Eskayef Limited

Vs

Collector of Central Excise

Civil Appeal No. 4457 of 1989

(S. C. Agarwal, N. M. Kasliwal JJ)

14.09.1990

JUDGMENT

S. C. AGRAWAL, J. -

1. This appeal involves the question whether the products, Bifuran Supplement, Neftin-50 and Neftin-200, manufactured by the appellant, are chargeable to excise duty as 'patent or proprietary medicines' under Item 14-E of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as the 'Excise Tariff') or the said products are exempted from excise duty under Notification No. 6/84 dated February 15, 1984, as animal feed supplement. At the relevant time Item 14-E of the Excise Tariff was as under :

> "14-E. Patent or proprietary medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotic drugs or other narcotics other than those medicines which are exclusively Ayurvedic, Unani, Sidha or Homeopathic.

Explanation I. - 'Patent or Proprietary Medicines' means any drug or medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in human begins or animals which bears either on itself or on its container or both, a name which is not specified in a monograph in a pharmacopoeia, formulary or other publications notified in this behalf by the Central Government in the official Gazette, or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person, having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person.

Explanation II. - 'Alcohol', 'Opium, 'Indian Hemp', 'Narcotic Drugs' and 'Narcotics' have the meanings respectively assigned to them in Section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955".

2. Item 68 of the Excise Tariff was in the nature of a residuary provision and it read as under :

"68. All other goods, not elsewhere specified, but excluding :

> (a) alcohol, all sorts, including alcoholic liquors for human consumption;
>
> (b) opium, Indian hemp and other narcotic drugs and narcotics; and

(c) dutiable goods as defined in Section 2(c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).

Explanation. - For the purposes of this item, goods which are referred to in any preceding item in this Schedule for the purpose of excluding such goods from the description of goods in that item (whether such exclusion is by means of an Explanation to such item or by words of exclusion in the description itself or in any other manner) shall be deemed to be goods not specified in that item".

3. In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government issued notification dated February 28, 1982 whereby the goods of the descriptions specified in the Schedule annexed to the said notification and falling under Item 68 of the Excise Tariff were exempted from the levy of central excise duty. Entry at Serial No. 10 in the Schedule annexed to the said notification was :

"Animal feed including compound livestock feed".

4. The said notification dated February 28, 1982 was superseded by notification dated November 1, 1982 which also exempted from levy of central excise duty goods of the description specified in the Schedule annexed to the said notification falling under Item 68 of the Excise Tariff. Entry at Serial No. 10 in the Schedule annexed to the said notification was in the same terms as in the previous notification dated February 28, 1982. The notification dated November 1, 1982 was amended by notification dated February 15, 1984 whereby entry at Serial No. 10 in the Schedule annexed to the notification dated November 1, 1982 was substituted by the following entry :

"Animal feed including compound livestock feed, animal feed supplements and animal feed concentrates".

5. By the aforesaid notification dated February 15, 1984, the following explanation was also inserted :

"Explanation II. - For the purposes of this notification, the expression -

(i) "animal feed supplements" means an ingredient or combination of ingredients added to the basic feed mix or parts thereof to fulfil a specific need, usually used in micro quantities and requiring careful handling and mixing;

(ii) "animal feed concentrates" means a feed intended to be diluted with other feed ingredients to produce complete food of optimum nutrient balance".

6. The appellant carries on business as manufacturer of pharmaceuticals. Among the products manufactured by it are Bifuran Supplement, Neftin-50 and Neftin-200. Prior to the notification dated February 15, 1984 the appellant was classifying the products mentioned above under Item 14-E and was paying central excise duty on that basis. After the notification dated February 15, 1984 the appellant filed a classification list effective from March 1, 1984 whereby the abovementioned products were classified as 'animal feed supplements' under Item 68 and exemption was claimed under notification dated February 15, 1984. The said classification list submitted by the appellant was approved by the Assistant Collector of Central Excise on June 4, 1984. Subsequently the Assistant Collector realised that the said classification had been wrongly approved and he gave a show cause notice dated January 31, 1985 to the appellant wherein it was stated that the abovementioned products classified by the appellant to be "animal feed supplement" do not appear

