

(2002) 02 BOM CK 0122

Bombay High Court

Case No: Writ Petition No. 4103 of 1987

Wyeth Laboratories Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision: Feb. 15, 2002

Acts Referred:

- Customs Act, 1962 - Section 27

Citation: (2002) 3 ALLMR 70 : (2002) 5 BomCR 761 : (2002) 143 ELT 47

Hon'ble Judges: V.C. Daga, J; J.P. Devadhar, J

Bench: Division Bench

Advocate: J.F. Pochkhanwala and R.A.K. Nijan-es-sani, for the Appellant; S.V. Bharucha and S.M. Shah, for the Respondent

Judgement

V.C. Daga, J.

The petitioners are seeking to set aside the order of the Collector of Customs (Appeals), Bombay dated 21st August, 1987 (Exh. "F") and calling upon the respondents to refund forthwith the amount alleged to be illegally collected and recovered from the petitioners by way of alleged countervailing duty.

THE FACTS

2. The facts, in brief, are as under :

M/s. Wyeth Laboratories Limited is the company, having its factory at Ghatkopar, Mumbai manufacturing pharmaceutical products (Patent and Proprietary Medicines) falling under Chapter 30 of the Central Excise Tariff Act, 1985. For the manufacture of said patent and proprietary medicines, the petitioners were required to import, from time to time, different kinds of bulk drugs. In the present case, the petitioners had imported from Netherlands various quantities of Norgesterel U.S.P. ("the said goods", for short) during March, 1986 for manufacture of patent and proprietary medicines in India.

3. Upon arrival of the said goods in India, from time to time, during that period, the petitioners were required to pay the customs duty and also countervailing duty to the extent of 15% on the landed cost of the said goods. The total amount of the countervailing duty paid by the petitioners in respect of various consignments was in the sum of Rs. 2,25,288.80.

4. The petitioners contended that the said goods, at the relevant time, were also manufactured in India and were exempted from payment of excise duty under the Notification No. 234/82, dated 1st November, 1982. After coming into force of the Finance Act, 1986, and until 8th August, 1986, there was no exemption from payment of excise duty in respect of the said goods and thus the said goods became liable to excise duty. The said situation was reversed by subsequent Exemption Notification No. 234/86, dated 3rd April, 1986; where under the said goods were again exempted from the incidence of excise duty. The claim in the petition, therefore, is restricted to the period from 3rd March, 1986 to 8th August, 1986.

5. The Central Duties of Excise (Retrospective Exemption) Act, 1986 (hereinafter referred to as "the Retrospective Act", for short) was brought on the statute book on 8th September, 1986, so as to give retrospective effect to the notifications which were issued by the first respondent on or after 3rd March, 1986 but before 8th August, 1986 for the purpose of maintaining the effective rates of duty of excise in respect of certain goods at the level obtaining prior to 28th February, 1986, notwithstanding the changes in the rates of duties of excise made by the Central Excise Tariff Act, 1985 and further to maintain the effective rates of excise in respect of certain goods at the level obtaining prior to 1st March, 1986, notwithstanding the changes in the rates of duties of excise made by the Finance Bill 1986. The effect of the said Retrospective Act was that all the exemption notifications relating to the said goods were deemed to have, and to have always had, effect on and from 1st March, 1986. As a result of coming into force of the said Retrospective Act, no excise duty whatsoever became payable on the said goods manufactured in India.

6. The petitioners, in the above backdrop, have raised the contention that since the said goods, manufactured in India, were not liable to any excise duty, the corresponding countervailing duty collected from the petitioners; as set out hereinabove; was illegal and the same was liable to be refunded to them, inasmuch as the countervailing duty was leviable on the imports only when excise duty was leviable on similar goods manufactured in India.

7. The petitioners on the aforesaid canvass of their interpretation filed separate refund applications before the Assistant Collector of Customs for obtaining refund of each of the amounts paid by way of countervailing duty, total amounting to Rs. 2,25,288.80.

