(2010) 05 DEL CK 0297

In the Delhi High Court

Case No : Writ Petition (C) 9699-9700 of 2004

Ranbaxy Laboratories Ltd. and Another APPELLANT

Vs

Union of India (UOI) and Another RESPONDENT

Date of Decision : 10-05-2010

Acts Referred:
Essential Commodities Act, 1955 — Section 3
Punjab Land Revenue Act, 1887 — Section 69

Citation : (2010) 05 DEL CK 0297

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : S. Ganesh, Malini Sud and Deepak Khurana, for the Appellant; Neeraj Chaudhari, CGSC, Akshay Chandra and Khalid Arshad, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—The challenge in this petition is to a communication dated 15th April 2004 addressed to the Petitioners by the Department of Chemicals and Petrochemicals, Ministry of Chemicals and Fertilisers, Government of India assessing its liability under Para 7 (2) read with Para 17 (1)(a)(i) of the Drug Price Control Order 1979 (DPCO 1979) in respect of the dug Ampicillin Trihydrate (ATH) at Rs. 4,16,84,678/- of which the liability towards the Drug Price Equalization Account (DPEA) was Rs. 2,89,09,672/- and the interest was Rs. 1,27,74,996/-. After adjusting the sum of Rs. 2,44,19,500/- already deposited by the petitioner the balance amount to be paid within thirty days thereof was Rs. 1,72,65,178/- failing which action would be initiated against the Petitioner under the relevant provisions of the law. The challenge in the petition is also to the reports dated 24th May, 2001 and 14th January, 2004 of the Drug Prices Liability Review Committee (DPLRC) on the basis of which the said demand was raised against the petitioner.

2. The background to the raising of the above demand is that in exercise of the powers conferred on it u/s 3 of the Essential Commodities Act, 1954 (ECA), the

Central Government issued the DPCO 1979 with effect from 1st April, 1979. It remained in force till 25th August, 1987 when it was repealed by DPCO, 1987. The DPCO, 1987 continued in force till 6th January, 1995 when it was repealed by DPCO, 1995.

3. It is stated that in order to promote self-sufficiency and increased production of bulk drugs in the country, the Central Government introduced a system of "retention price" and "pooled selling price" under the DPCO, 1979. Under Para 3 of the DPCO, 1979 the Central Government had the power to fix, by Notification in the Official Gazette, the maximum price at which bulk drugs could be sold. While fixing such cost of bulk drugs, the Central Government was to take into account the average cost of production of such bulk drug and also to allow a reasonable return on net worth in terms of Para 3(2) of the DPCO, 1979.

4. Para 4 of the DPCO, 1979 provided that notwithstanding anything contained in Para 3, the Government may fix a "retention price" as well as a "common sale price" for such bulk drugs. Under Para 2(t) of the DPCO, 1979 "retention price" has been defined to mean the price fixed under Paras 4 and 7 for individual manufacturers or importers or distributors of such bulk drugs. Para 7 (1)(a) of the DPCO, 1979 provided that the central government shall fix by Notification a retention price for an individual manufacturers of such bulk drugs. Para 7 (1)(b) provides for fixing of the "pooled price" by the central government for the sale of such bulk drugs. Para 7(2) of the DPCO, 1979 provided that where a manufacturer of formulations utilizes in his formulation any bulk drugs either from his own production or from any other source, the price of such bulk drugs being lower than the price allowed to him in the price of such formulation then the central government may require such manufacturer to deposit into the DPEA the excess amount as determined by the central government or to sell the formulations at such prices as may be fixed by the central government. Under Para 17(2), the manufacturer or importer, as the case may be, is entitled to the short fall between his retention price, and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production or securing the equitable distribution or availability at fair prices, of drugs.

5. The petitioner states that in 1983, the retention/pooled price system was unworkable. Subsequently in December 1986, the government announced a Drug Policy (referred to as the 1986 Drug Policy). Para 5.4 of the 1986 Drug Policy acknowledged that the operation of bulk drugs pricing of the DPEA was in actual practice giving rise to intractable administrative problems. Consequently, the system of retention and pooled price was discontinued. It was further decided that the protection of indigenous production of bulk drugs, whichever necessary, would be provided through the tariff mechanism. It is stated that with the discontinuation of the retention/pooled price system, the need for maintaining the DPEA also disappeared.

