

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 10.10.2013

Date of Decision: 21.10.2013

%

+

W.P.(C) 3125/2001

SHIMAL INVESTMENT AND TRADING CO.

..... Petitioner

Through: Mr. Dhruv Mehta, Sr. Adv. with
Mr. K. Datta, Mr. Ashish Verma
and Mr. Rahul Malhotra, Advs.

versus

UNION OF INDIA AND OTHERS

..... Respondent

Through: Mr. Sachin Datta, CGSC with
Ms. Niti Arora, Adv. for R-1

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

Vide notification dated 3.9.1996, issued in exercise of the powers conferred by the Drugs (Prices Control Order, 1995), the Central Government, *inter alia*, fixed the price of Nalidixic Acid + Metronidazole Tab having strength of Nalidixic Acid 300 MG and Metronidazole 200 MG, at Rs.12.70 for a pack of six tablets. Vide order dated 27.01.1998, issued under the aforesaid order, the National Pharmaceutical Pricing Authority) notified that the manufacturers of all the Scheduled formulation, in pack sizes different from the notified pack size under sub-paragraphs (1) and (2) of the paragraph 9 of the aforesaid order, shall work out the price for such pack sizes, in respect of tablets

and capsules of the same strength or composition, packed in different strips or blisters, on prorata basis of the latest ceiling price fixed for such formulations under sub-paragraphs (1) and (2) of the paragraph 9 of the aforesaid order. Vide Notification dated 9.3.1998, issued in exercise of the above referred powers, the National Pharmaceutical Pricing Authority fixed the price of the coated tablets containing Nalidixic Acid 300 mg and Metronidazole 200 mg at Rs.13.65 in respect of pack of six tablets.

2. Vide letter dated 24.2.2000, the National Pharmaceutical Pricing Authority, referring to the ceiling prices fixed vide Notification dated 3.9.1996 as also to the above referred notification dated 27.01.1998, informed M/s Oscar Laboratories Private Limited that the said company had been manufacturing Gramogyl Tablets (Nalidixic Acid Formulations) in the pack of 8 tablets, but it had not complied with the ceiling price and had continued to charge retail price of Rs.24.65/- per strip of 6 tablets and Rs.31.80/- per strip of 8 tablets, for the said formulation. It was further stated that the said company had been directed vide letter dated 2.8.1999 to furnish the actual quantity of gramogyl Formulation sold during the period from January, 1998, but had not furnished the requisite information and, therefore, the said office was constrained to work out the amount overcharged by the notice on the basis of ORG data. It was estimated in the notice that the noticee company had obtained an unauthorized benefit of Rs.3,29,71,014/- by way of overcharging from the consumers in respect of Gramogyl Tablets during the period from February, 1998 to December, 1999. The details of overcharged amount were given in Annexure-I to the notice. The noticee was required to deposit the over-charged amount, along

with interest @ 15% per annum, under Section 7A of Essential Commodities Act, 1955. The liability towards interest till December, 1999 was worked out at Rs.49,45,652/- as per the details given in Annexure-I to the notice. The noticee was required to show cause why the aforesaid amount be not recovered from it.

3. The above referred notice was responded by the petitioner – Shimal Investment & Trading Company vide reply dated 23.3.2000 with which Oscar Laboratories Private Limited has amalgamated with effect from 29th August, 1999. It was stated in the reply that the brand ‘Gramogyl’ had been assigned by Oscar Laboratories Private Limited to M/s Delta Aromatics (P) Ltd. on 23.8.1999. It was further stated that the company had not manufactured or marketed any pack of eight tablets in respect of which ceiling prices were notified. It was also stated in the reply that subsequently the company had stopped manufacturing conventional tablets and had introduced Dispersible Tablets. The basic difference pointed out in the reply, between Gramogyl tablets and Gramogyl dispersible tablets, was (a) difference in the type of packing, (b) Gramogyl tablets being film coated, whereas the dispersible tablets being uncoated (c) the mix of raw material required for dispersible tablets being different from the conventional tablets, as also in respect of packing. Vide letter dated 2.6.2000, the National Pharmaceutical Pricing Authority informed the petitioner company that the ceiling price fixed vide notification dated 3.9.1996 was applicable to all tablets including dispersible tables, as also tablets manufactured in a pack of eight tablets. It was also clarified vide the said notification that the notice dated 24.2.2000 pertained only to the overcharging in respect of the formulation sold from 1.2.1998 to 31.12.1999 and the overcharging on

the formulation sold from 1.10.1996 to 31.12.1997 was the subject matter of a different notice dated 5.9.1997.

