(2006) 08 BOM CK 0082

In the Bombay High Court

Case No : Writ Petition No. 2348 of 1999

USV Ltd. and Another — APPELLANT

Vs

State of Maharashtra and Others — RESPONDENT

Date of Decision : 22-08-2006

Acts Referred:
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 2, 3

Citation : (2007) 3 BomCR 316 : (2009) 234 ELT 587 : (2006) 6 MhLj 461

Hon'ble Judges : R.M.S. Khandeparkar, J;Naresh H. Patil, J

Bench : Division Bench

Advocate : E.P. Bharucha, M. Baxi and Dipti Raja, instructed by Dhru and Co, for the Appellant; Vijay Sonpal, AGP for Respondent No. 1 to 4 and S.M. Shah, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—A short point, which arises for consideration in the matter is whether Dexovon Capsules containing 70 mg. of Dextropropoxyphene-HCL, for short DXC, per dosage unit, which is less than the prescribed limit of 135 mg. per dosage unit to classify the same as narcotic or narcotic drugs would be liable to the State Excise Duty under the provisions of Medicinal and Toilet Preparations (Excise Duties) Act, 1955.

2. The few facts, relevant for the decision in the matter, are that, the petitioners-company is the manufacture of medicaments pursuant to the licence granted under the relevant statute and the Rules framed thereunder. The petitioners-company manufactures Dexovon capsules which, according to the petitioners, do not contain the narcotic drug as prescribed under the said Act. The said capsules contain a substance known as Dextropropoxyphene- HCL of 70 mg. per dosage unit i.e. per capsule, which is according to the petitioners, much less than the prescribed limit to qualify the same to be medicinal preparations in terms of the clause No. 1(iii) of the Schedule to the said Act.

3. Some time in December, 1998, respondent No. 4 sought from the petitioner the particulars about the manufacture of medicaments using

Dextropropoxyphene with details regarding quantity thereof, L2 licence and payment of State Excise Duty on such product. Under letter dated 23rd December, 1998, the petitioner informed the respondent No. 4 that the said medicament is being manufactured under the licence obtained from the Food and Drug Administration and it contains 70 mg. of Dextropropoxyphene-HCL per dosage unit which is far below the prescribed limit of 135 mg. per dosage unit and, therefore, the said medicament is not covered under the said Act and, therefore, cannot be subjected to the State Excise Duty. The respondent No. 3, by its letter dated 13th January, 1999, however, required the petitioners to pay State Excise Duty at the rate of 20% ad valorem, stating that any medicaments containing Dextropropoxyphene, irrespective of the quantum was covered by the said Act in view of the Government of India letter dated 2nd March, 1989. The claim of the respondent No. 3 was sought to be disputed by the petitioners under their letter dated 10th February, 1999 contending that they are already paying Central Excise Duty on the said product.

4. After giving personal hearing to the petitioners, the respondent No. 3 by its letter dated 20th March, 1999 held that the product in question was chargeable to the State Excise Duty under the said Act as it contains narcotic drug. The respondent No. 3 also directed respondent No. 4 to initiate criminal proceedings against the petitioners for violation of the provisions of the said Act. On 23rd March, 1999, the respondent No. 4 seized the said product of the petitioners worth over rupees fifteen lakhs. The petitioners by their letter dated 25th March, 1999 requested for reconsideration of the said decision which was treated as an appeal by respondent No. 2 and, while admitting the said appeal for final disposal, under order dated 30th March, 1999 it was directed to return the seized goods with further directions that the petitioners shall not manufacture the said product during pendency of the appeal. The petitioners made further submissions in detail to the respondent No. 2 on 2nd April, 1999 which was followed by filing of the present petition. At the time of issuing Rule, an interim relief was granted, whereby the petitioners were permitted to apply for licence in Form L2 under protest and, upon grant of licence, the petitioners were permitted to continue manufacturing of the said product subject to payment of the State Excise Duty at the rate of 20% without any liability for excise duty to the Central Government and, in case the petitioners succeed in the petition, the State Government to reimburse the Central Government to the extent duty payable under the Central Excise Act in respect of the said product.

