(2009) 06 GUJ CK 0009

Gujarat High Court

Case No: Special Civil Application No''s. 1608 of 2002 and 2670 of 2004 and Civil Application No. 3465 of 2009 in Special Civil Application No. 1608 of 2002

Marck Parenterals India Ltd. and Another		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision: June 19, 2009

Citation: (2009) 3 GLH 119

Hon'ble Judges: K.A. Puj, J; A.L. Dave, J

Bench: Division Bench

Advocate: Paresh M. Dave and Dhaval Shah, in Special Civil application No. 1608 of 2002, Rakesh Gupta and Uday Joshi, for Trivedi and Gupta in Special Civil application No. 2670 of 2004 and R.J. Oza, Standing in Civil application No. 3465 of 2009, for the Appellant; R.J. Oza, Senior Standing Counsel in Special Civil Application No. 1608 of 2002, Darshan M. Parikh, Senior Standing Counsel in Special Civil Application No. 2670 of 2004 and Paresh M. Dave and Dhaval Shah, in Civil Application No. 3465 of 2009, for the Respondent

Judgement

K.A. Puj, J.

Since common issue is involved in both the petitions and since both the petitions were heard together, the same are being disposed of by this common judgment and order.

2. In Special Civil Application No. 1608 of 2002, the petitioner, namely, M/s. Marck Parenterals India Limited has challenged the Circular No. 334/1/2001-TRU dated 28.02.2001 issued by the Joint Secretary, Department of Revenue, Ministry of Finance and also the show-cause notice issued on 28.08.2001 based on Circular dated 28.02.2001.

3. Similarly, in Special Civil Application No. 2670 of 2004, this very Circular and also the show-cause notice dated 23.01.2004 issued by the Additional Director General, DGCEI, Ahmedabad, were challenged.

4. Special Civil Application No. 1608 of 2002 was admitted and Rule was issued by this Court on 01.02.2002 and by way of interim relief, the Court has passed an order to the effect that pursuant to the show-cause notice, hearing may go on but final adjudication shall await till further order.

5. Likewise, Special Civil Application No. 2670 of 2004 was admitted and Rule was issued on 01.03.2004 and ad-interim relief was granted to the effect that pursuant to the impugned show-cause notice dated 23.01.2004, hearing may go on but final adjudication shall not be made. The said ad-interim relief was continued till further order vide order dated 19.04.2004.

6. Civil Application No. 3456 of 2009 was filed by Union of India for fixing early date of hearing of Special Civil Application No. 1608 of 2002. Since the petitions are heard by the Court, the said Civil Application no longer survives and it is accordingly disposed of.

7. So far as the main petitions are concerned, Mr. Paresh M. Dave, learned advocate appears on behalf of the petitioner in Special Civil Application No. 1608 of 2002 and Mr. Rakesh Gupta, learned advocate appears on behalf of the petitioner in Special Civil Application No. 2670 of 2004. On behalf of the respondent authorities, Mr. R.J. Oza and Mr. Darshan Parikh, learned Senior Standing Counsels appear in Special Civil Application Nos. 1608 of 2002 & 2670 of 2004 respectively.

8. Heard learned Counsels appearing for the parties and considered their submissions.

9. The main issues raised by the petitioners in both these petitions are that vide Notification No. 6/2000 dated 01.03.2000, as amended by Notification No. 36/2000 dated 04.05.2000, Intravenous Fluids falls under Chapter 30 came to be exempted from payment of central excise duty. During the relevant time, the entry in the said Notification No. 6/2000 reads as under:

Sr. No.	Chapter of heading No. or sub-heading No.	Description of goods	Rate under the First Schedule	Rate un Second S
47A	30	Intravenous Fluids	Nil	

10. Thus, the above exemption was not restricted to I.V. Fluids used for sugar, electrolytes or fluid replenishment as alleged in the impugned show-cause notices, but was available to all I.V. Fluids irrespective of their use. In the Budget for the year 2001, the aforesaid Notification No. 6/2000 came to be withdrawn and a new notification No. 3/2001 dated 01.03.2001 came to be issued. The entry of the said Notification at relevant time, reads as under:

Sr. No.	Chapter of heading No. or sub-heading No.	Description of goods	Rate under the First Schedule	Rate un Second S
56	30	Intravenous Fluids which are used for sugar, electrolyte or fluid replenish-ment.	Nil	-

11. Thus, in the above Notification, exemption came to be restricted making it available to intravenous fluids used for sugar, electrolyte or fluid replenishment. The said Notification No. 3/2001 dated 01.03.2001 came into force with effect from 01.03.2001 to the clearances made from the said date. The petitioners have started paying duty on clearances of I.V. Fluids not used for sugar, electrolyte or fluid replenishment with effect from 01.03.2001. Despite there being no restriction as regards the use of I.V. Fluids in Notification No. 6/2000, which was in force during the relevant period i.e. 04.05.2000 to 28.02.2001, the impugned show-cause notices have been issued raising demand of central excise duty for the aforesaid period, seeking to import a restriction in Notification No. 6/2000, which was never there.