4. Pursuant to the demand raised by the National Pharmaceutical Pricing Authority, the Additional District Magistrate issued notice to the petitioner requiring it to deposit a sum of Rs.4,38,92,663/-. Being aggrieved, the petitioner is before this Court seeking the following reliefs:

- a) issue of a writ of or in the nature of certiorari and/or any other appropriate writ, order or direction quashing and/or setting aside the demand of Rs.4,38,92,773/- as envisaged in the notice dated 8.5.2001 issued by the Additional District Magistrate/ Additional Collector being respondent no.4 herein to the petitioner.
- b) issue of writ of or in the nature of certiorari or any other appropriate writ, order or direction quashing the demand notice issued by respondent no.2 dated 24.2.2000 demanding sum of Rs.3,29,71,000/-.
- c) issue of a writ of or in the nature of prohibition or any other appropriate writ, order or direction restraining the respondents, their officers, servants and agents and in particular respondent no.3 and no.2 from taking any action for recovery of alleged demand of Rs.4,38,92,663/- or any part thereof or from taking any action pursuant to or in furtherance of the demand notice of respondent no.4 received by the petitioner on 8.5.2001.
- d) issue a writ of or in the nature of mandamus and/or any other appropriate writ order or direction requiring the respondent no.2 to issue a non-ceiling price order in respect of the Gramogyl dispersible tablets.

e) pass ad interim ex-parte orders in terms of prayers hereinabove and confirm the same after notice to the respondents.

5. In their counter affidavit, the respondents have stated that the petitioner had indulged in violation of directions of DPCO and had over-charged the price from the public by selling Gramogyl tablets at a price higher than the ceiling price fixed by the Government. It is also claimed in the counter affidavit that the price fixed by the Government applied to all kinds of tablets including dispersible tablets.

6. The following issues primarily arose for consideration in this writ petition:

- (i) whether the price fixed vide notification dated 3.9.1996 read with notification dated 27.01.1998 and 9.3.1998 applies to coated tablets and dispersible tablets which are a combination of Nalidixic Acid + Metronidazole Tab.
- (ii) Whether the respondent can recover the excess price charged by the petitioner, only in respect of the drug manufactured after 15 days from the date of notification fixing its price or in respect of the drug sold after 15 days from the date of the notification, irrespective of the date on which it was manufactured.
- (iii) Whether the petitioner is liable to reduction of 16% trade margin while calculating its liability to pay the overcharged amount.
- (iv) Whether interest is to be charged from the date of sale of the products or from the date on which the demand was raised.

Issue No.1:

7. The Drugs (Price Control) Order, 1995 to the extent it is relevant for the purpose of deciding this writ petition reads as under:

“2 (v) "Scheduled formulation" means a formulation containing any bulk drug specified in the First Schedule either individually or in combination with other drugs, including one or more than one drug or drugs not specified in the First Schedule except single ingredient formulation based on bulk drugs specified in the First Schedule and sold under the generic name.

8(4). Any manufacturer, who desires revision of the retail price of a formulation fixed under sub-paragraph (1), shall make an application to the, Government in Form III or Form IV, as the case maybe, and the Government shall after making such enquiry, as it deems fit within a period of two months from the date of receipt of the complete information, fix a revised price for such formulation or reject the application for revision for reasons to be recorded in writing.

8(6)No manufacturer or importer shall market a new pack, if not covered under sub-paragraph 3 of para 9, or a new formulation or a new dosage form of his existing Scheduled formulation without obtaining the prior approval of its price from the Government.