5. While assailing the impugned order and demand for State Excise Duty in relation to the product in question the learned Senior Counsel appearing for the petitioners submitted that in terms of Section 3 of the said Act, the excise duty is leviable on all the dutiable goods at the rate specified in the Schedule annexed to the said Act and, as per the said Schedule, Clause 1(iii) thereof, the medical preparations not containing alcohol but containing narcotic drug or narcotic are subjected to the payment of 20% excise duty. However, the narcotic drug or narcotic has to be in terms of the declaration in that regard by the Central

Government under a Notification and the Notification issued in that regard requires minimum of 135 mg. of DXC in case of the medicinal preparation to be made subject to State Excise Duty under the said Act, wherein, the product of the petitioners does not contain the DXC in that quantity.

6. The term "dutiable goods" has been defined u/s 2(c) of the said Act to mean the medicinal and toilet preparations specified in the Schedule as being subject to the duties of excise levied under the said Act.

7. The term "medicinal preparation" has been defined u/s 2(g) to include all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals.

8. The term "narcotic drug" or "narcotic" is defined u/s 2(h) to mean a substance which is coca leaf, or coca derivative, or opium, or derivative of opium, or Indian hemp and shall include any other substance, capable of causing or producing in human beings dependence, tolerance and withdrawal syndromes and which the Central Government may, by notification in the Official Gazette, declare to be a narcotic drug or narcotic.

9. Under Notification dated 12th June, 1986, issued by the Central Government, in terms of the said provisions of the said Act, certain substances have been declared as narcotic drugs or narcotic and, the relevant clause under Item No. 86 thereof read thus;

(+) 4-dimethylamine_1, 2_diphenyl_3_methyl_2 butanol propionate, (the international non-proprietary name of which is Dextropropoxyphine) ad its salts, preparations, admixtures extracts and other substances containing any of these drugs, except preparations for oral use containing not more than 135 milligrams of Extropropoxyphene base per dosage unit or with a concentration of not more than 2-5 percent in undivided preparation, provided that such preparations do not contain any substance controlled under the Convention on Psychotropic Substances, 1971 adopted by the United Nations Conference at Vienna in February, 1971.

10. Referring to the said notification, it is the contention on behalf of the petitioners that a medicament, in order to be classified as containing narcotic drug or narcotic within the meaning of the said expression under the said Act, should contain minimum 135 milligram of Dextropropoxyphene per dosage unit as has been specified in the said notification issued by the Central Government in exercise of the powers under the said Act and with reference to the definition of the said expression u/s 2(h) of the said Act and, in case, the quantity is found to be less than 135 mg. per dosage unit, it cannot be classified as medicinal preparation containing narcotic drug or narcotic and, for the same reason, it would not fall within the expression "medicinal preparation" as specified under Clause 1(iii) of the Schedule of the said Act and, therefore, it could not be subjected to the State Excise Duty. It is, therefore, further contended that

Dextropropoxyphene-HCL capsules manufactured by the petitioners contain only 70 mg. per dosage unit which is far below the prescribed limit of 135 mg. per dosage unit and, hence it cannot be subjected to State Excise. Being so, according to the learned Senior Counsel appearing for the petitioners, the authorities erred in holding that the product can be subjected to the State Excise Duty merely because it contains some quality of Dextropropoxyphene.

11. The learned advocate appearing for the respondent Nos. 1 to 4 submitted that merely because the notification restricts to prescribe that the preparation for oral use containing not more than 135 mg. of Extropropoxyphene base per dosage unit to be excluded from the product which can be subjected to be classified as narcotic drug or narcotic under the said Act, that itself is not sufficient to classify the product of the petitioner to be not the medicinal preparation within the meaning of said expression under the Schedule of the said Act, when, undisputedly, the product contains Dextropropoxyphene. It was further sought to be contended that the product does not contain Extropropoxyphene base per dosage unit, but the product contains Dextropropoxyphene which is different from one excluded under the notification and, therefore, there is no substance in the contentions sought to be raised on behalf of the petitioners and, therefore, the petition should be dismissed.