8. The Assistant Collector of Customs by his various orders, all dated 23rd October, 1986, rejected all the refund claims of the petitioners on the ground that the same

were barred by limitation prescribed u/s 27 of the Customs Act, 1962. The petitioners contended that all refund claims filed by them were similar and identical and were well within time.

9. Being aggrieved by the aforesaid orders of the Assistant Collector of Customs, the petitioners herein preferred separate appeals before the Collector of Customs (Appeals), Mumbai, who after hearing the petitioners, by his order dated 21st August, 1987, rejected all the appeals preferred by the petitioners; reiterating that the same were barred by limitation. The common order passed by the second respondent is subject matter of challenge in this petition.

SUBMISSIONS

10. The learned Counsel appearing for the petitioners submitted that the impugned order dated 21st August, 1987, passed by the second respondent rejecting the appeals of the petitioners holding it to be time barred, is ex facie bad in law and demonstrates non application of mind. The submission of the petitioners is that the refund claims are the consequence of the Retrospective Act, which came into force on 8th September, 1986. The petitioners only after examining the retrospective operation of the said Retrospective Act realised that if no excise duty was payable on the said goods, then, no countervailing duty was attracted in respect of the importation of the said goods made by the petitioner. This has given rise to the refund claims.

11. In the submission of the learned Counsel for the petitioners, Section 3 of the Customs Tariff Act, 1975 provides for levy of an additional duty. The duty, in other words, is in addition to the customs duty leviable u/s 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly, this duty is leviable at a rate equal to the excise duty for the time being leviable on a like article to the one, which is imported, if produced or manufactured in India.

12. The learned Counsel for the petitioners further submitted that it is specifically provided in the Retrospective Act that application for refund of such duty is to be made within six months from the commencement of the Act i.e. from 8th September, 1986. Thus the findings recorded by the second respondent ought to have been that the refund claims were within limitation. The limitation for claiming refund of the countervailing duty paid on the importation of the goods as per the Act is six months from the date of the commencement of the said Retrospective Act.

13. The learned Counsel for the petitioners further submitted that the petitioners could not have filed their refund applications prior to the commencement of the Retrospective Act for two reasons, firstly, they would not have been entitled for refund in absence of the said Act and, secondly, had the petitioners filed their refund claims prior to the commencement of the said Retrospective Act, the Customs Authorities would have rejected their claims as pre-mature.

14. The learned Counsel for the petitioners placed reliance on the judgment of the Apex Court in the case of Collector of Central Excise, Jaipur v. J.K. Synthetics, reported in ` in support of the proposition that the countervailing duty was not imposable as the said goods were exempted from the payment of central excise duty. He, therefore, urged that since the goods in question were not retrospectively liable to any excise duty, as such, for the same reasons, no countervailing duty was payable. The respondents, therefore, were not entitled to levy and collect the said countervailing duty, as such the collection thereof is without any authority of law. The petitioners, therefore, are liable to get refund of the said countervailing duty.

15. The learned Counsel for the petitioners stated that the countervailing duty was paid on 16th April, 1986. The refund claims were filed on 23rd October, 1986. Between this period or even contemporaneously thereafter the petitioners have not increased the prices of their final products viz. "Ovral" and "Ovral-L" in any manner to off-set the incidence of the said countervailing duty but absorbed the same themselves and, therefore, doctrine of unjust enrichment will not apply to the refund claims in question. The petitioners therefore prayed that the respondents be directed to grant refund forthwith to the petitioners.

16. Per contra, the learned Counsel appearing for the respondents contended that this Court in its writ jurisdiction should not go into the question as to whether incidence of duty on imported material had been passed on by the petitioners to any other person, as the adjudication of this question would involve investigation of disputed questions of fact and prayed that it should be left open for the respondents to examine this aspect of the matter on its own merits in the light of law laid down by the Supreme Court in the case of [Mafatlal Industries Ltd. and Others Vs. Union of India \(UOI\) and Others](#), . So far as merits of the case are concerned, the learned Counsel for the respondents found it difficult to support the impugned order of the second respondent dated 21st August, 1987 impugned in this petition.

