(2004) 05 DEL CK 0028

In the Delhi High Court

Case No : C.W.P. No. 1588 of 2003

Ranbaxy Laboratries Ltd. — APPELLANT

Vs

Union of India (UOI) and Another — RESPONDENT

Date of Decision : 20-05-2004

Acts Referred:
Drugs and Cosmetics Rules, 1945 — Rule 104A
Essential Commodities Act, 1955 — Section 10, 3, 3(1), 3(2)

Citation : (2004) 05 DEL CK 0028

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : T.R. Andhyarujina and Anjali Vohra, for the Appellant; Maninder Singh, Kirtiman Singh and Abhinav Mukherji, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The petitioner company is engaged in the business of manufacture inter alias of bulk drug ''Pentazocine'' utilised in the formulation of the injunction of the said drug and sold under the brand name `Fortwin''. The petitioner, vide an order dated 29.08.1995 issued by respondent No. 1, was granted exemption from the purview of the Drugs (Prices Control) Order, 1995 (hereinafter to be referred to as, `DPCO''). The effect of this notification was that it enabled the petitioner company to fix its own price for the drug for the period of exemption.

2. DPCO was published in the Gazette of India dated 06.01.1995 and was made in exercise of the powers conferred u/s 3 of the Essential Commodities Act, 1955 (hereinafter referred to as, `EC Act''). Para 25 of the DPCO authorised the Government to exempt any manufacturer from the operation of the provisions of the Order subject to such conditions as may be deemed proper. Since the matter in controversy would require reference to certain paragraphs of the DPCO, the same are reproduced hereunder for convenience of reference :-

" 3. Power to fix the maximum sale prices of bulk drugs specified in the First Schedule:

1. The Government may, with a view to regulate the equitable distribution and increasing supplies of a bulk drug specified in the First Schedule and making it available at a fair price, from different manufacturers, after making such inquiry as it deems fit, fix from time to time, by notification in the Official Gazette, a maximum sale price at which such bulk drug shall be sold:

Provided that for the purpose of enquiry, in addition to the information required to be furnished by the manufacturers under this Order, the manufacturers shall provide any such additional information as may be required by the Government, and shall allow for inspection of their manufacturing premises for verification through on the spot study of manufacturing processes and faculties and records thereof, by the Government.

2. While fixing the maximum sale price of a bulk drug under sub-paragraph (1), the Government shall take into consideration a post-tax return of fourteen per credit on net worth or a return of twenty-two per cent on capital employed or in respect, of a new plant an internal rate of return of twelve per cent based on long-term marginal costing depending upon the option for any of the specified rates of return that may be exercised by the manufacturer of a bulk drug:

Provided that where the production is from basic stage, the Government shall take into consideration a post-tax return of eighteen per cent on net worth or a return of twenty-six per cent on capital employed:

Provided further that the option with regard to the rate of return once exercised by a manufacturer shall be final and no change of rates shall be made without the prior approval of the Government.

3. No person shall sell a bulk drug at a price exceeding the maximum sale price fixed under sub-paragraph (1) plus local taxes, if any:

Provided that until the price of a bulk drug is fixed, by the Government under sub-paragraph (1), the price of such bulk drug shall be the price which prevailed immediately before the commencement of this Order and the manufacturer of such bulk drug shall not sell the bulk drug at a price exceeding the price prevailing immediately before the commencement of this Order.

4. Where, after the commencement of this Order, any manufacturer commences Production of any bulk drug specified in the First Schedule, he shall within fifteen days of the commencement of production of such bulk drug, furnish the details to the Government in Form I, and any such additional information as may be required by the Government and the Government may after receipt of the information and after making such inquiry as it may deem fit, may fix the maximum sale price of bulk drug by notification in the Official Gazette.

5. Any manufacturer, who desires revision of the maximum sale price of a bulk drug fixed under sub-paragraph (1) or (4) or as permissible under sub-paragraph (3), as the case may be, shall make an application to the Government in Form 1, and the Government shall after making such enquiry, as it deems fit within a

period of four months from the date of receipt of the complete information, fix a revised price for such bulk drug or reject the application for revision for reasons to be recorded in writing.