12. It was also urged before the Court that the adjudication before the respondent authorities would be a futile exercise in view of Circular No. 334/1/2001-TRU issued by the Joint Secretary to the Department of Revenue, Ministry of Finance, whereby all Chief Commissioners of Customs and Central Excise as well as Commissioners of Customs & Central Excise through out the country have been directed as to how the changes made in the Union Budget presented on 28.02.2001 were to be implemented. In the said Circular, which is binding on the Adjudicating Authorities, it has been informed that the description of I.V. Fluids has been changed to I.V. Fluids for sugar, electrolyte or fluid replenishment and that this change was clarificatory in nature. It has, therefore, been contended that the Secretary to the Ministry of Finance has no authority to issue such clarifications in asmuchas there is no provision in the Statute which empowers the Secretary to interpret a notification and to direct the lower authorities to implement the same in a particular manner. The earlier exemption Notification No. 6/2000 had been withdrawn saving the actions done and the Notification No. 3/2001 was a fresh/new notification granting specific exemption to I.V. Fluids for sugar, electrolyte or fluid replenishment. It was, therefore, strongly contended that the subsequent notification cannot by any stretch of imagination be termed as clarificatory of a notification which was rescinded and that too by the Joint Secretary without there being anything in the subsequent new notification to that effect.

13. To make good the submissions made, several authorities were cited by the learned Counsels appearing for the petitioners.

14. In Inter Continental (India) Vs. Union of India (UOI) and Others, this Court has taken the view that it is not permissible to read some additional words in a notification, much less any condition where none have been prescribed. The entire matter is governed wholly by language of the notification and in a case where the plain term of the exemption show that the tax payer falls within the same, benefit cannot be denied by relying upon supposed intention of the exempting authority. This judgment was also relied on for the proposition that the Circulars issued by the Board may bind the officers of the department yet the position would be different with regard to an assessee who is always entitled to contest the validity or leaglity of such instructions. This decision was challenged before the Hon''ble Supreme Court and while dismissing the appeal, the Hon''ble Supreme Court in the case of Union of India (UOI) and Others Vs. Inter Continental (India), , held that the department, by issuing Circular subsequent to the notification could not add new condition to the notification thereby restricting the scope of exemption notification or whittling it down.

15. The decision in the case of Suchitra Components Ltd. Vs. Commissioner of Central Excise, Guntur, is relied on for the proposition that a beneficial Circular has to be applied retrospectively while oppressive Circular has to be applied prospectively. Thus, when the Circular is against the assessee, they have right to claim enforcement of the same prospectively.

16. The decision of the Hon''ble Supreme Court in the case of Sandur Micro Circuits Ltd. Vs. Commissioner of Central Excise, Belgaum, , is relied on for the proposition that the issue relating to effectiveness of a Circular contrary to a notification statutorily issued has been examined by the Court in several cases. A Circular cannot take away the effect of the notifications statutorily issued. In fact, in certain cases, it has been held that the Circular cannot whittle down the exemption notification and restrict the scope of the exemption notification or hit it down. In other words, it was held that by issuing a Circular, a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed.

17. The decision of the Hon''ble Supreme Court in the case of Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries, is relied on for the proposition that Circulars and instructions issued by C.B.E. & C. no doubt binding in law on the authorities under the respective Statutes, but when the Supreme Court or the High Court declares the law on the question, arising for consideration, it would not be proper for the Court to direct that the Circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/Circulars issued by the Central Government and of the State Government are concerned, they represent merely their understanding of statutory provisions. They are not binding upon the Court. It is for the Court to declare what

the particular provision of Statute says and it is not for the Executive. Looked it from another angle, a Circular which is contrary to the statutory provisions has really no existence in law.

18. In support of the submission that an alternative remedy is not a bar to exercise of writ jurisdiction by this Court, reliance is placed on the decision of the Hon''ble Supreme Court in the case of Collector of Central Excise and Land Customs v. Sanawarmal Purohit 1979 (4) E.L.T. 613 (S.C.), wherein it is held that ordinarily the High Court will decline to interfere until the party claiming to be aggrieved by the order of a quasi-judicial authority has exhausted the other remedies, if any, available to him. The Rule that before a writ of certiorari is claimed, an aggrieved party should exhaust the statutory remedies is one of convenience and not a Rule of law. If the inferior tribunal has acted without, or patently in excess of, jurisdiction, or has conducted the proceeding before it in a manner contrary to the Rules of natural justice, or offending the sense of justice and fairplay, the High Court would be competent to exercise its power to issue the prerogative writ of certiorari to correct the order of the Court or tribunal, even if an appeal to a departmental authority or tribunal was open and the aggrieved party did not avail himself of that remedy.

19. Based on the above authorities, submission is made before the Court that the benefit granted under a notification No. 6 of 2000, cannot be withdrawn retrospectively. By virtue of the said notification dated 04.05.2000, the benefit of exemption was granted to the assessee and no duty was required to be paid on I.V. Fluids. However, by virtue of the communication issued by the Joint Secretary, it was stated that the said change was merely a classificatory in nature. This was not in the original notification and this was an addition to the notification which is not permissible. It is, therefore, contended before the Court that the said communication issued by the Joint Secretary is in excess of jurisdiction and since the show-cause notices issued by the respondent authorities are without jurisdiction, the same are also challenged before the Court in the present petitions.