FINDINGS

17. Having heard the rival submissions at length, it is not in dispute that the Retrospective Act came into force on 8th September, 1986. The notifications issued by the Government of India, Ministry of Finance, Department of Revenue on or after 3rd March, 1986 but before 8th August, 1986 were to be given retrospective effect. The duties of excise, which have been collected, would not have been so collected, had the exemption notification been in force at all material times, as such the duties of excise were to be refunded. The said Act further provided that any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Customs before the expiry of six months from the commencement of the Retrospective Act. In order to appreciate the contentions raised by the petitioners, it is not necessary to dilate on the said issue in view of the judgment of the Supreme Court in the case of Collector of Central Excise, Jaipur, v.

J.K. Synthetics (supra), wherein the Apex Court after taking survey of various provisions of the Customs Act, 1962 held that the impost u/s 3 of the Customs Tariff Act, 1975 was with a view to levy additional duty on the imported article so as to counter balance the excise duty leviable on the like articles indigenously made. In other words, the purpose of Section 3 is to provide for a level playing field to the present and future manufacturers of the like articles in India.

18. Examining in the light of the above decision, it is to be first examined as to whether the article imported is manufactured or not. Secondly, whether the said article if manufactured in India, attracts excise duty and whether such article if manufactured in India, is exempted from payment of excise duty. Examined from this point of view, it is clear that the excise duty payable on such products manufactured in India were exempted from payment of the whole of the excise duty leviable thereon. Consequently, there being no excise duty leviable on the said goods viz. patent and proprietary medicines manufactured in India, there could have been no levy of additional duty, as such the petitioners were entitled to claim refund of the same.

19. So far as the question of limitation is concerned, having examined the provisions of the Retrospective Act, it is clear that the refund claims preferred by the petitioners were well within the period of six months as prescribed in the said Act. Consequently, their applications for refund could not have been rejected by the respondents holding it to be barred by limitation. For the purpose of finding limitation, the Retrospective Act would be the relevant Act and not Section 27 of the Customs Act, though refund claims shall be u/s 27 of the Customs Act. The adverse finding in this behalf is, therefore, liable to be set aside.

20. The question of doctrine of unjust enrichment in respect of the said refund claims is also no longer res Integra in view of the judgment of the Apex Court in the case of [Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another](#), wherein the Apex Court relying upon the judgment of 9 Judges Bench in the case of Mafatlal Industries Ltd. v. Union of India (supra) held that the refund claim under the Customs Act has to be decided on the doctrine of unjust enrichment statutorily recognised u/s 27 of the said Act. The Supreme Court in Mafatlal Industries Ltd. v. Union of India (supra), while upholding the constitutional validity of the Section 27 of the Customs Act, held that the procedure provided u/s 27 of the Customs Act is applicable in case of application filed after the said section is amended. Sub-section (1) of Section 27 requires the person making applications for refund to make the same accompanied by documentary or other evidence including the documents referred to in Section 28(C) as the applicant may furnish to establish that the amount of duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person. In the aforesaid teeth of the prevailing legal position, the refund claims set up by the petitioners shall have to pass through the test provided u/s 27

of the Customs Act.

21. In the result, we set aside the impugned order passed by the second respondent dated 21st August, 1987 (Exh. "F") and hold that the refund applications moved by the petitioners are well within the statutory period of limitation and the same are maintainable. With this finding, we remit the proceedings back to the Assistant Collector of Customs, Mumbai to decide the refund claim applications moved by the petitioners on their own merits, as observed in this judgment, in accordance with law; as expeditiously as possible, at any rate, within three months from the date of receipt of writ of this Court.

22. Accordingly, rule is made absolute in terms of prayer Clause (a) with no order as to costs.