... ... 7. Calculation of retail price of formulation:

The retail price of a formulation shall be calculated by the Government in accordance with the following formula namely :

R.P. = (M.C. + C.C. + P.M. + P.C.) x (1 + MAPE/100) + ED where

" R.P." means retail price;

" M.C." means material cost and includes the cost of drugs and other pharmaceuticals aids used including overages, if any, plus process loss thereon specified as a norm from time to time by notification in the Official Gazette in this behalf;

" C.C." means conversion cost worked out in accordance with established procedure of costing and shall be fixed as a norm every year by notification in the Official Gazette in this behalf;

" P.M." means cost of the packing material used in the packing of concerned formulation, including process loss, and shall be fixed as a norm every year by notification in the Official Gazette in this behalf;

" P.C." means packing charges worked out in accordance with established procedures of costing and shall be fixed as a norm every year by notification in the Official Gazette in this behalf;

"MAPE" (Maximum Allowable Post-manufacturing Expenses) means all costs incurred by a manufacturer from the stage of ex-factory cost to retailing and includes trade margin and margin for the manufacturer and it shall not exceed one hundred per cent for indigenously manufactured Scheduled formulations;

" E.D." means excise duty;

Provided that in the case of an imported formulation, the landed cost shall form the basis for fixing its price along with such margin to cover selling and distribution expenses including interest and importer''s profit which shall not exceed fifty per cent of the landed cost.

Explanation - For the purpose of this proviso, "landed cost" means the cost of import of formulation inclusive of customs duty and clearing charges.

... ... 9. Power to fix ceiling price of Scheduled formulations:

1. Notwithstanding anything contained in this Order, the Government may, from time to time, by notification in the Official Gazette, fix the ceiling price of a Scheduled formulations in accordance with the formula laid down in paragraph 7, keeping in view the cost or efficiency, or both, of major manufacturers of such

formulations and such price shall operate as the ceiling sale price for all such packs including those sold under generic name and for every manufacturer of such formulations.

... ...

14. Carrying into effect the price or revised by the Government, its display and proof thereof:

1. Every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as the case may be, as fixed by the Government from time to time, within fifteen days from the date of notification in the Official Gazette or receipt of the order of the Government in this behalf by such manufacturer or importer.

2. Every manufacturer, importer or distributor of a formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation, notified in the Official Gazette or ordered by the Government in this behalf, with the words ''retail price not to exceed'' preceding it, and " local taxes extra" succeeding it, in the case of Scheduled formulations.

Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the prorata retail price of the main pack rounded off to the nearest paisa.

3. Every manufacturer or importer shall issue a price list and supplementary price list, if required in Form V to the dealers, State Drugs Controllers and the Government indicating reference to such price taxation or revision as covered by the order or Gazette notification issued by the Government, from time to time.

4. Every retailer and dealer shall display the price list and the supplementary price list, if any, as furnished by the manufacturer or importer, on a conspicuous part of the premises where he carries on business in a manner so as to be easily accessible to any person wishing to consult the same.

... ...

16. Control of sale price of bulk drugs and formulations:

No person shall sell any bulk drug to any consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof, whichever is less, plus excise duty and all local taxes, if any, payable in the case of Scheduled formulations and maximum retail price inclusive of all taxes in the case of non-Scheduled formulations.

... ...

23. Power to issue guidelines and directions:

... ... 2. The Government may, from time to time, issue such guidelines and directions, consistent with the provisions of this Order to any manufacturer or importer as may be necessary to carry out the provisions of this Order and such manufacturer or importer shall comply with such guidelines and directions.

... ... 25. Power to exempt:

1. Government may, having regard to the factors mentioned in sub-paragraph (2) and subject to such conditions as it may specify, by an order in the Official Gazette, exempt any manufacturer from the operation of all or any of the provisions of this Order.

2. While granting exemption under sub-paragraph (1), the Government shall have regard to all or any of the following factors -

number of workers employed;

amount of capital invested;

range/group and type of products manufactured;

sales turnover;

production of bulk drugs from basic stage by a process developed through indigenous research and development and which is significantly different from known processes and results in cost reduction;

production of a new drug which has not been produced elsewhere, if developed through indigenous research and development."

3. The exemption notification / order dated 29.08.1995 was, thus, issued having regard to the factors specified in clause (e) of sub-paragraph 2 of paragraph 25 of the said order as the Central Government found that it was in public interest to exempt the bulk drug formulation from the operation of the DPCO. It may be noticed that the drug in question was being imported earlier and the petitioner company through its own process of research and development made this drug available in India. The exemption period was, thus, in the nature of a moratorium period given as an incentive for the effort of the petitioner company in bringing the drug indigenously manufactured into the market. The said notification / office order is as under :-

" Government of India

Ministry of Chemicals & Fertilizers

Department of Chemicals & PetroChemicals.

