(2012) 11 MP CK 0151

In the Madhya Pradesh High Court

Case No : Writ Petition No. 13584 of 2010

Parenteral Drugs (India) Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 27-11-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2013) 289 ELT 296

Hon'ble Judges : Shantanu Kemkar, J;Krishn Kumar Lahoti, J

Bench : Division Bench

Advocate : L.N. Soni, with J. Lopez, for the Appellant; Vinay Zelawat, Learned Counsel, for the Respondent

Judgement

1. Petitioner has sought following reliefs:-

1. Issue writ of Declaration or any other appropriate writ, order or direction under Article 226-227 of the Constitution of India, against the office of the Respondent No. 2 Commissioner of the Central Excise quashing the impugned show cause notices issued for the period between December 2003 to 31st March, 2009, i.e. the period when the order of the Hon''ble Customs Excise, Service Tax Appellate Tribunal was operative.

2. Issue such other or further appropriate order, writ or directions as this Hon''ble Court may think appropriate in the interest of justice.

The case of the petitioner is very short one. Petitioner is a manufacturer of Intravenous Fluids and the question involved in this case is whether such item is exempted from payment of excise duty or not. The contention of the petitioner is that vide notification dated 1-3-2001 bearing No. 3/2001, petitioner is exempted from payment of excise duty. The department is contesting the matter. The Customs, Excise and Service Tax Appellate Tribunal, Mumbai had decided the matter in favour of the petitioner vide order dated 27-2-2004 and held that the product manufactured by the petitioner was an exempted product covered under

Notification No. 3/2001. The order passed by the Tribunal was subject matter of Civil Appeal Nos. 4944/2004, 6519/2005, 1152/2006, 2127/2006, 2628/2006, 2630/2006 and 4059/2006 before the Apex Court. The Apex Court vide order dated 31-3-2009 [2009 (236) E.L.T. 625 (S.C.)] decided the appeals, which reads thus:-

Delay condoned.

In this batch of Civil Appeals, the main issue which arose for determination before the Adjudicating Authority was whether Intravenous Fluids having a therapeutic value stood covered under Exemption Notification No. 3/2001.

In the lead matter - M/s. Parenteral Drugs (I) Ltd. - the respondents were engaged in the manufacture of various types of Intravenous Fluids. They were availing the benefits of Notification No. 6/2000, dated 1-3-2000. The said Notification was amended by Notification No. 36/2000, dated 4-5-2000, whereby Entry No. 47-A was added thereby exempting "Intravenous Fluids" from payment of excise duty. However, from 1-3-2001, the earlier notifications were replaced by Notification No. 3/2001 which defined "Intravenous Fluids" as those which are used for sugar, electrolyte or fluid replenishment. In other words, open-ended exemption stood restricted by the above three qualifications.

Accordingly, show cause notices were issued in which it was alleged that the respondents were engaged in the manufacture of intravenous infusions of various kinds which besides the fluids included certain medicines having anti-bacterial, antibiotic and antimicrobial properties. It was alleged in the show cause notice that by addition of the following items to the Intravenous Fluids, the product attained therapeutic value and, consequently, it fell outside Notification No. 3/2001 which defined TV Fluids'' as those used for sugar, electrolyte or fluid replenishment. The items added to the fluids are as follows:

(a) Ciprofloxacin I.P.

(b) Metronidazole I.P.

(c) PDZOLE-D

(d) Ciprodex

(e) Tinipidi Isotonic Infusion, and

(f) Mannitol I.P.

The most important aspect to be noted is that in the 2001-2002 Budget, an explanation was inserted in Notification No. 36/2000, clarifying that only such IV fluids which were used for sugar, electrolyte or fluid replenishment, were exempt from duty and not other IV fluids. This provision in the Budget was relied upon by the Department in the show cause notice(s) to deny the benefit of exemption claimed by the respondents under Notification No. 3/2001. Unfortunately, despite detailed analysis of the notification in question by the Commissioner, the Tribunal has not examined this aspect and, therefore, the matter needs to be remitted to the Tribunal to give its finding as to what is the effect of the 2001-2002 Budget which restricts the definition of ''IV Fluids'' in terms of the above three qualifications.