12. It was also sought to be contended by the learned advocate appearing for the respondent Nos. 1 to 4 that the product of the petitioners can be misused and, considering the same, it is not a fit case for grant of exemption from the excise duty. Even attention was sought to be drawn to the State List in the 7th Schedule to contend that it is within the Legislative domain of the State Legislature to levy tax on the manufacture of the medicaments containing narcotic drug or narcotic.

13. Plain reading of the Notification dated 12th June, 1986 would disclose that any medicinal preparations containing Dextropropoxyphene base per dosage unit not more than 135 mg. are excluded from being classified as narcotic drug or narcotic within the meaning of the said expression u/s 2(h) of the said Act. Once the product of the petitioners discloses Dextropropoxyphene-HCL which in terms contains Dextropropoxyphene base to the extent of 70 mg, which fact has not been disputed by the respondents at any stage of the proceedings, even in the affidavit in reply filed by them, obviously such a product would stand exempted in terms of the said notification and would not be classifiable as narcotic drug or narcotic under the said Act.

14. It is also not in dispute that the excise duty at the rate of 20% is sought to be levied in terms of Clause 1(iii) of the Schedule to the said Act. The said clause relates to medicinal preparations not containing alcohol but containing narcotic drug or narcotic. Once it is not in dispute that the medicinal preparations of the petitioners cannot be said to contain narcotic drug or narcotic for the reasons stated above, the question of bringing the said product within the ambit of Clause 1(iii) of the Schedule of the said Act does not arise at all. Neither the

impugned order nor any materials placed before us even remotely suggest that the product of the petitioners contain Dextropropoxyphene base per dosage unit of 135 mg. Besides, the impugned order ex facie discloses that the authorities have proceeded to classify the product of the petitioners as narcotic drug merely because it contains some quantity of Dextropropoxyphene, while confirming the fact that each dose unit does not contain 135 mg. of Dextropropoxyphene base. In such circumstances, therefore, the petitioners are justified in contending that there was no occasion for the respondents to classify the product of the petitioners being one as specified under Clause 1(iii) of the Schedule of the said Act and, for the same reason it could not have been subjected to the licence under the said Act or to the State Excise Duty in terms of the said Act.

15. The decision of the Apex Court in Baidyanath Ayurved Bhawan (Pvt) Ltd., Jhansi Vs. The Excise Commissioner, U. P. and Others, was on totally different issue where the quantity of Dextropropoxyphene or any similar such product was not in issue. The issue in that case was, whether the medicinal preparations contain alcohol or not. The quantity of alcohol was not subject-matter to adjudicate. In the matter in hand, the quantity of Dextropropoxyphene is most relevant factor to decide, whether the product can be called as narcotic drug or narcotic under the said Act and as already seen above, the product of the petitioners cannot be considered as containing narcotic drug or narcotic.

16. For the reasons stated above, therefore, the impugned order cannot be sustained and is liable to be set aside and is hereby set aside. The demand of the respondent Nos. 1 to 4 about the State Excise Duty is to be held as thoroughly untenable.

17. Bearing in mind, the directions which were issued at the time of issuance of Rule and grant of interim relief, the State Government shall reimburse the Central Government as regards the liability of the petitioners for the Central Excise Duty during the relevant period for which the petitioners have paid the duty at the rate of 20%. Needless to say that the petitioners in the circumstances are entitled to the benefit of MODVET Credit in accordance with law. Obviously, it would be now CENVAT Credit. Rule is made absolute in the above terms with costs.

18. At this stage, the learned Advocate for the respondent Nos. 1 to 4 prays for stay of the order passed today. The same is objected on behalf of the petitioners. However, we are inclined to stay the order for a period of six weeks from today.