20. Both the learned Counsels for the petitioners at length taken us through all these authorities and also the contents of the show-cause notice. They have also submitted before the Court that the show-cause notices were issued only on the basis of the Circular and no such action was taken prior to the Finance Bill of 2001 and consequently, notification was issued. They have, therefore, submitted before the Court that the impugned action on the part of the respondent authorities is in excess of jurisdiction and the same deserves to be quashed and set aside.

21. On behalf of the respondent authorities, Mr. Darshan Parikh and Mr. R.J. Oza, learned Senior Standing Counsels, on the other hand, have made the submission that the issuance of show-cause notices by the respondent authorities is an independent action and after examining the documents and materials on record which they have seized pursuant to their action, the show-cause notices were issued. They have, therefore, submitted that the challenge to the show-cause

notices in the present petitions should not be entertained by this Court. They have further submitted that even at the time of admission of the petitions, the Court has granted interim relief to the extent that the proceedings before the respondent authorities should go on and only the final adjudication should not be made. They have, therefore, submitted that the petitioners have ample opportunity to make their submissions before the authorities and ultimately, if the final order of adjudication is adverse to the petitioners, the remedies are available to them. They have, therefore, submitted that the petitions should not be entertained by this Court.

22. Mr. Oza in support of his submission has relied on the decision of the Hon''ble Supreme Court in the case of Piedade Filomena Gonslves Vs. State of Goa and Others, wherein it is held that challenge to the show-cause notice should not be entertained by the Court.

23. We have heard learned Counsels appearing for the parties at length and considered various authorities cited before the Court in light of the facts found on record. As far as challenge to the communication issued by the Joint Secretary is concerned, we are in agreement with the submissions made on behalf of the learned Counsels appearing for the petitioners and we are of the view that the Joint Secretary is not justified in adding certain words to the notification dated 01.03.2001. It operates prospectively and petitioners were paying excise duty on I.V. Fluids not used for sugar, electrolyte or fluid replenishment. However, the dispute which is involved in the present petitions is pertaining to the period between 04.05.2000 to 28.01.2001 and duty was demanded on the basis of the Circular issued by the Joint Secretary, as per the submissions of the learned Counsels appearing for the petitioners. If it is so, such action of the respondent authorities cannot be upheld. We are, therefore, of the view that the impugned communication issued by the Joint Secretary is not tenable at law and deserves to be quashed and set aside.

24. The question, however, still remains as to whether the issuance of show-cause notices is solely based on the Circular or any independent material is available with the respondent authorities so as to enable them to issue such show-cause notices. From the plain reading of the show-cause notices, it appears to us that while issuing the show-cause notices, the respondent authorities have considered the products as well as the contents of the products and based on that, they have prima facie formed an opinion that on scrutiny of the seized documents, it was revealed that the petitioners have classified the products deeming them as Intravenous Fluids. After forming this prima facie view, they have also referred to the Circular dated 28.02.2001/01.03.2001. It is, therefore, to be decided as to whether the issuance of show-cause notice can be said to be only based on the Circular or not? While considering this issue, we are of the view that it cannot be said at this stage that issuance of show-cause notice is without jurisdiction. The petitioners are called upon to explain about their products and if they are Intravenous Fluids, certainly they are

entitled to exemption. This issue is yet to be adjudicated and it is not finalised. Hence, in absence of any adjudication, it is not just and proper for us at this stage, to quash and set aside the show-cause notices. The petitioners are required to present their case before the authorities and after proper adjudication, the real picture would emerge and the authorities can take the view as to whether they are entitled to such exemption or not. Hence, while taking the view that the Joint Secretary, by issuing a Circular subsequent to the issuance of the notification, can not impose any condition thereby restricting the scope of the exemption notification. However at the same time, if on the basis of the available materials, the authorities are satisfied that the products in respect of which the exemption is claimed are not merely Intravenous Fluids but if they are something more than that, in that case, the issue so raised will have to be decided in accordance of law.

25. In the above view of the matter, while setting aside the impugned Circular, we are of the view that the show-cause notice is not solely based on the said Circular and hence, the petitioners are required to represent their case before the respondent authorities in pursuance of the show-cause notices issued on them. As observed earlier, since the proceedings were allowed to go on and they have already made their submissions before the authorities, the respondent authorities are, therefore, directed to adjudicate the issue in accordance with law, without being influenced by the said Circular and appropriate order would be passed on the basis of the materials available with them.

26. Though pursuant to the interim order passed by this Court, the petitioners have made their submissions, the final order is not yet passed and hence, it is open for the petitioners to make their further submissions before the authorities and after considering fresh submissions, if so made and after giving them an opportunity of being heard, final order may be passed in accordance with law and without being influenced by the impugned Circular.

27. We, therefore, partly allow both these petitions by setting aside the impugned Circular and sustain the action of issuance of show-cause notices which shall be adjudicated in accordance with law. Both these petitions are disposed of without any order as to costs. Rule is made absolute to the above extent. Interim relief granted earlier stands vacated.