Astra Pharmaceuticals (P) Ltd vs C.C.E on 16 December, 1994

Equivalent citations: 1995 SCC (2) 84, JT 1995 (1) 276

Author: R.M. Sahai

Bench: R.M. Sahai, K.S. Paripoornan

PETITIONER:
ASTRA PHARMACEUTICALS (P) LTD.

Vs.

RESPONDENT:
C.C.E.

DATE OF JUDGMENT16/12/1994

BENCH:
SAHAI, R.M. (J)
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SAHAI, R.M. (J)
PARIPOORNAN, K.S.(J)

CITATION:
1995 SCC (2) 84 JT 1995 (1) 276
1995 SCALE (1)17

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by R.M. SAHAI, J.- This appeal under Section 35-L of the Central Excises and Salt Act, 1944 ('Act' for short) raises two important questions of law, one relating to construction of Item 14-E of the Central Excise Tariff levying duty on patent and proprietary medicines and other the scope of proviso to Section 11-A of the Act.

2.For purposes of duty, patent and proprietary medicines were classified in relevant period in two broad categories - one, which were dutiable under Tariff Item 14-E and other which fell under the Residuary Item 68. The latter were wholly exempt from duty under Notification No. 55/75 dated 1-3-1975. The appellant manufactured pharmacopoeial and non-pharmacopoeial medicines. One of

the items manufactured by the appellant was 20% Dextrose injection. It is a trade name in the Indian Pharmacopoeia. It being one of the medicines specified in Pharmacopoeia it was wholly exempt from duty. An item which fell under Tariff Item 68 and was wholly exempt from duty was further exempted from operation of Rule 174 and no Central Excise licence to manufacture it was required to be taken out. The appellant, therefore, did not obtain any licence and cleared the Dextrose manufactured by it without paying any duty since the date of manufacture in December 1978 till 23rd January, 1982 when notice was served on it for showing cause as to why Dextrose manufactured by it may not be subjected to duty under Tariff Item 14-E as even though it was pharmacopoeial product, yet the label used on the packing and the container bore a monogram which indicated a connection between the medicine and the appellant.

3.To determine if the appellant was liable to pay duty on Dextrose injection manufactured by it, it will have to be examined if it fell under Tariff Item 14-E extracted below:

Tariff Item No.	Description of Goods	Rate of duty Basic	Special Excise
14-E	Patent or Proprietary Medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotics other than those medicines which are exclusively Ayurvedic, Unani, Sidha or Homeopathic.	12 1/2% adv. duty chargeable	10% of the basic duty

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Explanation 1.- "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 beings or animals, which bears either on itself or on its container or both, a name which is not specified in a monogram 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 trademark 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 H.- '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 (16 of 1955).

The entry is in two parts, one the main and other explanatory. The main part negatively excludes those medicines which contain any of the ingredients mentioned in it or are Ayurvedic, Unani, Sidha or Homeopathic medicines. The range of patent and proprietary medicines thus having been determined by the main part the

explanation spells out the exact scope of the entry by first widening its ambit by including any drug or medicinal preparation in whatever form and used for any ailment in human beings or animals, then carves out an exception in favour of any pharmacopoeial medicine or medicines which have been mentioned in a publication issued by the Central Government, but excludes again from it those medicines which even though mentioned in pharmacopoeia are identified by a monogram or a symbol, signature or invented words so as to establish a relationship between the producer and the medicine. To put it simply, all those patent and proprietary medicines which are mentioned in Pharmacopoeia are excluded from the entry unless the manufacturer or producer by use of any distinctive mark establishes connection with the medicine. In other words, all those medicines which either bear a name which is not specified in the pharmacopoeia or which is a brand name and that brand name is used by any symbol, monogram or signature so as to establish a relationship between the medicine and the person manufacturing or selling it then such patent or proprietary medicine would be covered in it. The purpose appears to be that if a manufacturer manufactures medicines which were mentioned in pharmacopoeia then it was not liable to pay any duty. But if it produced a medicine which carries its own name which was not mentioned in the pharmacopoeia, then it was liable to pay duty under this item. That is, a patent or proprietary medicine to attract levy under this tariff item must either be a medicine which was not specified in a pharmacopoeia or other publication and carried on it or its container name of the produce by symbol or invented name etc. A medicine of which the producer is the proprietor and it is known by its name would be covered in this clause. The other class of patent or proprietary medicines to which this tariff item applies are those medicines which have a brand name or a registered trademark under the Trade and Merchandise Marks Act and carry such mark, symbol or monogram as to establish relation between medicine and producer or manufacturer, That is, the writing or monogram on the medicine must establish that it was the producer or the manufacturer who was proprietor of the medicine.

