was dealt with by the DGFT by holding that if that was the case, there was no need to amend Appendix 37A and specific value added products under heading value added products of herbs including Mentha. Accordingly, they were denied benefits effective from 1st April, 2004.

23. At the cost of repetition we note that notification 15(RE-2004) 2004-07 dated 4th January, 2005 clearly specified that minor forest produce which would qualify for export benefit would be notified separately. It is only after the Petitioners'' product were specifically included under Product Code 11.111, 11.112 and 11.113 that they became eligible for the benefits. The Petitioners products are

covered under Appendix 37A under the following description:

24. According to the Respondents it was decided to initially exclude the value added variants from the scope of Yojana as the revenue on this count would be very high. According to the Respondents the revenue outgoings on account of exports of Mentha would have been very high on account of export value being of Rs. 2,300 crores during period 2004-05 and 2006-07 it is only when the revenue of Vikas Yojana was increased effective from 1st April, 2007 According to the Respondents therefore it is matter of policy that the issue does not call for interference and the contentions of the Petitioners are required to be rejected.

25. Mr. Desai submitted that choice of dates is not for the petitioner to decide and that government had taken a valid policy to incentivise the value added price of methanol only with effect from 1st April, 2007 and, therefore, cannot be in contemplation for the parties as policy effective from 1st April, 2007 in respect of Mentha products.

26. Mr. Sridharan also relied upon the decision of the Supreme Court in the matter of Government of India, represented by Secretary, Ministry of Finance and Others Vs. Dhanalakshmi Paper and Board Mills, Tiruchirapalli, and submitted that the cutoff date restricting benefit of exemption without any basis is arbitrary and ultra vires. In that case a group was divided in two classes without having rightly related such division to the object of the notification. Benefit to one class was withdrawn while retaining it in favour of others. It was, therefore, held in that case that such different treatment was ultra vires and the benefit was available to the entire group. In that case, the Supreme Court was deciding a Civil Appeal filed by the Central Government in connection with Rule 8(1) of the Central Excise Rules, 1944 while holding that the cutoff date was restrictive an arbitrary.

27. According to us, the choice of dates is not arbitrary. The product in question was specifically made eligible for the benefit of the Yojana from 1st April, 2007 and the Petitioner was found availing the same from 1st April, 2004. Although compilations of judgments were tendered by both the sides, neither side relied upon any other judgment. Mr. Sridharan was at pains to explain the plant and part, including seeds and fruits of tree shrubs and other plants are classified under product-12.11 and he relied upon the explanatory note issued for Harmonized Commodity Description and Coding System. He contended that mint was included as that part of plant and it included mint of all species. Mr. Desai also relied upon the order dated 9th August, 2011 passed by the D.G.F.T. on remand by this Court wherein the D.G.F.T. considered the Petitioner''s case that the export of menthol is covered under entry at serial No. 432 bearing product code No. 08.432 with the description of ''Mentha Arvensis, Linn (Mint, Pudina)''.

28. Suffice it to say that the Jt. D.G.F.T. held that such export product is not covered under this entry and even though in respect of some applications, had granted export benefit, after the issuing clarification by policy circular dated 28th

February, 2006, recovery had been initiated. The issue before the D.G.F.T. was only to decide as to whether the product exported by the petitioner is eligible for grant of export benefit as on that day and up to 1st April, 2007. The Petitioner had then pleaded that Mentha in its natural form is not exported neither is it exportable in that form and, therefore, the intention was to incentivise the export of mentha oil or mentha crystals. If that was the case, it was held that there would have been no need to amend Appendix 37A and bring in specific lists of value added product for Mentha. It was held that in view of the clarification, the Petitioner will not get the benefit of Vishesh Krishi Upaj Yojana announced in 2004-05. They will get the benefit with effect from 1st April, 2007.

29. We are in agreement with the contentions of the Respondents to the extent that inclusion of value added products were detailed in Appendix 37A of the Handbook. The relevant value added extracts of herbs were introduced in Appendix 37A under product code 11 and specifically 11.111, 11.112 and 11.113. On 1st April, 2008 with benefits due form 1st April, 2007. ''Having considered all the facts and the relevant provisions, we find that Vishesh Krishi Upaj Yojana was introduced for incentivising exports in a phased manner. It is not as if every product which could be relatable to the items listed in 37A can qualify for export benefits. But only products that found mention in Appendix 37A qualified for export benefits. The petitioners'' were specifically granted benefit with effect from 1st April, 2007. This is evident from the Appendix which specifies dates of export from which benefit can be admissible. In case of diverse products different dates apply. For instance, in items covered under product Code 1 to 7, the relevant date was taken as 1st April, 2004. In chapter 33 of ITC (HS), Oleoresins specified in the list of items under product code 7A qualified for benefit from 1st April, 2005. Product code 8.106 only included the plant Mentha (Japanese pudina) (Mentha arvensis) which qualified for export benefit on 1st April, 2004. These did not in our view include the products derived from Mentha Arvensis. Mentha Arvensis, Linn (Mint, Pudina) covered by product code 08.432 qualified with effect from 1st April, 2004. The distinction drawn between product code 08.432 Mentha Arvensis (Mint, Pudina) and 08.438 described as Mintha Arvensis (Podina) itself makes it obvious that they are different variants of Mentha Arvensis covered by product code 08.106, 08.432 and 08.438.

30. It therefore, stands to reason that the petitioners'' specific products i.e. value added extracts of Mentha such as Menthol BP/USP, Menthol Crystal BP/USP, Mentha oil IP were covered by product code 11 and were undoubtedly, different from those covered by product code 08.106, 08.432 and 08.438. In addition, even within product code 11, we find different kinds of Mentha derived product. For instance, 11.114 refers to Menthone, 11.115 refers to Menthol liquid 11.116 refers to Mint Blend, 11.117 refers to Peppermint oil, 11.118 refers to Rectified peppermint oil, 11.119 refers to Spearmint, 11.120 refers to Cornmint oil, 11.121 refers to Dementholised peppermint oil and 11.122 refers to value mint, all of which qualified for benefits effective from 1st April, 2007. It is, therefore, not possible to accept the petitioners'' contention that their product qualified

even earlier to their inclusion in product code 11.

31. In the result, the challenge to policy circular dated 28th February, 2006 on the ground that the effective date is to be treated as 1st April, 2004 and not 1st April, 2007 fails. The Petitioners will not be entitled to benefits of the Yojana from 1st April, 2004 till 31st March, 2007. Writ Petition No. 9308 of 2011 is dismissed with no order as to costs.

32. In the case of Writ Petition No. 9412 of 2011, the petitioners were concerned with the exports of identical nature. The challenge in the petition is also directed to the Circular dated 28th February, 2006. The issue being identical, the aforesaid findings will apply to both the petitions. Writ Petition No. 9142 of 2011 is also dismissed with no orders as to cost. Rule in both petitions is thus discharged.