

Customs, Excise and Gold Tribunal - Delhi

Pharmachem vs Collector Of Customs on 1 March, 1996

Equivalent citations: 1996 (84) ELT 41 Tri Del

ORDER U.L. Bhat, J. (President)

1. The appellant in C/635/88-A manufactures product by name Oxytetracycline (capsule) using Oxytetracycline HCL as raw material. Manufacturer imported two consignments of Oxytetracycline HCL from a concern by name Krka, Yugoslavia (each of 500 kgs.) under open general licence at US \$ 28.30 per kg. The goods were provisionally released. The Collector, after observing legal formalities, passed order holding that import could not have been made under OGL as it required specific licence, that there was misdeclaration of value as was evident from the price declared in a comparative import at almost the same time and demanded differential duty, confiscated the goods fixing redemption fine of Rs. 1,37,000.00 for each consignment and levied penalty of Rs. 70,000.00 on the manufacturer. Penalty of Rs. 3000.00 was imposed on the Manager of the Bank who issued the letter of credit on the ground that the document was antedated. This order is now challenged in the present appeals, one filed by the importer and the other by the Manager of the Bank.

2. Import Trade Control Order 1 of 1982 dated 5-4-1982 issued under Section 3 of the Imports and Exports (Control) Act, 1947 gave general permission to import into India from any country, except the two named countries, raw materials, components and consumables by actual users (industrial) subject to various conditions enumerated therein. One of the conditions was that the items to be imported were not covered by Appendices 3 to 9 and 15 of the Import and Export Policy, 1982-83 Volume I. Admittedly, Oxytetracycline was mentioned in Appendix 4 of that Policy. Para 218(4) of the Policy stated that:

"In the case of drugs appearing in Appendices 3, 5 and 9, the names mentioned:

(i) refer to the respective ingredients or

(ii) are as they are commonly known Each entry includes the salts and esters of the same drug, if any."

Oxytetracycline HCL is a salt of Oxytetracycline. Since Oxytetracycline was referred to in an entry only in Appendix 4 of the Policy, the salt of Oxytetracycline would not be included in the entry by virtue of Para 218(4) of the Policy, as it stood initially. In other words, Oxytetracycline HCL could be imported under OGL by virtue of the Import Control Order No. 1 of 1982. On 19-4-1982, Public Notice No. 21 ITC(PN)/82 was issued whereby, among other things, in paragraph 218(4) of the Policy, "4" was inserted after "3". By virtue of the amendment since Oxytetracycline was included in Appendix 4, the salt of Oxytetracycline also would be deemed to be part of the entry and since one of the conditions in the Import Trade Control Order 1 of 1982 was that items covered by Appendix 4 cannot be imported, the Department took the view that the appellant could not import the consignments of Oxytetracycline HCL under OGL.

3. The answer of the appellant is two-fold. It is contended that while the Import Control Order 1 of 1982 has statutory root, inasmuch as it was issued in exercise of the power vesting in the Central Government under Section 3 of the Imports and Exports (Control) Act, 1947, the Policy and the amendment to the Policy are purely executive in character and cannot override the statutory order. It is further contended that Appendix 4 was incorporated by reference in the Import Trade Control Order 1 of 1982 and, therefore, the appellant's rights under the Order are governed by Appendix 4 as it stood on the date of the issue of the Order and any subsequent changes brought about in Appendix 4 by amendment to the Policy would not derogate from such right. The effect of incorporation by reference has been examined by the Supreme Court in *Mahindra and Mahindra Ltd. v. The Union of India and Anr.* - AIR 1979 SC 798. In a case of incorporation by reference, as distinct from a reference, any subsequent amendment in the former statute or even its repeal would not affect the provision incorporated in the latter statute. The Tribunal has followed this principle in *Collector of Customs v. Mansingka Brothers* - 1988 (38) E.L.T. 105. The Bombay High Court has followed the same principle in *American Dry Fruit Stores v. Union of India and Ors.* - AIR 1990 Bombay 376. The effect of incorporation is, as if, the provision incorporated is written out in the incorporating statute and is a part of it. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute.

4. By virtue of the amendment to the Import Policy published in the Public Notice, Appendix 4 will include Oxytetracycline HCL, but the Appendix 4 as it stood when it was incorporated in the Import Trade Control Order 1 of 1982 could not be said to include Oxytetracycline HCL. Therefore, the bar on import contained in Appendix 1 of the Import Trade Control Order 1 of 1982 would not affect the import of Oxytetracycline HCL by the manufacturer in this case. The import could be made OGL.

5. The next contention relates to the valuation. The price declared was US \$ 28.30 per kg. The assessed price was US \$ 30 per kg. The total quantity imported was 1000 kgs. The import in this case was from a concern by name Krka, Yugoslavia. The Collector relied on the price shown in an invoice relating to import by another Indian importer from a concern by name Pliva, Yugoslavia. Though the country of origin was the same, the manufacturer was different. Considering the small margin between two prices, we are of the opinion that the Collector should have refrained from loading the price, particularly in the light of the fact that the manufacturers in the two cases were different.

6. The two appellants appear to be party to antedating the letter of credit. That might have been done on the supposition that the letter of credit if bears the date prior to the Public Notice, the appellant's import would be allowed under OGL. The appellants have a different story. According to them, the Manager of the Bank wanted clearance from the head office for opening the letter of credit and on the insistence of the importer, he gave the letter of credit number to him and that was how it came to be antedated. However undesirable this act may be, since we have already held that the import was allowable under the OGL, the imposition of penalty on the Manager of the Bank cannot stand.

7. In the result, we set aside the impugned order. The appeals are allowed.