New Delhi, the 29th August, 1995

O R D E R

S.O. 7153 (E), in exercise of the powers conferred by sub-paragraph (1) of

Paragraph 25 of the Drugs (Prices Control) Order, 1995, the Central Government having regard to the factors specified in clause (e) of sub-paragraph (2) of paragraph 25 of the said order and also having been satisfied for the need to do so in public interest hereby exempts the bulk drug and formulations based thereupon specified in column 2 of the Table below which is manufactured by the company specified in the corresponding entry in column 3 from the operation of price control stipulated in sub-paragraph (1) of paragraph 3, sub-paragraph (1) of paragraph 8 and sub-paragraph (1) of 9 of the said order, up to the period as indicated in column 4 thereof.

TABLE

---------- S.No. Name of the Name of the Period up to which the Product Company exemption is granted. ----------

1 2 3 4 ---------- 1. Pentazocine and M/s. Ranbaxy 31.10.1999 Formulations Laboratories Ltd. sd/-

(K. MULALIDHARAN)

DESK OFFICER"

4. As a result of the aforesaid notification, the petitioner company was able to fix its own price for the drug as Rs.72.49 per ampule as against the notified price of the drug under the DPCO being Rs.47.68 per ampule. This privilege was available to the petitioner in terms of the exemption notification up to 31.10.1999. To this extent, there is no issue between the parties. However, at the time of expiry of the said period, there was still stocks of the drug with the petitioner or their C&F agents. The petitioner understood the effect of the notification as if it could continue to sell the drug manufactured on or before the said date at the price fixed by it and not at the notified price.

5. The respondents sought information from the petitioner including in respect of the stocks of the drug in question and in terms of the letter dated 08.02.2000 informed the petitioner that they were required to follow the notified price for the drug with effect from 01.11.1999. The petitioner was further asked to calculate and deposit with the National Pharmaceuticals Pricing Authority the price charged over the notified price by the petitioner. In its correspondence, the petitioner emphasised the fact that there was no production being done after 31.10.1999. Apparently, there was some change of packaging to combat the menace of spurious manufacturers and the petitioner started manufacture only in July, 2000 thereafter. The relevant data was also furnished by the petitioner. Respondent No. 2, National Pharmaceuticals Pricing Authority, issued a letter dated 23.10.2001 to the petitioner company in respect of its stock position stating that the stock of the drug had been built up till October, 1999 and informing the petitioner that the company should have ensured that all stocks of the said formulation should have been nil since the exemption notification expired on

31.10.1999.

6. These communications resulted in a show-cause notice being issued by respondent No. 2 to the petitioner company dated 29.04.2002 alleging that the petitioner company had deliberately built up stocks of the injections as on 31.10.1999 with a view to sell those injections at a higher price to the public even after the period of exemption. It was estimated that the public had paid Rs.2,59,76,070/- in excess of the notified price for the accumulated stock and, thus, the petitioner was asked to show-cause why action should not be taken to recover the said amount apart from the action under paras 21 and 24 of the DPCO read with Section 10 of the EC Act, which provide for seizures and penalties. The petitioner replied to the said show-cause notice but in terms of the order dated 13.02.2003, the petitioner was directed to deposit the over-charged amount failing which the appropriate penal action as aforesaid would be taken. This order was passed on a judgment of the Karnataka High Court in Writ Petition No. 38973 of 1998 dated 12.11.2002 and failure of the petitioner company to adopt the notified price in terms of the Guidelines No. 1/1995 dated 02.06.1995.

7. It may be noticed that the said Guidelines have been issued in exercise of the power conferred by para 23 of the DPCO. The relevant portions of the Guidelines are as under :-

" The Government shall have the liberty to withdraw the exemption mentioned as above at any time.

(i) The manufacturer who has been given such price exemption for a bulk drug shall submit application(s) in Form I and Form III of the Drugs (Prices Control) Order, 1995 for fixation of price of such bulk drug(s) and formulations respectively under the provisions of the said Order, four months before the expiry of the period of exemption. However, if there is an existing notified price for bulk drug or ceiling price for formulations, the manufacturer shall follow the same on the expiry of the exemption and obtain price approval for non-ceiling packs of formulation(s) based on that bulk drug.

(ii) The manufacturer who has been given price exemption for a new delivery system shall submit application in Form III, of the Drugs (Prices Control) Order, 1995, for fixation of price of such formulation(s) under provisions of the said Order, two months before the expiry of the period of exemption. However, if there is an existing notified price he shall follow the same on the expiry of the exemption."

8. The petitioner company has thereafter filed the present writ petition impugning the aforesaid demand notice and sought its quashing along with that of the show-cause notice.

9. Learned senior counsel for the petitioner sought to contend that the exemption notification itself provided for exemption of the drug manufactured up to the period of expiry of the exemption notification. In this behalf, learned

senior counsel referred to the exemption notification / order dated 29.08.1995 where the expression `which is manufactured by the company'' has been used. It was, thus, contended that if the intention of the exemption notification was only to exempt the drugs sold by the said date, the phraseology used would have been `which is sold by the company''.