6. The petitioner received a letter dated 21st April 1995 i.e. nearly eight years after repeal of the DPCO, 1979 computing the ''unintended benefits'' enjoyed by

the Petitioner for the period 1979 to August, 1987. It was observed that the petitioner had enjoyed an unintended benefit on account of difference between the price of the bulk drug ATH allowed in formulation prices and the actual procurement price by the petitioners. The petitioners were called upon to deposit a sum of Rs. 4,88,38,997/-along with interest in the DPEA.

7. In its reply dated 22nd June 1995 the petitioner pointed out that the reference in the letter dated 21st April, 1995 to the petitioners purchasing the bulk drug ATH was obviously a mistake, since the petitioner never procured/purchased ATH. The petitioners had produced ATH for captive use and it was so used between 1979 and August 1987. The price of ATH as notified on 30th April, 1977 was Rs. 1,475/- per kg and together with 8% incidental charges it worked out to Rs. 1,593/- per kg. It is submitted that the price of ATH was revised by Notification dated 2nd September, 1983 to Rs. 1,677/- per kg which together with 8% incidental charges worked out to Rs. 1,811.16 per kg. It is submitted that the price of ATH given by the petitioner in its formulation was in fact the notified price of the said drug. There was no question of there being any difference between the so-called procurement price and the price allowed in the formulations creating any liability for paying any amount into the DPEA.

8. However, the reply dated 22nd June 1995 given by the petitioner was not responded to and a notice dated 13th December 1995 was sent by the DPLRC stating that the Petitioner''s liability was quantified at Rs. 4,88,38,997/-. The Petitioner replied on 30th January 1996 denying any liability. In a subsequent notice dated 25th July 1996, the Department of Chemicals and Petrochemicals determined the liability incurred by the petitioner as Rs. 12,37,26,920/-. The petitioner replied on 8th August 1996 denying the liability. The petitioner received another notice dated 8th January 1997 demanding a sum of Rs. 12,37,26,920.09/- failing which arrest warrants would be issued u/s 69 of the Punjab Land Revenue Act, 1887.

9. Aggrieved by the aforementioned demand, the petitioner filed Writ Petition (Civil) No. 106 of 1997. By an order dated 10th January 1997 this Court stayed the recovery of the aforementioned amount subject to the petitioner depositing 50% of the assessed liability of Rs. 4,88,38,997/-within a period of eight weeks. Time for making the deposit was extended till 11th March, 1997. The petitioner thereafter deposited Rs. 2,44,19,500/-.

10. The aforementioned W.P.(C) No. 106 of 1997 was disposed of by an order dated 28th October 1998 whereby the Petitioner was directed to make a representation before the DPLRC. The Petitioners made the said representation to the DPLRC on 1st December 1998. This was followed by another letter dated 2nd November 2000 following which a reference for hearing was held on 17th October 2000. It was pointed out in the said reference that in the counter affidavit filed by the Respondents in W.P.(C) No. 106 of 1997, a stand had been taken that since the cost of production was lower than the notified price of the bulk drugs, on that ground alone the petitioner was liable to pay the amount

towards the DPEA. The petitioner protested saying that the Department was seeking to advance a new plea not taken by it in the writ petition. The petitioner sent a letter dated 3rd January 2001 with which the details of production, gross sales and captive consumption of the bulk drug for the years 1979 to 1987 were enclosed. A further representation was filed by the Petitioner on 18th January 2001.

11. After about three years, the Central Government sent the impugned communication dated 15th April, 2004 to the Petitioners stating that the DPLRC in its report dated 14th January 2004 had assessed the liability of the Petitioner as Rs. 4,16,84,678/-. The liability towards the DPEA was Rs. 2,89,09,672/- and the interest was Rs. 1,27,74,996/-. It was stated that the Petitioner had already deposited Rs. 2,44,19,500/-. The petitioner was called upon to pay the balance amount of Rs. 1,72,65,178/- within 30 days failing which action would be commenced against it. The DPLRC''s reports dated 24th May 2001 and 14th January 2004 were sent to the petitioner thereafter. These have also been challenged in the present petition.