9. Power to fix ceiling price of Scheduled formulations :

1. Notwithstanding anything contained in this Order, the Government may, from time to time, by notification in the Official Gazette, fix the ceiling price of a Scheduled formulation in accordance with the formula laid down in paragraph 7, keeping in view the cost or efficiency, or both, of

major manufacturers of such formulations and such price shall operate as the ceiling sale price for all such packs including those sold under generic name and for every manufacturer of such formulations.

2. The Government may, either on its own motion or on application made to it in this behalf by a manufacturer in Form III or Form IV, as the case may be, after calling for such information as it may consider necessary, by notification in the Official Gazette, fix a revised ceiling price for a Scheduled formulation.

3. With a view to enabling the manufacturers of similar formulations to sell those formulations in pack size different to the pack size for which ceiling price has been notified under the subparagraphs (1) and (2), manufacturers shall work out the price for their respective formulation packs in accordance with such norms, as may be notified by the Government from time to time, and he shall intimate the price of formulation pack, so worked out, to the Government and such formulation packs shall be released for sale only after the expiry of sixty days after such intimation.

13. Power to recover Overcharged Amount:

Notwithstanding anything contained in this order, the Government shall by notice, require the manufacturers, importers or distributors, as the case maybe, to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government under the provisions of Drugs (Prices Control) Order, 1987 and under the provisions of this Order.

8. Admittedly, the medicine in question, whether in the form of coated tablets, uncoated tablets or dispersible tablets contained a bulk drug specified in the First Schedule and, therefore, it is a 'scheduled

formulation' within the meaning of clause 2(v) of DPCO. To this extent, there is no dispute between the parties. The contention of the petitioner is that no price for the coated and dispersible tablets has been fixed by the respondents whereas the case of the respondents is that the price fixed vide notifications dated 3.9.1996 & 9.3.1998 applies to all tablets having combination of Nalidixic Acid and Metronidazole in specified quantity.

9. A perusal of the notification dated 3.9.1996 would show that it applies to the tablets of Nalidixic Acid + Metronidazole Tab having strength of Nalidixic Acid 300 MG and Metronidazole 200 MG respectively. A tablet is a tablet irrespective of whether it is coated, uncoated or dispersible, I find that the notification dated 3.9.1996 made no distinction on the basis of nature of the tablet and, therefore, its applicability cannot be restricted to uncoated tablets, which are not dispersible. The notification is not restricted to any particular form of tablets. The classification of such tablets into coated/uncoated/dispersible is not borne out from and cannot be read into the aforesaid notification. In fact, as far as coated tablets are concerned, the petitioner itself in its reply dated 23.3.2000 claimed such tablets to be conventional tablets and this was not the case in the said reply that the coated tablets are different from uncoated tablets or that it is only the uncoated tablets which constitutes conventional tablets.

11. The learned senior counsel appearing for the petitioner drew my attention to clause 7 of DPCO which prescribes the formula on the basis of which the retail price of formulation is to be calculated by the government and submitted that the manufacturing cost would be different for coated tablets as compared to uncoated tablets since the

cost of coating material as well as the process of coating would be an additional costs in such tablets and, therefore, there cannot be a common price for coated and uncoated tablets. He also submitted that the cost of dispersible tablet would be different from the cost of the conventional tablets.

10. Referring to the following excerpts from Indian Pharmacopoeia, 1996 (volume-II), the learned senior counsel for the petitioner contended that coated tablets and dispersible tablets are altogether different from uncoated tablets:

“TABLETS

Tablets are solid dosage forms each containing a unit dose of one or more medicaments. They are intended for oral administration. Some tablets are swallowed whole or after being chewed, some are dissolved or dispersed in water before administration and some are retained in the mouth where the active ingredient is liberated.

Because of their composition, method of manufacture or intended use, tablets present a variety of characteristics and consequently there are several categories of tablets. Unless otherwise stated in the individual monograph, tablets are uncoated. Where coating is permitted the monograph states “The tablets may be coated”. Where the monograph directs coating the statement reads, “The tablets are coated”. Unless otherwise directed, tablets may be coated in one of different ways.

Uncoated Tablets: Uncoated tablets may be single-layer tablets resulting from a single compression of particles or multi-layer tablets consisting of parallel layers obtained by successive compression of particles of different composition.