10. Learned counsel for the respondents, on the other hand, contended that the aforesaid expression was used only for purposes of identifying the particular drug manufactured by the petitioner company of which exemption had been granted and that the date of manufacture was irrelevant for purposes of the DPCO read with the Guidelines. This is, in fact, the contour of the controversy in the present case and the submissions made by learned counsel for the parties was to emphasise their respective stands in this behalf.

11. Learned senior counsel for the petitioner sought to contend that the very basis of the decision was fallacious since reliance was placed on the judgment of the Karnataka High Court in Writ Petition No. 38973 of 1998 titled `Smithkline Beecham Pharmaceuticals (India) Limited v. Union of India & Ors.'' decided on 12.11.2002, which did not deal with such an exemption notification. The particular judgment deals with the provisions of para 14 of the DPCO which gave a 15 days'' moratorium period in case of fixation or revision of the notified price by the Government of India. It was further submitted that against the said judgment, leave to appeal had been granted by the Supreme Court and further prosecution had been stayed.

12. Learned senior counsel sought to contend that the interpretation put forth by the respondents would create numerous difficulties and in this behalf referred to the fact that the amount demanded from the petitioner was including in respect of stock with C&F agents of the petitioner. There was, thus, the difficulty as to how the stock had to be got back and new price affixed on the stock as these are ampules of injunctions. Learned senior counsel also drew support from a circular issued by the Ministry of Petroleum, Chemicals and Fertilizers as far back as on 28.04.1979, which dealt with the DPCO of 1970 in an identical position in respect of clearance of such stocks. The matter was examined by the Ministry of Law, Justice and Company Affairs and the clarification was issued to the effect that the notified price would apply to stocks cleared on or after the date. The said order is as under :-

" Sub: Price reductions effected under DPCO 1970 - applicability to Stocks cleared after effectuation of reduction.

Sir,

I am directed to say that under the provisions of the Drugs (Prices Control) Order, 1979, as also the repealed Drug (Prices Control) Order, 1970, Government of India is required to issue, from time to time, orders regarding price reductions of formulations. A question has been raised whether the reduction in prices is applicable to all the stocks of such formulations, whether lying with the

manufacturers, distributors dealers, etc. or only to such of the stocks as are cleared after the date of effectuation of reduction. This matter has been examined in consultation with the Ministry of Law, Justice and Company Affairs (Department of Legal Affairs), based on which, is clarified that all reductions in the prices of formulations effected from time to time by the Central Government would be applicable to the stocks cleared on and after the date of effectuation of reduction provided, however that :-

1. batch numbers from which the reduction is effective, are clearly indicated on the price list issued in pursuance of the reduction;

2. the manufacturers shall, jointly with the distributors, dealers, etc. ensure that the formulation batches which are meant to be sold at the reduced prices are actually sold at the reduced prices; and

3. in doing so they do not infringe any other law of the land."

13. Learned senior counsel sought to contend that in matters of the interpretation of an exemption notification, principles have been laid down by different courts which support the stand taken by the petitioner.

14. Learned senior counsel referred to judgment of the Supreme Court in Collector of Central Excise, Bombay-I and Another Vs. Parle Exports (P) Ltd., to contend that the effect of an exemption notification is as if it has been incorporated in the Act and in case two views are possible, it should be construed as part of a fiscal enactment. It was observed in pars 17 as under :-

" 17. How then should the courts proceed? The expressions in the Schedule and in the notification for exemption should be understood by the language employed therein bearing in mind the context in which the expressions occur. The words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. It is, however, necessary to bear in mind certain principles. The notification in this case was issued under Rule 8 of the Central Excise Rules and should be read along with the Act. The notification must be read as a whole in the contest of the other relevant provisions. When a notification is issued in accordance with power conferred by the statute, it has statutory force and validity and, Therefore, the exemption under the notification is as if it were contained in the Act itself. See in this connection the observations of this Court in Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI), . See also Kailash Nath and Another Vs. State of U.P. and Others, . The principle is well settled that when two views of a notification are possible, it should be construed in favor of the subject as notification is part of a fiscal enactment. But in this connection, it is well to remember the observations of the Judicial Committee in Coroline M. Armytage v. Frederick Wilkinson, (1878) 3 AC 355 that it is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction arises.

The Judicial Committee reiterated in the said decision at page 369 of the report that in a taxing Act provisions establishing (sic enacting) an exception to the general rule of taxation are to be construed strictly against those who invoke its benefit. While interpreting an exemption clause, liberal interpretation should be imparted to the language thereof, provided no violence is done to the language employed. It must, however, be borne in mind that absurd results of construction should be avoided."

