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Collector of Central Excise Vs. E. Merck India (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-05-1985

Reported in : (1986)(6)LC200Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : E. Merck India (P) Ltd.

Judgement :

1. The present appeal arises out of Review proceedings under the erstwhile Section 36(2) of the Central Excises & Salt Act, 1944. The Government of India had issued a show cause notice under Section 36(2) of the Central Excises & Salt Act, 1944 seeking to review an order in appeal No. V-2 (14E) 2255/78, dated 14th August, 1981 passed by the Collector of Central Excise (Appeals), Bombay in respect of M/s. E.Merck India (P) Ltd. In defence the assessee had objected to the Review proceedings. After coming into existence of the Tribunal the same stands transferred to the Tribunal under Section 35P of Central Excises & Salt Act, 1944 to be disposed of as an appeal.

2. Briefly the facts of the case are that M/s. E. Merck India (P) Ltd. is having L.4 licence No. PPM/1/73 for the manufacture of Patent or Proprietary Medicines falling under TI No. 14 E of the Central Excise Tariff. Right from the inception, for obvious reasons, the manufacturers of medicines have been allowed duty free samples to the extent and subject, to the conditions specified in the relevant Notification. The first such Notification No. 105/61 dated 20th April, 1961 was issued almost at the same time as the imposition of the said excise duty. In April,

1977, this Notification was replaced by Notification No. 48/77-CE, dated 1st April, 1977. Like earlier Notifications, this Notification as well allowed clinical samples without payment of duty (upto certain specified limit) and subject to certain conditions. The assessee had been taking the benefit of the said Notification. The learned Asstt. Collector of Centra Excise was of the view that the assessee was not entitled to the benefit of duty free clearance of clinical samples as E. Merck India (P) Ltd. had interest in a foreign company and a foreigner or a foreign company has interest in the said E. Merck India (P) Ltd. The learned Asstt. Collector had issued show cause notice desiring the assessee to explain why the benefit of duty free samples should not be withdrawn, as the assessee does not fulfil the provisions of Sub-clause (1) & (2) of Clause B of explanation below the second proviso to the Notification. In reply, the assessee pleaded that sampling of drugs to the medical profession was absolutely necessary for all products irrespective to the number of years, and the Notification No. 48/77, dated 1st April, 1977 not only restricts the exemption of clinical samples from the payment of duty to an unreasonably short period of three years from the date of first clearance, but also describes distinction between the manufacturer with no foreign investment and one with foreign investment. The learned Asstt. Collector of Central Excise did not accept the contention of the assessee and had held that the assessee was not eligible to the concession of duty free samples in terms of the provisions contained in Notification 48/77, dated 1st April, 1977, and had withdrawn the approval according to the duty free clearance of clinical samples upto a value of four per cent to their classification lists dated 11-7-77 and 23-8-77.

3. Being aggrieved from the aforesaid order, the assessee had filed an appeal to the Appellate Collector of Central Excise. The learned Appellate Collector of Central Excise had accepted the appeal of the assessee and had followed the judgment of the Gujarat High Court in the case of Suhrid Geigy Ltd, v. Union of India and Anr. reported in 1980 E.L.T. 759. Being aggrieved from the order passed by the Appellate Collector of Central Excise, the Government of India did not accept the order passed by the Appellate Collector of Central Excise and started Review proceedings under Section 36(2) of the Central Excises and Salt Act, 1944. The same stand transferred to the Tribunal to be disposed of as an Appeal.

4. Shri A.S. Sundar Rajan, the learned Junior Departmental Representative, has appeared on behalf of the appellant. He has reiterated the facts and the arguments made in the review show cause notice. Shri Sundar Rajan has pleaded that the respondent is not entitled to the benefit of Notification No. 48/77 dated 1st April 1977.