to fulfil the conditions enumerated in the notification dated February 15, 1984 and the appellant was required to show cause why the exemption granted to the said products should not be withdrawn. The appellants submitted a rely dated March 29, 1985 to the said show cause notice. After considering the said reply Assistant Collector passed an order dated August 21, 1985 whereby it was held that the exemption granted to the above mentioned products of the appellant has to be withdrawn with effect from March 1, 1984 as the conditions set out in the Notification No. 6/84 dated February 15, 1984 had not been fulfilled and the duty involved on the clearance of the said formulations had to be paid and further clearance could be effected under the revised classification list by including these items in Tariff Item 14-E. The said order was set aside, on appeal, by the Collector of Central Excise (Appeals) by his order dated December 12, 1985 and the matter was remanded to the Assistant Collector to decide the classification in de novo proceedings after recording evidence to establish that the product has definite therapeutic or preventive value for disease in animals. Thereafter the Assistant Collector initiated de novo proceedings. The appellant submitted written submissions and filed documents. After giving a personal hearing to the representative of the appellant the Assistant Collector passed an order November 17/21, 1986 holding that products Neftin-50, Neftin-200 and Bifuran Supplement manufactured by the appellant are correctly classifiable under erstwhile Tariff Item 14-E and that effective from February 8, 1986 the said products are classifiable under sub-heading 3003.9. The said order was set aside by the Collector of Central Excise (Appeals) by his order dated May 28, 1987, who held that the said products are animal feed supplements and these products merit classification only under the erstwhile Tariff Item 68 and not under Tariff Item 14-E. Aggrieved by the said order of the Collector (Appeals) the department filed an appeal before the Customs, Excise and Gold Control Appellate Tribunal, which was allowed by order dated June 29, 1989. The tribunal held that the aforesaid three products manufactured by the appellant are patent and proprietary medicines as defined in Tariff Item 14-E inasmuch as they have therapeutic and preventive use in respect of the specific ailments in animals. The tribunal was also of the view that if the products satisfy the requirements of Tariff Item 14-E there was no question of considering their classification under Tariff Item 68, which is a residuary item. Aggrieved by the said order of the tribunal the appellant has filed this appeal under Section 35-L of the Central Excises and Salt Act, 1944.

7. During the course of arguments Shri K. K. Venugopal, the learned counsel for the appellant fairly stated that according to the printed pamphlet issued by the appellant the use of Bifuran Supplement is to promote growth rate, weight gains and feed conversion efficiency in growers and broilers by keeping coccidiosis away during growing period, and that the said product can be regarded as preventive medicine falling under Tariff Item 14-E and he has confined his submissions in respect of the other two products, namely, Neftin-50 and Neftin-200.

8. Shri Venugopal has urged that Neftin-50 and Neftin-200 are manufactured by the appellant for use as animal feed supplement and not for use as medicine and therefore they should have been classified as animal feed supplement under Tariff Item 68 and were exempted from payment of central excise duty under notification dated February 15, 1984. Shri Venugopal has invited our attention to the printed literature issued by the appellant for the sale of these products as well as certain certificates issued with regard to the use of these products as additive to poultry feed and their usefulness for that purpose. Shri Venugopal has pointed out that in the printed literature it has been specifically mentioned :

"For use in poultry feed only. Not for medicinal use."

9. Shri Venugopal also pointed out that as regards uses of Neftin-50 and Neftin-200 it is stated in the

said printed literature :

> "To improve egg production, feed/egg ratio and hatchability in layers; to increase weight gains and growth rate in broilers and growers."

10. The learned Additional Solicitor General, on the other hand, has urged that both these products are patent and proprietary medicines chargeable to central excise duty under Tariff Item 14-E. In this connection the learned Additional Solicitor General has pointed out that Neftin-50 contains Furazolidone 5 per cent W/W and Neftin-200 contains Furazolidone 20 per cent W/W. The submission of learned Additional Solicitor General is that Furazolidone is used as an aid in the prevention of coccidiosis as well as for treatment of coccidiosis and that Furazolidone is a patent drug and the England it is sold to the public on the prescription of a registered medical practitioner only. The learned Additional Solicitor General also urged that the finding that aforesaid two products are patent and proprietary medicines filling under Tariff Item 14-E is essentially a finding of fact based on the materials placed before the excise authorities and the said finding is not normally open to challenge in appeal before this Court. The submission of the learned Additional Solicitor General is further that in the present case it cannot be said that the aforesaid products manufactured by the appellants can be regarded as animal feed supplement as defined in Explanation II, inserted by notification dated February 15, 1984 in the notification dated November 1, 1982.