4. This appeal is concerned with the latter clause, i.e., the medicine carrying brand name. The Explanation includes in its ambit all those medicines which carry a brand name which is registered under the Trade and Merchandise Act and the manufacturer describes that medicine by any symbol, monogram or label so as to establish a relationship between the manufacturer and the medicine then the medicine manufactured by him could be included in the explanation appended to Item 14-E. The appellants manufacture 20% Dextrose injections. It is not disputed that 20% Dextrose injections are mentioned in pharmacopoeia but the appellant has been denied exemption as on the cover it carries the name "AP - ASTRA". According to the Department, since the medicine is described by a monogram and it established a relation between the manufacturer and the medicine, therefore, it was included in Explanation 1 to Item 14-E. The Tribunal found that letters 'AP' do not constitute a monogram because the two letters are not interwoven but they being placed side by side in an artistic manner on the top it made the medicine manufactured by the appellant as a patent or proprietary medicine attracting Central Excise duty under Tariff Item 14-E.

5.As has been explained earlier the first part of the Explanation widens the ambit of the entry by extending it to any drug or medicinal preparation for use in internal or external administration for prevention of ailments in human beings or animals. But then it narrows it by restricting the applicability of the tariff item to only such medicines which bear either on itself or on its container or both a name which is not specified in a monogram in a pharmacopoeia. This obviously is not applicable to the appellant as the injections manufactured by the appellant are specified in a pharmacopoeia. The other class of medicines to which this Explanation applies are those which have a brand name that is a name or a registered trademark under a Trade and Merchandise Marks Act. The medicine manufactured by the appellants is not registered under the Trade and Merchandise Marks Act. Therefore, it 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 mark. Identification is compulsory under the Drug Rules. Technically, it is known as "house mark". In Narayan's book on Trade Marks and Passing-Off, the distinction between "house mark" and "product mark" (brand name) is brought out thus:

> "677-A.'House mark and product mark (or brand name).- In the pharmaceutical business a distinction is made between a house mark and a product mark. The former is used on all the products of the manufacturer. It is usually a device in the form of an emblem, word or both.

For each product a separate mark known as a product mark or a brand name is used which is invariably a word or a combination of a word and letter or numeral by which the product is identified and asked for. In respect of all products both the product mark and house mark will appear side by side on all the labels, cartons etc. Goods are ordered only by the product mark or brand name. The house mark serves as an emblem of the manufacturer projecting the image of the manufacturer generally."

The 'AP' or 'ASTRA on the container or packing was used to project the image of manufacturer generally. It did not establish any relationship between the mark and the medicine. For instance, if the appellant instead of using Dextrose injections would have described it as Astra injections or Astra Dextrose injections then it could be said that a relationship between the monogram and the medicine was established. In the case of appellant it was only a monogram to identify the manufacturer.

6. In Indo-French Pharmaceutical Co. v. Union of India1 a learned Single Judge of the Madras High Court while construing Tariff Item 14-E observed:

> "A close reading of the Explanation, however, in my view indicates that the marks, symbols, monogram, label, signature or other words which are used in the 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.

" This was approved by a Division Bench of the same High Court in Union of India v. Indo-French Pharmaceutical Co.2 Reliance was, placed on Ramsey Pharma Pvt. Ltd. v. Superintendent, Central Excise3 for the Revenue and it was claimed that this decision was followed by the Tribunal and since it was based on correct interpretation of Explanation 1 the appellant was not entitled to any relief. It would be seen that in the decision rendered by the Allahabad High Court it is not clear if the container bore the name of the medicine as well. What has been extracted in the judgment is that the medicine has been manufactured by Ramsey Pharma Pvt. Ltd. As stated earlier if the container of the appellant would have stated that these were Astra Dextrose injections then it could be said that a relationship between the medicine and the manufacturer was established. The ratio laid down by the Madras High Court is approved as correctly enunciating the scope of Explanation 1. Since the appeal is being allowed on merits the question whether the Revenue was justified in reopening the case under proviso to Section 11-A of the Act is rendered academic and is not necessary to be decided.

7. In the result this appeal succeeds and is allowed. The order passed by the Tribunal is set aside and the question of law raised by the appellant is decided by saying that Dextrose injections manufactured by the appellant in the relevant years were not patent and proprietary medicines dutiable under Tariff Item 14-E of the Schedule. There shall be no order as to costs.

1 1978 ELT J478 (Mad) 2 1983 ELT 725 (Mad) 3 1983 ELT78 (All)