

Wockherdt Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-05-1999

Reported in : (1999)LC233Tri(Delhi)

Appellant : Wockherdt Ltd.

Respondent : Collector of Central Excise

Judgement :

1. As the common issue involved in both the appeals filed by M/s.

Wockhardt Ltd. is whether their product Mannitol Injection B.P. 20% W/V is a patent or proprietary medicine classifiable under sub-heading 3003.10 of the Schedule to the Central Excise Tariff Act, both the appeals are being disposed of by one common order.

2. Shri C.S. Lodha, learned Advocate, submitted that their product has been held to be patent or proprietary medicament by the Collector (Appeals) as the label carried a distinct design in the form of four bars, two of which were black and the other two were plain. The Collector (Appeals) had further found that as these patterns were on their other medicines also, this established a relationship between the manufacturer and the medicament and, therefore, the medicine was a patent or proprietary medicine. The learned Advocate submitted that show cause notice dated 25-11-1992 was issued to classify the medicine under sub-heading 3003.10 as the labels were found to be not plain but were designed contoured and company name printed predominantly so as to indicate connection between them

and the product; that the Collector (Appeals) agreed with their submission that the name of the manufacturer did not figure in a prominent manner; that however, Collector (Appeals) proceeded to take a view that as the label carried four bars, it was not a generic medicament; that the impugned order is ex facie bad in law because nowhere in the notice, there was any allegation with regard to different bars printed on the label; that accordingly order has been passed in breach of principles of natural justice as they were never given an opportunity to defend the said allegation. He further submitted that the bars were used by them on the label because the impugned product was a colourless liquid and to enable the illiterate workers to easily distinguish one medicament from another so that mix up do not occur, two bars were put by them on the label; that this fact does not and cannot convert a generic medicament into a patent or proprietary medicament; that they do not have any trade mark registration or monopoly or exclusive right to use such bars that until the fact that customers associated such bars with the appellants, is established, it was not possible to hold that the product in question was patent or proprietary medicament. He also submitted that there was no legal bar for a manufacturer manufacturing and marketing medicaments under generic name in a coloured label; that unless the colour scheme of the label was registered in favour of the appellant, it could not be regarded as a trade mark of the manufacturer; that if the same colour scheme or colours could be used by any manufacturer and in fact have been so used, the question of regarding such medicament as P or P medicament could not arise at all.

Finally the learned Counsel submitted that the impugned order does not survive after the decision of the Supreme Court in the case of Astra Pharmaceuticals (P) Ltd. v. C.C.E., Chandigarh, 1995 (75) E.L.T. 214 (S.C.).

3. Shri H.K. Jain, learned SDR, reiterated the findings contained in the impugned order and emphasised the fact that the allegation contained in the show cause notice was about the label being designed /contoured so as to indicate connection between the appellants and the impugned product during the course of the trade; that bars on the labels are part of the design of the label and as such appellants can't claim that they were not given an opportunity to defend the allegation; that the pattern did establish a relationship between the appellants and the

medicaments; and as such the impugned medicine is a P or P medicament.

4. We have considered the submissions of both the sides. There is substantial force in the submissions made by the learned Counsel for the appellants that putting bars on the labels and the colour scheme, unless proved to be proprietary, cannot make a medicine patent or proprietary medicine. There is nothing in the law/Note 2 to Chapter 30 of the Schedule to the Central Excise Tariff Act that the label of a medicine sold under generic name should be plain. Further the Apex Court, in the case of Astra Pharmaceuticals (P) Ltd., supra, held that the medicine "would attract levy only if its container or packing carried any distinctive marks so as to establish the relation between the medicine and the manufacturer. But the identification of a medicine should not be equated with the produce marks." The Apex Court approved the decision of Madras High Court in Indo French Pharmaceuticals Co.

1978 (2) E.L.T. (J 478) which was upheld by the Division Bench of Madras High Court as reported in 1983 (12) E.L.T. 725 (Mad.) wherein it was held as under: "a close reading of the Explanation, however, in my view indicates that the marks, symbols, monogram, medicinal preparation or its container should be such as to indicate that the medicine is a special preparation made by the manufacturer. The connection between the medicine and the manufacturer contemplated under the Explanation should be such as to indicate that the manufacturer has a proprietary interest in the medicine." 5. In these facts and circumstances and following the ratio of the above referred case, we hold that the medicine in question is not a patent or proprietary medicine and accordingly we set aside both the orders and allow both the appeals.

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