He has pleaded that the Revenue has gone in SLP in the case of Suhrid Geigy Ltd. v. Union of India and Anr. reported in 1980 E.L.T. 759. Shri Sundar Rajan fairly conceded that the pendency of SLP will not deprive the respondent of the benefit of the judgment of the Gujarat High Court. He has however agreed that even if it is accepted that the Appellant is to get the benefit of the notification No. 48/77 dated 1-4-77, the Respondent has to establish that he complied with the terms of the said notification. He has pleaded for the acceptance of the appeal.

5. In reply, Shri R.J. Majra, the learned Advocate has pleaded that the Revenue cannot expand the contents of the show cause notice issued under Section 36(2) of the Central Excises and Salt Act, 1944. He has pleaded that the said Review proceedings were started only on the ground that the judgment passed by the Hon'ble Gujarat High Court in the case of Suhrid Geigy Ltd. v. Union of India and Anr. was the subject matter of SLP, and the Appellate Collector had overlooked the same. He has referred to a judgment of the Hon'ble Supreme Court in the case of Shri Baradakanta Mishra v. Shri Bhimsen Dixit reported in AIR 1972 Supreme Court 2466, wherein the Hon'ble Supreme Court had held that where a subordinate Court or a Tribunal refused to follow a High Court decision, where a petition for leave to appeal to Supreme Court against that High Court decision was pending, it will amount to deliberate disobedience and wilful disregard of the High Court and was contempt of Court. He has pleaded that the mere fact that SLP was pending against the Gujarat High Court judgment, cannot deprive the respondent from the benefit of the said judgment. He has pleaded for the dismissal of the appeal. With reference to Shri Sundar Rajan's arguments that the respondents should now furnish evidence of compliance with the other conditions of the notification, Shri Majra has stated that in the Review Show Cause notice there is no mention that there is non-compliance with the conditions of the Notification No. 48/77 dated 1-4-77. It must, therefore, be presumed that the Departmental

authorities had satisfied themselves that there was no other objection to the benefit of the notification being extended to the respondent. It was not open to the Department at the review stage to raise fresh objections which were not raised before the lower authorities, or to demand that the respondents should now prove that they have complied with the other conditions of Notification No. 48/77 dated 1-4-77. Shri Majra pointed out that it would be difficult for the respondents at this stage to produce documentary evidence in reply to points not raised before the lower authorities, and it would not be fair and just to make such a demand on the respondents.

6. After hearing both, the sides and going through the facts and circumstances of the case, we would like to observe that the appellant was denied the benefit of Notification No. 48/77 dated 1st April, 1977 on the ground that he did not satisfy the terms of the said Notification. The said Notification is reproduced as under :- "In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India, Ministry of Finance (Deptt.

of Revenue) No. 105/61-Central Excises, dated the 20th April, 1961, the Central Government hereby exempts, clinical samples cleared by a manufacturer of patent or proprietary medicines, being medicine falling under item No. 14E of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from the whole of the duty of Excise leviable thereon : (i) such clearances in any month are limited to a quantity not exceeding four per cent by value of the total duty paid clearances during the preceding month of all types of patent or proprietary medicines ; (ii) samples are intended for free supply to hospitals, nursing homes or medical practitioners ; and (iii) the samples are packed in a form distinctly different from regular trade packing and each smallest packing is clearly and conspicuously marked "physician's samples not to be sold;" Provided further in respect of a patent or proprietary medicine aforesaid, the exemption under this notification will be available only for a period of three years from the date of first clearance of the said medicine from any factory of a manufacturer.