11. In the instant case we are not required to consider the scope of two competing entires of the Excise Tariff because Item 68 was a residuary entry which dealt with all other goods not elsewhere specified. A product which is found to be covered by the other items of the Schedule of the Excise Tariff would be outside the ambit of Item 68. Therefore, the primary question to be considered is whether the products in question, namely, Neftin-50 and Neftin-200, are patent and proprietary medicines falling within Item 14-E.

12. In this context we may refer to the decision of this Court in Dunlop India Ltd. v. Union of India ((1976) 2 SCC 241 : (1976) 2 SCR 98) where the question was whether V. P. Latex manufactured by the appellant in that case was raw rubber and classifiable under Item 39 or it was classifiable under the residuary entry contained in Item 87. It was found that V. P. Latex fell within Item 39 and in view of the said finding it was held that it could not fall within the residuary entry of Item 87. It was observed : (SCR p.113 : SCC p.254, para 35)

> "When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of competition between two rival classification will, however, stand on a different footing."

13. Similarly in Collector of Central Excise v. Krishna Carbon Paper Co. ((1989) 1 SCC 150 : 1989 SCC (Tax) 42) the question was whether carbon paper was taxable under Item 17 or under the residuary entry at Item 68. It was found that carbon paper was taxable as paper under Item 17(2) and, therefore, it would not fall in the residuary entry at Item 68.

14. As noticed earlier, Item 14-E refers to patent or proprietary medicines. The expression 'patent or proprietary medicines' has been defined in Explanation I in Item 14-E to mean any drug or medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the

prevention of ailment in human beings or animals. What is, therefore, required is that the product must be a preparation for use in the treatment or prevention of ailments in human beings or animals. Neftin-50 contains Furazolidone 5 per cent W/W and Neftin-200 contains Furazolidone 20 per cent W/W. The Assistant Collector in his order dated November 17/21, 1986 has referred to the following authorities on the subject :

> (a) British Pharmacopoeia 1980, Vol. I wherein with reference to Furazolidone it has been stated : (p. 205)
>
> "A yellow crystalline powder, odourless, to be protected from light. An antibacterial, antifungal and antiprotozol."
>
> (b) British Pharmacopoeia Codex 1979 wherein it has been stated : (P. 376)
>
> "A bactericide which is observed only slightly from the intestinal mucosa and has therefore been used in the treatment of bacterial diarrhoea and gastroenteritis. It is also active against, "Giardia lamblia."
>
> "Furazolidone is used in animals as an antibacterial agent and for the prevention and treatment of histomoniasis."
>
> "For histomoniasis in poultry, the usual prophylactic dosage is 100 ppm in the feed and the usual therapeutic dosage is 400 ppm in the feed for 10 days."
>
> (c) Scientific Foundations of Veterinary Medicine, (1980 edn.) : (p. 193)
>
> "Bloody or cecal coccidiosis is an acute haemorrhagic disease and is the most severe form of coccidiosis in chickens."
>
> "Furazolidone is fed continuously at 0.0055 per cent in the feed as an aid in the prevention of coccidiosis caused by E. tenella, E. necatrix and E. acervulina. Furazolidone can also be used for the treatment of these same coccidia species when fed at 0.011 per cent for 5 to 7 days."
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> (d) Medicines and Poisons Guide (2nd edn. 1980), prepared by the Law Department of Pharmaceutical Society of Great Britain : (p. 59)
>
> "Furazolidone is a prescription only veterinary drug and by virtue of an entry in the medicines order (prescription only) may be sold or supplied to the public only on a practitioner's prescription."