15. In so far as the issue of the Guidelines is concerned, learned senior counsel referred to sub-para 2 of para 23 of the DPCO to contend that the Guidelines have to be consistent with the provisions of the DPCO. It was, thus, submitted that if the Guidelines of 1995, which provide for following notified price on expiry of the exemption notification, are read as if to include the goods manufactured prior to the date of expiry of the exemption notification, then the same would not prevail and would be contrary to the DPCO since the exemption notification is part of the DPCO in view of the observations of the Supreme Court in Parle Exports (P) Ltd.''s case (supra).

16. Learned senior counsel also referred to judgment of the Supreme Court in Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, where it was held in respect of the notification issued under the Central Excise Act, 1954 in respect of circulars issued by the Central Board of Excise and Customs as follows :-

" 10. The notification is intended to give relief against the cascading of excise duty - on the raw material and again on the goods made there from. There is no cascading effect when no excise duty is payable upon the raw material and the hardship that the notification seeks to alleviate does not arise.

11. We need to make it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."

The aforesaid judgment was referred to substantiate the plea that though the circular dated 28.04.1979 may not strictly be applicable, the principles have to be followed in view of the aforesaid judgment.

17. Learned counsel for the respondents, on the other hand, sought to defend the stand taken by the Department on the ground that the DPCO has been issued u/s 37 of the EC Act and in view thereof it is the purchasing price for the consumer which is of relevance and not the commercial hardship. It was, thus, contended that the principles applicable to matters of excise and customs would not apply in case of the DPCO and it is only the date provided in the notification which is relevant.

18. Learned counsel referred to judgment of the Supreme Court in Prag Ice and Oil Mills and Another Vs. Union of India (UOI), dealing with the EC Act to

emphasise the importance of the interest of the consumers being of paramount importance. In this behalf, learned counsel referred to the observations made in paras 21 and 60 which are as under :-

" 21. All the tests of validity of the impugned price control or fixation order are, Therefore, to be found in Section 3 of the Act. Section 3 makes necessity or expediency of a control order for the purpose of maintaining or increasing supplies of an Essential Commodity or for securing its equitable distribution at fair prices the criteria of validity. It is evident that an assessment of either the expediency or necessity of a measure, in the light of all the facts and circumstances which have a bearing on the subjects of price fixation, is essentially a subjective matter. It is true that objective criteria may enter into determinations of particular selling prices of each kilogram of mustard oil at various times. But, there is no obligation here to fix the price in such a way as to ensure reasonable profits to the producer or manufacturer. It has also to be remembered that the object is to secure equitable distribution and availability at fair prices so that it is the interest of the consumer and not of the producer which is the determining factor in applying any objective tests at any particular time. Hence, the most important objective fact in fixing the price of mustard oil, which is consumed generally by large masses of people of limited means, is the paying capacity of the average purchaser or consumer.

... ... 60. Section 3(1) of the Essential Commodities Act, 1955, empowers of the Central Government to fix the prices of essential commodities if it is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at a fair price. Sub-section (2)(c) of Section 3 provides that without prejudice to the generality of the power conferred by sub-section (1), an order made under that sub-section may provide for controlling the price at which any essential commodity may be bought or sold. The dominant purpose of these provisions is to ensure the availability of essential commodities to the consumers at a fair price. And though patent injustice to the producer is not to be encouraged, a reasonable return on investment or a reasonable rate of profit is not the sine qua non of the validity of action taken in furtherance of the powers conferred by Section 3(1) and Section 3(2)(c) of the Essential Commodities Act. The interest of the consumer has to be kept in the forefront and the prime consideration that an essential commodity ought to be made available to the common man at a fair price must rank in priority over every other consideration."

19. It may, however, be noticed that, in the present case, there is no challenge to the price fixation and learned senior counsel for the petitioner emphasised the fact that even the notification of exemption issued is in public interest.