12. In their counter affidavit dated 6th October 2004 the Respondents stated that the Supreme Court upheld the validity of the DPCO, 1979 in Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., The purport of the aforementioned judgment, according to the Respondents, was that the manufacturers of bulk drugs and formulations should not be allowed to retain the unintended benefits arising out of (i) overcharging and (ii) unauthorized retention of the overcharged amount. The counter affidavit stated that the DPLRC was constituted by a resolution dated 21st March, 1994 by the Central Government under the Chairmanship of a retired judge of the High Court to review the entire matter relating to liability of the drug manufacturers to pay amounts into the DPEA. It was claimed that despite repeated reminders to the petitioner to furnish the requisite details it failed to do so and, therefore the central government had to work out the petitioner''s liability "from whatever data became available with the Government from whatever sources". Thereafter the case was referred to the DPLRC for consideration. Even before the DPLRC, despite notice the Petitioner did not appear and it was accordingly presumed that it was not interested in making submissions. It is claimed that on the basis of the ex parte report of the DPLRC, the liability of Petitioner No. 1 was computed and communicated to it. However, since the petitioner failed to deposit the amount of liability in terms of the DPCO, 1979 the Collector at Punjab was requested to take appropriate action. Pursuant to the remand by this Court a further hearing was given to the petitioner by the DPLRC.

13. The Respondents state that the DPLRC formulated the following issues for consideration:

1. Keeping in view the fact that the Petitioners did not procure any quantity of bulk drug used in the formulations from outside sources, but on the other hand utilized the entire quantity of the bulk drug in the formulations from their own

production, are they exempt from liability under provisions of para 7(2) of DPCO 1979?

2. Can the allowed price of the bulk drug in the formulations manufactured by the Petitioners as indicated by the Department and the price of the bulk drug for the Petitioners fro the basis of computation of the liability of the Petitioners or not? If not, how should these two sets of prices be determined?

3. How should the quantities of the bulk drug consumed in the manufacture of formulations of Ampicillin Trihydrate be computed?

14. Later the terms of the DPLRC were revised on 10th October 2002. The petitioner''s case was referred to the newly constituted DPLRC. By its report dated 14th January 2004 the DPLRC quantified the petitioner''s liability based on which the impugned demand by the letter dated 15th April, 2004 was raised on the petitioner.

15. Mr. S. Ganesh, learned Senior Counsel appearing for the Petitioners referred to Para 14 of the DPCO, 1987 and submitted that no action had been taken by the Respondents during the period when DPCO, 1979 was in force i.e. till 25th August 1987. It is submitted that earlier letters dated 10th May 1984, 29th December 1986 and 17th June 1987 did not mention any "accrued amount" due from the petitioner. The first time a demand was raised was on 21st April 1995, eight years after the repeal of the DPCO 1979. Therefore the demand was time barred. He pointed out that for the DPEA liability under Para 17 of the DPCA 1979 to accrue, the government has to first determine the excess amount in terms of Para 7 (2). He states that there was no such "determination" by the government during the time the DPCO 1979 was operational. As regards the interest component, it is submitted that in the first place it is not leviable at all. Even otherwise, it was excessive. Interest could not be greater than 6% per annum simple interest.

16. In reply Mr. Neeraj Chaudhari, learned Counsel appearing for the Respondents, refers to the findings made in the reports of the DPLRC which show the basis for the determination of the liability. He submits that the question whether the petitioner is at all liable under the DPCO 1979 since it did not procure ATH but manufactured it for captive consumption has been answered by the DPLRC in its report dated 24th May 2001. Since the petitioner refused to provide the necessary data despite several letters written to it, the government and later the DPLRC were justified in proceeding on whatever information was available.

17. The first issue that arises for consideration is whether the government could invoke Para 14 of the DPCO 1987 to raise a demand on the petitioner for its DPEA liability in respect of ATH even eight years after the repeal of DPCO 1979? The relevant clause enabling recovery of dues accrued under the DPCO 1979 even after the expiry of the period it remained in force is Para 14 of the DPCO 1987 which reads as under:

Power to recover dues accrued under the Drugs (Prices Control) Order 1979 into the Drug Prices Equalization Account-

(1) Notwithstanding anything contained in this order, the Government may, by notice, require the manufacturer, importer or distributor, as the case may be, to deposit the amount which has accrued on account of the actions under the Drugs (Prices Control) Order 1979 on or before the commencement of this order, into the Drugs Price Equalization Account and the manufacturer, importer or distributor, as the case may be, shall deposit the said amount into the said account within such time as the Government may specify in the said notice.

(2) The existing amount if any, in the Drugs Prices Equalization Account on or before the date of commencement of this Order, and the amount deposited under sub-paragraph (1) shall be used for the purpose stipulated in the Drugs (Prices Control) Order 1979.