15. These observations indicate that Furazolidone is an antibacterial, antifungal and antiprotozol compound and it is used for prevention and treatment of coccidiosis as well as histomoniasis in poultry. From this material it also appears that in England Furazolidone is a prescription (sic) only veterinary drug and it can be sold or supplied to the public on a practitioner's prescription only. Furazolidone is thus a drug or medicinal preparation used for treatment and prevention of ailments in poultry and since Neftin-50 and Neftin-200 contain only Furazolidone, the said products are also drugs or medicinal preparations for use in the treatment and prevention of ailments in poultry. In this context it would be relevant to mention that apart from Neftin-50 and Neftin-200 the appellant also manufactures Neftin tablets. The appellant has not disputed that Neftin tablets manufactured by

it are drugs or medicines falling within the ambit of Item 14-E and it pays central excise duty on the same.

16. Shri Venugopal has laid stress on the word "used" in Explanation I in Item 14-E and has submitted that Neftin tablets are manufactured for use as medicine whereas Neftin-50 and Neftin-200 are manufactured for use as animal feed supplement and are not manufactured for use as medicine. Shri Venugopal has invited our attention to the decision of this Court in Annapurna Carbon Industries Co. v. State of A. P. ((1976) 2 SCC 273 : 1976 SCC (Tax) 184 : (1976) 3 SCR 561) In that case the question for consideration was whether Cinema Arc Carbons were taxable to sales tax under the entry relating to cinematographic equipment and parts and accessories 'required for use therewith'. This Court held that the main use of the arc carbon was proved to be that of production of powerful light used in projectors in cinemas and the fact that they can also be used for search lights, signalling, stage lighting or where powerful lighting for photography or other purposes may be required, could not detract from the classification to which the carbon are belong, which is determined by their ordinary or commonly known purpose or user and hence their sale was subject to sales tax under the said entry. Here we find that Neftin-50 and Neftin-200 contain Furazolidone which is administered for prevention and treatment of ailments viz., coccidiosis and histomoniasis in poultry. Merely because Neftin-50 and Neftin-200 can also be used for improving egg production and increase in growth rate of broilers would not in any way detract from the fact that the said products are medicine for use in the treatment and prevention of ailments in poultry. Once it is found that Neftin-50 and Neftin-200 are medicines for use for treatment and prevention of aliments in poultry they have to be regarded as patent and proprietary medicines chargeable to excise duty under Item 14-E and the question whether the said products fall in the residuary entry at Item 68 does not arise.

17. The exemption from payment of central excise duty which has been granted under notification dated November 1, 1982, as amended by notification dated February 15, 1984, is confined in its application to goods specified in the Schedule annexed to the said notification which fall under Item 68. The said notification does not grant exemption in respect of a product falling in any other entry of the excise tariff. It can not be construed as transferring a product from an entry other than Item 68 to Item 68. The insertion of animal feed supplement in the Schedule to the Notification dated November 1, 1982, by the Notification dated February 15, 1984, would not mean that a product which was liable to payment of central excise duty under Item 14-E prior to such insertion would cease to be so liable and would become exempt from such payment of duty by virtue of this notification. It is not disputed that prior to the Notification dated February 15, 1984, the appellant was paying central excise duty on Neftin-50 and Neftin-200 as patent and proprietary medicines falling under Item 14-E. In the absence of any notification granting exemption in respect of products falling under Item 14-E, Neftin-50 and Neftin-200, which are patent and proprietary medicines falling under Tariff Item 14-E and which do not fall under the residuary entry at Item 68, cannot be claimed to be exempt from central excise duty as animal feed supplement under Notification dated November 1, 1982, as amended by Notification dated February 15, 1984.

18. Shri. Venugopal has contended that the appellant has been subjected to arbitrary and hostile discrimination inasmuch as similar products of other manufacturers which contain the same percentage of Furazolidone as Neftin-50 and Neftin-200 are being exempted from payment of central excise duty under Notification dated November 1, 1982, as amended by Notification dated February 15, 1984. In support of this submission Shri. Venugopal has invited our attention to the pamphlets issued by other manufacturers about their products and the contents of those products. Shri. Venugopal has placed reliance on the decisions of the U. S. Supreme Court in Cumberland

Coal Co. v. Board of Revision (76 L ed 147) and Iowa-Des Moines National Bank v. E. R. Bennett (76 L ed 265) as well as the decision of this Court in Vishundas Hundumal v. State of M. P. ((1981) 2 SCC 410 : (1981) 3 SCR 234). The learned Additional Solicitor General has submitted that the other manufacturers referred to by Shri. Venugopal are located at different places and are assessable to excise duty by different authorities and that merely because the relevant notifications have been wrongly applied to those manufacturers by the concerned authorities and the said manufacturers are enjoying exemption from duty in respect of their products would not mean that the impugned order passed against the appellant is liable to be quashed on the ground of violation of the right to equality under Article 14 of the Constitution. The learned Additional Solicitor General has also stated that proceedings would be initiated against those manufacturers in the light of the decision of this Court in this case.