(a) where it is a company within the meaning of the Companies Act, 1956 (1 of 1956); a company- (i) which does not hold any share in the capital of any foreign company; and (ii) no part of the capital of which is held by a foreigner or a foreign company ; (ii) no interest in the firm is held by a foreigner or a foreign company; and The Hon'ble Gujarat High Court in para No. 11 in the case of Suhrid Geigy Ltd. v. Union of India and Anr. reported in 1980 E.L.T. 759 had observed as under :- "Now, if the primary object of the exemption notification is to render service to the patients by enabling a manufacturer to make his patent or proprietary medicines known to the medical world, can we say that such object will be better served by dividing in two classes the manufacturers of patent or proprietary medicines-the wholly indigenous companies and the companies having foreign element in them On this hypothesis, we are enable to see any rational nexus which this classification may have with the primary object of serving the patients in the society. A patient may need as much a new patent or proprietary medicine manufactured by a wholly indigenous company as he may need a patent or proprietary medicine manufactured by a company which has foreign element in it. So far as the object of serving the patients is concerned, it is difficult to think that this classification has any rational nexus with it. In our opinion, therefore, the impugned part of the exemption notification does not have any rational nexus with the object which the exemption notification seeks to serve and, therefore, though it makes a differential between two sets of companies, that differentia is not intelligible. Rule 8 in the context of the present case cannot mean anything different. In our opinion, therefore, Clause (a) in Explanation appended to the exemption notification does not satisfy the rationality test laid down under Article 14. It is, therefore, ultra vires Rule 8 of the Central Excise Rules, 1944 read with Article 14." The mere fact that the Revenue has filed a SLP against Gujarat High Court judgment cannot deprive the respondent from the benefit of the Notification No. 48/77 dated 1st April, 1977. We very respectfully follow the observations of the Hon'ble Supreme Court in the case of Shri Baradakanta Mishra v. Shri Bhimsen Dixit reported in AIR 1972 (2466).

"The conduct of the appellant in not following the previous decision of the High Court is calculated to create confusions in the administration of law. It will undermine respect for law laid down by the High Court and impair the

constitutional authority of the High Court. His conduct is therefore comprehended by the principles underlying the law of contempt. The analogy of the inferior court's disobedience to the specific order of a superior court also suggests that his conduct falls within the purview of the law of contempt.

Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly any deliberate and mala fide conduct of not following the taw laid down in the previous decision undermines the constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the constitutional authority and respect of the High Court generally, but is also likely to subvert the Rules of law and engender harassing uncertainty and confusion in the administration of law." In the said judgment, the Hon'ble Supreme Court in para 14 had discussed an earlier judgment of the Hon'ble Supreme Court in the case of East India Commercial Co. Ltd., Calcutta v. The Collector of Customs, Calcutta reported in AIR 1962 Supreme Court 1893. The Hon'ble Mr. Justice Subba Rao had observed as under :- "The Division Bench of the High Court held that a contravention of a condition imposed by a licence issued under the Act is not an offence under Section 5 of the Act. This raises the question whether an administrative tribunal can ignore the law declared by the highest Court in the State and initiate proceedings in direct violation of the law so declared. Under Article 215, every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

Under Article 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority including, in appropriate cases any Government within the territorial jurisdiction. Under Article 227, it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally

do.so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should confirm to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer." 7. Keeping in view the observations of the Hon'ble Supreme Court in the case of Shri Baradakanta Mishra v. Shri Bhimsen Dixit reported in AIR 1972 Supreme Court 2466, we quash the Review proceedings started under erstwhile Section 36 (2) of the Central Excises and Salt Act, 1944. We do not find any reason why appellant should be denied the benefit of the Hon'ble Gujarat High Court judgment in the case of Suhrid Geigy Ltd. v. Union of India and Anr. reported in 1980 E.L.T. 759. We have gone through the Review show cause notice F. No. 198/25/1/82-CXV dated 5-2-1982. In para No. 4 of the said Review show cause, the Reviewing Authority viz. the Gover-ment of India has given the reasons for the proposed Review of the Order. The only reason which has been given is that the Appellate Collector to Central Excise has overlooked the fact that the judgment of the Hon'ble Gujarat High Court is the subject matter of S.L.P. There is no mention that there was non-compliance with the provisions of Notification No. 48/77 dated 1-4-1977. We find that there is substance in the arguments of the learned Advocate for the respondent that the Revenue cannot expand the contents of the Review Show Cause notice issued under the erstwhile Section 36(2) of the Central Excises and Salt Act, 1944. Accordingly we reject the argument of the learned Departmental Representative that the respondent should now produce evidence of having satisfied the other conditions of the Notification No. 48/77 dated 1-4-1977. In the result, the Appeal is rejected.

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