20. Learned counsel for the respondents emphasised the object of issue of the DPCO was to make available the drugs at the notified price to the consumer and the Guidelines issued themselves are clear which leave no manner of doubt. In

this behalf, the relevant portion of the Guidelines quoted aforesaid was referred to emphasise the fact that the same provides for the manufacturer to follow the notified price `on the expiry of the notification''. Prior to the DPCO of 1995, the DPCO of 1987 was prevalent which was repealed when DPCO of 1995 brought into force. Even in respect of the DPCO of 1987, Guidelines used to exist though the specific provision quoted aforesaid did not form part of the Guidelines. Despite this fact, the Bombay High Court while interpreting the said Guidelines of 1995 made certain observations. This was in WP No. 1266/1999 titled `GlaxoSmithKline Pharmaceuticals Ltd. & Anr. v. Union of India & Ors.'' decided on 16.02.2004. It may, however, be noticed that an appeal has been filed before the Supreme Court against the said judgment and notice has been issued though there is no stay of operation of the order. The said judgment dealt with the DPCO of 1987 and the Guidelines issued there under and it is specifically noted that one of the issues which arose was about the quantity of goods manufactured during the period of exemption notification but not sold within the same time. The contention of the counsel for the petitioner therein was that the company had a legitimate expectation that the drugs manufactured by it during the exemption period would be allowed to be sold at the price fixed by the company, but this contention was rejected being contrary to the objects of the EC Act as also the DPCO of 1987.

21. It may, however, be noticed that the Bombay High Court went into the issue of price fixation which, in my considered view, would not be relevant for the purposes of the present case in view of the limited nature of controversy. The observations of the Bombay High Court which are, however, relevant is that the reading of the DPCO and exemption notification from price control imply that the exemption notification would operate for the period of exemption only and, thus, to permit goods manufactured during that period of time to be sold at a price not being the notified price would amount to an extension of the notification. The aspect of public interest was also taken note of by the Bombay High Court. Another aspect relevant is that the Guidelines of 1995 were also taken note of in view of the submission of counsel for the petitioner therein that the provisions as contained therein were not part of the earlier Guidelines. Despite this, the Bombay High Court held to the contrary. Since the relevant exemption notification was not available from the judgment, the same was directed to be produced by the respondents, which reads in respect of the relevant portion as under :-

" ... hereby exempts the bulk drugs and formulations based thereupon specified in column 2 of the Table below which is manufactured by the company specified in the corresponding entry in column 3 from the operation of price control ..."

The purpose of this was as to whether the words `manufactured by the company'' also figured in the said notification. As noticed above, the position was the same.

22.Learned counsel for the respondents also laid great emphasis on the fact that

the date of the Guidelines coming into force being 02.06.1995 is prior to the exemption notification dated 29.08.1995 and, thus, at the stage of the exemption notification, the petitioner was fully conscious of the existence of the Guidelines.

23.Learned counsel for the respondents also laid great emphasis on the fact that in matters of excise and customs, the paying capacity of a party is not relevant which is the case in respect of the notification in the present case. It is also emphasised that in calculation of the notified price in terms of para 7 of the Order, it is not as if the manufacturer is selling the drug at a loss. The notified price is calculated taking into consideration all costs incurred by the manufacturer and includes trade margin and margin for the manufacturer not exceeding 100 per cent. Thus, even if the drug is sold at the notified price, the manufacturer makes a profit.

24. The clarification circular of 1979 was explained by stating that the same was with reference to the DPCO of 1970 and would not subsequently apply in the present case, especially when the Guidelines issued under the DPCO of 1995 are to the contrary. On the issue of interpretation of the exemption notification, a reference was made to the judgment of the Supreme Court in Modipon Limited and Another Vs. Union of India (UOI) and Others, where reference has been made to judgment of the Supreme Court in Union of India and Others Vs. Indian Charge Chrome and Another, where it was held that what was given in public interest can always be curtailed in public interest and the individual interest must yield in favor of social interest. In Modipon Limited''s case (supra), an exemption which was time-bound was withdrawn prior to the date of expiry in public interest and the same was upheld by the Division Bench of this Court. It was, thus, contended that the said case was at a higher plain while in the present case the date of expiry of the notification was known to the petitioner.

25. Learned counsel also referred to judgment of the Constitution Bench of the Supreme Court in Dr Preeti Srivastava and Another Vs. State of M.P. and Others, which dealt with the Indian Medical Council Act of 1956. One of the objects and reasons for the Act being brought into force was for the Medical Council of India to prescribe standards for post-graduate medical education for guidance of universities and to advise universities. The standards prescribed were held to be mandatory by the Constitution Bench disagreeing with the earlier view taken by the Supreme Court to the contrary in Ajay Kumar Singh and Others Vs. State of Bihar and Others, . It was, thus, contended that on para materia principles, the Guidelines framed under the DPCO which have statutory force since DPCO is promulgated u/s 3 of the EC Act cannot be given a go-bye.

26. Learned counsel also emphasised the fact that C&F agents are only agents of the manufacturer and it is always open to take necessary action.