19. It is not the case of the appellant that the same authority has passed orders discriminating between the appellant and other producers of similar products. The grievance of the appellant is that on account of difference in the interpretation of Notification dated February 15, 1984, amending Notification dated November 1, 1982, by the excise authorities in other regions while the appellant is being required to pay excise duty on Neftin-50 and Neftin-200 manufactured by it, other manufacturers of similar products in other regions are enjoying exemption from payment of such duty. The appellant, in substance, wants that because other producers have been granted exemption, though wrongly, the same exemption should be extended to it. In our opinion this is impermissible. The appellant cannot obtain such an exemption in disregard of the law by invoking the right to equality before the law and equal protection of the laws guaranteed under Article 14 of the Constitution. A similar question arose before this Court in Narain Dass v. Improvement Trust, Amritsar ((1973) 2 SCC 265 : AIR 1972 SC 865). In that case it was contended that while administering Section 56 of the Punjab Town improvement Act, 1922, there had been hostile discrimination against the appellants because lands under orchards belonging to persons similarly placed had been exempted whereas the appellants had been refused exemption. Rejecting this contention this Court has observed : (SCC p. 273, para 6)

> "In any event if the appellants had failed to bring their case within Section 56 of the Act, then merely because some other party had erroneously succeeded in getting his lands exempted ostensibly under that section that by itself would not clothe the present appellants with a right to secure exemption for their lands. The rule of equality before the law or of the equal protection of the laws under Article 14 could not be invoked in such a case."

20. In Cumberland Coal Co. ((1973) 2 SCC 265 : AIR 1972 SC 865) and Iowa-Des Moines National Bank (76 L ed 265) it was found that there was intentional and systematic discrimination in favour of certain persons by the officials administering the law. In the instant case it is not said that there has been intentional and systematic discrimination in favour of the producers other than the appellant. The said decisions have, therefore, no application to the present case.

21. Vishundas Hundumal v. State of Madhya Pradesh ((1981) 2 SCC 410 : (1981) 3 SCR 234) was in respect of a scheme for nationalisation of motor transport whereunder the permits of the appellants before this Court had been curtailed and they were prohibited from operating their stage carriages on that portion of the route for which they had permits which was overlapping with the notified route while others similarly situate were permitted to ply their stage carriages over the routes for which they had permits passing over a portion of the notified route without any let or hindrance and their permits were neither curtailed nor cancelled. This Court found that this was due

to an error or omission on the part of the Regional Transport Authority in not supplying full information to the Special Secretary about all the valid permits in force at the relevant date. After referring to the decision of this Court in Ramnath Verma v. State of Rajasthan ((1963) 2 SCR 152 : AIR 1967 SC 603) where in it was held that discrimination under Article 14 is conscious discrimination and not accidental discrimination that arises from oversight which the State is ready to rectify, this Court observed : (SCC p. 413, pars 5)

> "We did not find any willingness on the part of the State authorities to rectify the error in the High Court or before this Court".

22. In these circumstances, this Court, instead of rejecting the whole scheme, considered it appropriate to rectify the same by removing the discrimination by putting the appellants before it in the same class as those who had enjoyed favourable treatment by inadvertence on the part of the Regional Transport Authority. The present case stands on a different footing. Here the discrimination complained of arises on account of orders passed by different excise authorities acting quasi-judicially. Moreover it cannot be said that there is no willingness on the part of the authorities to recover excise duty on similar products manufactured by other producers because the learned Additional Solicitor General, during the course of his arguments, has indicated that proceedings would be initiated against those manufacturers in the light of the decision of this Court in this case. The decision in Vishundas case ((1981) 2 SCC 410 : (1981) 3 SCR 234) has, therefore, no application to the present case.

23. For the reasons aforesaid we find no substance in this appeal and it is accordingly dismissed. There will be no order as to costs.

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