There is one more aspect which the Tribunal is required to consider. In the labels of the respondent-Company, there is a warning stating that IV fluid manufactured by the assessee is Schedule-H Drug. What is argued on behalf of the assessee(s) is that because of addition to the IV Fluid of one of the above-mentioned six items, the product manufactured is required to be sold as a Schedule-H drug. On the other hand, the Department has placed reliance on the Drugs and Cosmetics Rules, 1945 read with Schedule-H to indicate that when IV Fluid has dominant therapeutic value, it will not come within the exemption because it has to be treated as a Schedule-H drug. We do wish to express any opinion on this point. Suffice it to state that on the above two questions/issues, the matter needs to be remitted to the Tribunal for consideration in accordance with law.

We may add that exemption notifications have to be read strictly. We may also add that the burden is on the assessee to prove that the item falls within the four corners of the exemption notification.

Before concluding, we may state that if on the second issue, regarding Schedule-H Drug, as spelt out hereinabove, if the Tribunal feels that the matter requires further evidence, it may either itself decide that point after giving opportunity to the parties or it may remit the matter to the Adjudicating Authority for its decision on factual aspect in accordance with law.

Subject to what is stated above, the Department''s Appeals are allowed, the impugned judgment is set aside and the matters are remitted to the Tribunal for fresh consideration in accordance with law. In the facts and circumstances, there will be no order as to costs.

2. The matter has been remanded back to the Tribunal for a fresh adjudication as per directions issued by the Apex Court. The (sic)tention of the petitioner is that after the order passed by the Tribunal but before the order passed by the Apex Court, various show cause notices were issued to the petitioner by the Excise Department directing the petitioner to show cause why the tax as shown in the notices may be imposed. These notices are under challenge in this appeal on the ground that during period between 27-2-2004 and 31-3-2009, the order of the Tribunal was in force and there cannot be any recovery of the excise duty from the petitioner. It was also stated that the Tribunal has not decided the matter in spite of the order of the Apex Court so no recovery could have been directed against the petitioner. It was submitted by Shri L.N. Soni, learned senior Advocate that aforesaid notices may be quashed.

3. Shri Vinay Zelawat learned counsel appearing for Revenue opposed the contention and submitted that the aforesaid notices have been issued to keep

the issue alive and as per order passed by the Apex Court, the matter has already been decided by the Tribunal and the intravenous fluids manufactured by the petitioner have been held to be exciseable, so petitioner is liable to make the payment of tax as per notices issued by the department. Shri Soni, learned senior counsel also submitted that this matter is squarely covered by a decision of a Division Bench of this Court in M/s. Prem Pharmaceuticals v. Union of India and another - W.P. No. 117/2010, dated 1-2-2010, but the aforesaid position is disputed by Shri Vinay Zelawat, learned counsel appearing for respondents. As the matter is subjudice before the Customs Excise & Service Tax Appellate Tribunal, the petitioner may rely this judgment before the Tribunal to submit that the matter is covered by the decision and the product of petitioner is not excisable.

4. On being asked, no order has been produced before us by the respondents in the case of the petitioner by the Tribunal. However, a statement has been made by Shri Zelawat that he has received instructions from the department that an identical issue has been derided in other matter by the Tribunal.

5. As matter of the petitioner has not been decided till date in compliance of the order of the Apex Court and during the period when the order of Tribunal dated 27-2-2004 was operative, impugned show cause notices by which recovery was directed against the petitioner were totally untenable as at that time no recovery could have been directed, so we find it appropriate to decide the matter with following directions:-

1. Show cause notices Annexure P-1A to P-1J are hereby quashed.

2. The Customs, Excise & Service Tax Appellate Tribunal, who has been directed by the Apex Court, shall decide the matter as per directions issued by the Apex Court.

3. If the matter is decided in favour of the petitioner then there would be no question of imposing of any excise duty against the petitioner. However, if the matter is decided against the petitioner, the department shall be free to issue fresh show cause notices. However, this action shall be subject to final adjudication of the dispute after the order passed by the Tribunal.

6. No order as to costs. C.C. as per rules.