27. In the end, learned counsel emphasised the fact that para 9 of the DPCO prescribes the power to fix a ceiling price and the word used in sub-para 1 of

para 9 are `shall operate''. Thus, the notified price must operate as the ceiling sale price and the exemption notification only creates an eclipse which goes on expiry of the time-period. In this behalf, para 16 of the DPCO was also referred to to contend that there is a prohibition on the sale of any bulk drug formulation at a price exceeding the price specified as the notified price.

28. Learned senior counsel for the petitioner sought to rebut the contentions of learned counsel for the respondents and emphasised the fact that while granting the exemption, there was no limitation on the quantum of the production made and, thus, the reading of the notification by the respondent would imply that the quantity would be curtailed. The aspect of public interest of the notification was again emphasised as well as the fact that the Bombay High Court in GlaxoSmithKline Pharmaceuticals Ltd.''s case (supra) did not consider the terms of the notification, the fact that the exemption was in public interest and that the same had statutory force.

29. The practical difficulties were once again emphasised since for each ampule the price would have to be changed and in this behalf Rule 104-A of the Drugs and Cosmetics Rules, 1945 was referred to which is as under :-

" 104-A. Prohibition against altering inscriptions on containers, labels or wrappers of drug. - No person shall alter, obliterate or deface any inscription or mark made or recorded by the manufacturer on the container, label or wrapper of any drug:

Provided that nothing in this rule shall apply to any alteration, any inscription or mark made on the container, label or wrapper of any drug at the instance or direction or with the permission of the Licensing Authority."

30. It was, thus, submitted that even for the sake of argument if it was assumed that the price had to be changed, there would be violation of the said Rule and, in fact, the ampule would break. This aspect was, however, explained by learned counsel for the respondents by relying upon The Standards of Weights And Measures (Packaged Commodities) Rules, 1977 where Rule 34 provides for exemptions in respect of certain packages and exemption has been granted in respect of drugs covered under the DPCO of 1995. The relevant Rule is as under :-

" 34. Exemption in respect of certain packages. - Nothing contained in these rules shall apply to any package containing a commodity if, -

... ... (e) it contains schedules formulations and non-scheduled formulations covered under the Drugs (Prices Control)Order, 1995 made u/s 3 of the Essential Commodities Act, 1955 (10 of 1955).

... ... 1. It was further submitted that in terms of sub-paras 3 and 4 of para 14, only the price list and supplementary price list had to be issued and that would suffice.

2. In the end, learned senior counsel for the petitioner also submitted that the stand taken in the DPCO was different from the one in the show-cause notice inasmuch as the emphasis was on accumulation of the drugs manufactured while now a stand was sought to be changed in the present petition on the effect of the notification. It was, thus, contended that once the issue of built up stock was not found to be relevant, the show-cause notice and the order cannot be supplemented by subsequent reasons as noticed in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, where it was held that where a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and it cannot be supplemented by fresh reasons in the shape of the affidavit or otherwise since otherwise an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

3. I have considered the submissions advanced by learned counsel for the parties at length.

4. As noticed above, in my considered view, the matter in issue really turns on the reading of the exemption notification. Thus, what has to be seen is whether the use of the phraseology ''which is manufactured by the company'' implies that all goods manufactured during the period of exemption can be sold at the price to be fixed by the petitioner company or whether the notified price would apply. In my considered view, the reading of the Order shows that the expression has been used in reference to the drug manufactured by the company rather than on the issue of the manufacture of the drugs before the cut-off date. It is really an expression used for purposes of identification of the drug which is manufactured by the company.

5. The aforesaid interpretation is fortified by the reading of the DPCO and the Guidelines. The object of the DPCO is to make available drugs at notified price to the public, the drugs being essential in nature. Thus, the notified price comes into being forthwith. Even on the issue of consideration of a moratorium period of 15 days while fixing the price or modifying the same, the object is to provide for some time-period for the manufacturer to adjust to the situation. However, in the present case, it has been rightly said that the same is not directly relevant since the date itself is known to the manufacturer. The petitioner company was not suddenly faced with the procedure of a notified price, but, on the other hand, was fully aware that the notified price would become applicable after the specified date. The time-period itself was more than four years.

6. The provisions of the DPCO make it clear that the drug cannot be sold at any other price. This has been set out in para 3. The selling price fixed under para 9 has to come into operation. I, thus, find force in the contention of learned counsel for the respondents that the exemption notification really provides a period of eclipse.

7. There is no doubt that the exemption notification has also been issued in

public interest which is with the object of encouraging the indigenous manufacture of the drug. However, that public interest comes to an end on expiry of the period of exemption notification. There is no doubt that no quantum has been specified for manufacture of drug. However, the said contention advanced by learned senior counsel for the petitioner, in my considered view, supports the interpretation of the respondents since the focus is on the time-period and not on the quantum. Thus, any amount of drug could be manufactured and sold within the time-period. The respondents have rightly given up the concept of accumulation of stock which would, in my considered view, be irrelevant as if the notification was to be interpreted to provide for such an exemption for goods manufactured by that date, the same could not be curtailed by saying that stocks had been accumulated. The exemption notification also has statutory force.

