(1988) 06 AP CK 0011

In the Andhra Pradesh High Court

Case No : Writ Petition No. 4451 of 1988

Raphael Pharmaceuticals Pvt. Ltd. APPELLANT

Vs

Superintendent of Distilleries RESPONDENT

Date of Decision : 14-06-1988

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4, 4(1), 4(4)

Citation : (1988) 2 ALT 544 : (1992) 43 ECR 168 : (1988) 38 ELT 11

Hon'ble Judges : Yogeshwar Dayal, C.J;M. Jagannadha Rao, J

Bench : Division Bench

Advocate : P. Ramachandra Reddy, for the Appellant; A.G. and Government Pleader for Excise, for the Respondent

Judgement

Yogeshwar Dayal, C.J.—M/s. Raphael Pharmaceuticals (P) Ltd., is a manufacturer of a medicinal preparation called "HEMPHER". The petitioners are licencees with the State Excise Department since April 1984 under loan licence granted by Food & Drugs Authority. The said product belongs to M/s. Cachet Pharmaceuticals (P) Ltd., and is sold to M/s. Alkem Labs, Bombay only at Rs. 6.75 per bottle of 200 ml. The Excise Duty per bottle calculated at the above rate is Rs. 1.125. The petitioners have been paying excise duty on the aforesaid basis till they received a notice dated 18.6.1987 from the Superintendent of Distilleries, Hyderabad. The demand notice dated 18.6.1987 is reproduced hereunder :-

"....... M/s. Raphael Pharmaceuticals (P) Ltd., are manufacturing a medicinal preparation named "Hempher" under the Licence on behalf of M/s. Cachet Pharma (P) Ltd. Entire production is sold to M/s. Alkem Labs. As such, M/s. Alkem Labs become a related person referred to in Section 4(4)(c) of Central Excises and Salt Act, 1944. Under the proviso (iii) to Section 4(i)(a) read with Rule 6(c) and 6(a) of Central Excises Duty should be retail price reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a person other than a related person. As such levy of Excise Duty on the price of Rs. 5,625, by which the bottles are sold to M/s. Alkem Labs is not correct. The assessable value of the product shall be Rs. 13.60 (R.P. Rs. 17/- less trade discount of 20% i.e. Rs. 3.40) and excise duty on 20% ad valorem basis payable thereon shall be Rs. 2.72 per bottle of 200 ml. and not Rs. 1.125, which is being remitted now by the licencee.

Thus, upto June, 1986 on a quantity of 13,81,405 bottles, a differential amount of Excise Duty of Rs. 22,03,468.50 becomes recoverable from the licencee.

Therefore, M/s. Raphael Pharmaceuticals (P) Ltd., are directed to remit an amount of Rs. 22,03,468.50 due towards differential excise duty on the product removed from the Bond during the period upto June, 1986 within a week from the date of receipt of this notice."

2. The petitioner filed a reply and has submitted that it is true that M/s. Alkem Labs, Bombay are the sole distributors of petitioners but they are not related person within the meaning of Section 4(4)(c) of the Central Excise Act, 1944. (hereinafter referred to as "the Act") Though there were other denials by the petitioners, with which we are not concerned, we are not dealing with them.

3. To show cause notice was based on the provisions of Section 4(1)(a)(iii) read with sub-section 4(c). Section 4 Clauses (1)(a)(iii), (3) and (4)(c) of the Act are reproduced for facility.

"4. Valuation of excisable goods for purpose of charging of duty of excise -

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -

(i) Where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different price to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) * * * (iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related person) who sell such goods in retail;

(b) * * * (2) * * *

(3) The provisions of this Section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of Section 3.

(4) For the purpose of this Section, -

(a) * * * (b) * * * (c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee and a distributor of the assessee and any sub-distributor of such distributor."

4. It is obvious from Clause (4)(c) that for the person to be a "related person", two conditions have to be fulfilled. It is necessary that the person should be a distributor of the assessee and also should be related to the assessee.

5. The assessing authority dismissed the objections to the demand notice and confirmed the demand. The petitioner took into matter to the appellate authority, the Commissioner of Excise. The Commissioner of Excise did not give any finding whether the said sole distributor was a "related person" within the meaning of Section 4(4)(c) of the Central Excises and Salt Act, 1944 as amended. He, in fact, by-passed and went into the question whether the wholesale price is correct or incorrect, and came to the conclusion that the wholesale-price, in comparison with other manufacture, is prima facie not the correct wholesale price and on that basis, confirmed the order of the assessing authority. The petitioner went up in revision to the Government and the Government dismissed the revision petition as per its Order dated 2.2.1988.

6. The State in its Order dated 2.2.1988 did not accept the two submissions of the counsel for the petitioners viz.,

(1) No opportunity to explain the objections against the demand was afforded to the petitioners; and

(2) the levy of duty is barred by limitation.

7. Before us Sri P. Ramachandra Reddy, learned counsel for the petitioners again canvassed the aforesaid submissions also, but raised an extra point which was urged before both the assessing authority and the appellate authority, but which does not appear to have been urged before the Government. The point is a pure question of jurisdiction. The fact, however, is that the point was raised before the assessing authority as well as the first appellate-authority. The point is simple. The so-called demand notice, which was earlier reproduced, is really based on the plea that the distributor is a ''related person'' to the manufacturer and in that context, a demand was raised that the wholesale price adopted was not the normal wholesale price, but should be the price at which the sole distributor sold the goods. It was on no other ground the show cause notice was given. It is clear from the Order of the Appellate Authority that it had given a go-bye to the basis

of the demand notice by giving no finding whether the distributor was also a ''related person'' within the meaning of Section 4(4)(c) of the Central of Excises and Salt Act, 1944. The basis on which the appellate authority or the assessing authority gave a finding is not the basis mentioned in the demand notice. No such case was made as the basis in the demand notice. On this short ground alone, the impugned orders of all the three authorities mentioned above are liable to be quashed. We, accordingly, quash the impugned order of the assessing officer dated 18-6-1987, the appellate order of the Commissioner of Excise dated 7-9-1987 and the order of the State Government dated 2-2-1988.

8. The matter is fixed only for disposal of the stay application but the learned Advocate-General has no objection if the main writ petition itself is disposed of.

9. In this situation our views are not to be expressed in this Writ Petition as to the applicability of Rules 11 and/or 12 of the Medicinal and Toilet Preparations (Excise Duties), 1956 framed under the Act.

10. The Writ Petition is, therefore, accordingly, allowed. But in the facts and circumstances of the case, the parties should bear their own costs. Advocate''s fee Rs. 150/-.