18. The language of Para 14 of the DPCO 1987 is clear. It unambiguously states that the liability under DPCO 1979 should have been in the form of an "amount" accrued on account of "the actions" under the DPCO 1979. There is merit in the contention that the word "amount" obviously connotes a computed amount that has already accrued. Again the "actions" under the DPCO 1979 "on or before the commencement" of the DPCO 1987 refers to both the actions of the drug manufacturer that has led to the accrual of the amount as well as the actions initiated by the Respondents in terms of Para 7 (2) of the DPCO 1979 to "determine" the amounts accrued. The word "actions" cannot mean the mere soliciting of information. It has to be such "actions" taken "before the commencement" of the DPCO 1987 that results in the determination of the DPEA liability even if such determination is tentative. Viewed in this light the letters dated 10th May 1984, 29th December 1986 and 17th June 1987 sent by the Respondents to the petitioner were not letters communicating any "amount" quantified by the government as having "accrued." The particulars sought from the Petitioners by the letter dated 10th May 1984 related to the quantity of ATH procured by the petitioner and not the quantity manufactured and consumed. This obviously did not have any nexus to the demand finally raised. Likewise, the letter dated 15th October 1986 asks the petitioner to furnish the details of "procurement and utilization" of ATH. The letters dated 22nd/29th December, 1996 and 17th June 1987 were reminders in relation to the earlier letters. The Respondents" letter dated 10th August 1987/16th August 1989 to the petitioner also only "requested that the full details of procurement of various bulk drugs both imported and indigenous during the period from 1.4.1979 to 25.8.1987 may please be furnished."

19. Given the fact that the case of the petitioners throughout has been that it never "procured" ATH but manufactured it for captive consumption, the government did not and could not have the details on the basis of which it could have "determined" the petitioner''s liability to pay into DPEA in terms of Para 7 (2) of the DPCO 1979 the "amount" that was "accrued" thereunder. Even

assuming that the government could have estimated such amount on the basis of whatever information was available with it, the letters referred to hereinbefore written by the Respondents to the petitioner during the time the DPCO 1979 was operational did not raise any demand of any "amount" that was "accrued" even on a guesstimate. In the absence of such determination of the accrued amount during the period that DPCO 1979 was in force, the government could not have invoked Para 14 of the DPCO 1987. Under Para 14 of the DPCO 1987, which is an enabling provision, the government can seek to recover an already quantified amount that has accrued under the DPCO 1979, even if it is a tentative quantification that requires to be finalized. Para 14 of the DPCO 1987 does not enable the government to start proceedings to determine liability under the DPCO 1979 even if it had not undertaken such exercise during the time DPCO 1979 was operational. As far as the present case is concerned the government appears not to have taken the first step to recover any amount from the petitioner in terms of its liability under the DPCO 1979 till it raised a demand by its letter dated 21st April 1995. Clearly as far as the petitioner''s DPEA liability under the DPCO 1979 was concerned, the government had missed the bus.

20. One of the first questions that the DPCLR was required to address was whether the claim in terms of the DPCO 1979 was time barred. This it plainly did not. In neither of its two reports dated 24th May 2001 and 14th January 2004 did it even notice Para 14 of DPCO 1987. Both its reports that proceed to determine the DPEA liability of the petitioner without addressing this basic issue are therefore vitiated and are held to be legally unsustainable.

21. Consequently, this Court is of the view that no demand could have been raised against the petitioner in respect of its DPEA liability in respect of ATH under the DPCO 1979. Once the demand for DPEA liability is held to be legally untenable the demand for interest thereon also goes. The impugned demand by the Respondents letter 15th April 2004 is hereby quashed.

22. In view of the above conclusion, this Court does not consider it necessary to decide the other issues that have been raised. In particular the issue whether Para 7 (2) of the DPCO 1979 applies to captive consumption of a bulk drug is left open for decision in an appropriate case.

23. The entire amount deposited by the Petitioners will be refunded to it by the Respondents within a period of eight weeks from today together with interest at 6% simple interest per annum from the date of the deposit till the date of payment. If the said amount is not deposited within the aforementioned period, the Respondents will pay simple penal interest at 12% per annum for the period of delay.

24. The writ petition is accordingly allowed in the above terms with costs of Rs. 10,000/- which will be paid by the Respondents to the Petitioner within four weeks.