8. I am unable to accept the contention of learned senior counsel for the petitioner that there is a complete change in the basis on which the show-cause notice was issued. There is no doubt that there was an emphasis laid on the stocks accumulated, but even in the communications during that period of time, more particularly in letter dated 08.02.2000, it was clearly stated by respondent No. 2 that the excess price charged for goods sold with effect from 01.11.1999 have to be deposited by the petitioner company. The concept of accumulated stock come in only to emphasise that mere build up of stock gave no right to the petitioner unless stock is sold by the cut off date of end of exemption notification.

9. The principles of the exemption notification under the Customs Act cannot, thus, be imported into the concept in the present case.

10. The important aspect is the issuance of the Guidelines of 1995 which had come into force prior to the exemption notification. I do not find that the said Guidelines are in any manner contrary to the DPCO. The exemption notification was issued under the DPCO and the issue of contradiction would have arisen only if the exemption notification had been read otherwise and the contention of learned senior counsel for the petitioner on the meaning and effect of the expression ''which is manufactured by the company'' had been accepted. The Guidelines clearly provided that the manufacturer is bound to follow the price notified on expiry of the exemption notification. The words used are `shall follow''. This leaves no manner of doubt.

11. The Bombay High Court in GlaxoSmithKline Pharmaceuticals Ltd.''s case (supra), in fact, dealt with the Guidelines issued under the DPCO of 1987, which did not even contain the specific provisions as in the Guidelines of 1995. Even then the view taken was against a company similarly situated as the petitioner. In the present case, the Guidelines leave no manner of doubt in this behalf and the circular of 28.04.1979 issued under the DPCO of 1970 cannot be relied upon in the teeth of the Guidelines of 1995. Thus, the issue of the clarification dated 28.04.1979 being binding would not arise as was sought to be contended by learned senior counsel for the petitioner by reference to judgment of the

Supreme Court in Dhiren Chemical Industries''s case (supra).

12. As noticed above, in the present case, there is no issue about the challenge to fixation of the price and it has to be appreciated that the mechanism for fixation of the notified price as contained in para 7 of the DPCO itself takes care of profit margin up to 100 per cent. In such a case, the petitioner can hardly be permitted to contend any difficulty in this behalf. No doubt, the petitioner was permitted to fix a higher price during the period of exemption notification, but that has to be restricted for that period alone. This was an incentive for the indigenous manufacture of the drug. The mechanism set out in the DPCO brings the notified price immediately into effect for sale of any drug after the midnight of 31.10.1999.

13. There is force in the submission of learned counsel for the respondents that if even a notification issued for a specific time can be withdrawn before expiry of the time in public interest as held in Modipon Limited''s case (supra), the petitioner can hardly be permitted to contend any difficulties when the date of the exemption notification coming to an end is known well in advance.

14. In so far as the issue of the practical difficulties expressed by learned senior counsel for the petitioner are concerned, it has to be noticed that the C&F agents are of the petitioner itself. In view of the exemption granted under Rule 34 of the Standards Weights and Measures (Packaged Commodities) Rules, 1977, the apprehensions expressed by the petitioner in this behalf are not relevant. It is only the price list as per para 14 of the DPCO which has to be changed and notified.

15. The notification is statutory, but so are not Guidelines. The notification gives a moratorium period and the Guidelines prescribe how the price will apply after the period of exemption comes to an end. There is, thus, really no conflict in respect of the same. The petitioner knew that the exemption period was coming to an end. They could have manufactured whatever quantum they wanted, but be conscious of the fact that either they would have to sell the same before the end of the period of the exemption notification or they would have to sell the remaining stock at the notified price. Even this price contains the profit margin in view of the methodology of fixation of the notified price under para 7 of the DPCO.

16. In view of the aforesaid, I do not find any merit in the challenge by the petitioner to the amount sought to be recovered from the petitioner on account of difference of the price between the notified price and the price charged by the petitioner from the consumers.

17. It may be noticed that in terms of the interim orders dated 28.02.2003, the petitioner was asked to deposit an amount of Rs.1 crore against the demand made. The petitioner is granted six weeks'' time to pay the balance amount and on the amount being so paid, the same shall be deemed to have been paid in compliance of the order issued by the respondent and there would be no

question of any demand of interest or prosecution against the petitioner company.

18. The writ petition is dismissed leaving the parties to bear their own costs