No treatment is applied to such tablets after compression.

Coated Tablets: Coated tablets are tablets covered with one or more layers of mixtures of various substances such as resins, gums, inactive and insoluble fillers, sugars, plasticisers, polyhydric alcohols, waxes, etc. The coating may also contain medicaments.

Dispersible Tablets: Dispersible tablets are uncoated tablets that produce a uniform dispersion in water and may contain permitted colouring matter and flavouring agents.”

The above-referred quotations from Indian Pharmacopoeia, 1996 only show that there are several categories of tablets; they can be uncoated tablets, coated tablets, dispersible tablets, modified released tablets, soluble tablets, enteric coated tablets and effervescent tablets. But, despite individual characteristics of tablets of various categories, the fact remains that all of them are tablets though their formations may not be exactly the same. Therefore, when a notification refers to tablets, it applies to tablets of all the categories, whether they be dispersible tablets, coated tablets or uncoated tablets. It would be difficult to accept the contention that the expression ‘tablet’ used in the notification dated 03.09.1996 applied only to uncoated tablets. To accept the contention that the said notification applied only to uncoated tablets would defeat the very purpose behind controlling the price of the drug since, in order

to get out of the price restriction imposed by the notification, the manufacturers would simply apply a coating on the tablet manufactured by him or he would manufacture dispersible tablets and sell them at a price much higher than the price fixed under the notification. The primary objective behind fixing price of certain drugs is to make such essential drugs available to the masses of this country at a fair price. In the absence of price control, the manufacturers may sell the drug at a price which would put the medicine beyond the reach of a vast majority of our populous. It was also pointed out by the learned senior counsel for the petitioner that vide notification dated 09.03.1998, the Government fixed prices of coated tablets, thereby admitting that coated tablets are altogether different from uncoated tablets. I, however, find no merit in the contention. A careful perusal of the notification dated 09.03.1998 would show that by virtue of the said notification, the entries at serial No. 2, 4 and 8 in the notification dated 03.09.1996, were substituted. As a result, Nalidixic Acid + Metronidazole tablet were priced at Rs 13.65 for a pack of six tablets. Since the aforesaid notification substituted certain entries in the notification dated 03.09.1996, to accept the contention of the learned senior counsel for the petitioner, would mean that uncoated tablets would be out of the

purview of the Drugs (Prices Control) Order 1995 with effect from 09.03.1998. This certainly could not have been the intention behind amendment of the notification dated 03.09.1996. If I accept the contention advanced by the learned senior counsel for the petitioner, that would result in a situation where the manufacturer, instead of manufacturing coated tablets would manufacture uncoated tablets and then sell them at a price higher than the price fixed under Drugs (Prices Control) Order, thereby defeating the objective behind controlling the price of this drug. It appears to me that irrespective of whether the expression used in the notification issued under Drugs (Prices Control) Order 1995 is 'tablet' or 'coated tablet', the intention was to bring all the tablets containing Nalidixic Acid 300 MG and Metronidazole 200 MG under the purview of Drugs (Prices Control) Order 1995, so as to make them available at a reasonable price. A possible reason for using the expression 'coated tablet' in the notification dated 09.03.1998 could be that, at that time, only the coated tablets of this drug were being manufactured and that is why the second notification refers only to the coated tablet. As noted earlier, in its reply to the show cause notice, the petitioner itself had referred to the coated tablet as the conventional tablet.

10. The learned senior counsel for the petitioner drew my attention to the notification dated 10.07.1999, whereby the Government fixed conversion cost, packing charges and process loss of material for the purpose of Drugs (Prices Control) Order 1995 and pointed out that the conversion cost was different for tablets, coated tablets and sustained release tablets. He also pointed out that process loss of material was fixed at 4% for plain tablets and 5% for coated tablets, though packing material cost was same for plain, dispersible as well as coated tablets. The contention is that the aforesaid notification recognizes the fact that uncoated tablets are different from the coated tablets. I, however, find myself unable to accept the contention. As noted earlier, the notification dated 03.09.1996, which was amended vide notification dated 09.03.1998 applied to all tablets containing Nalidixic Acid 300 MG and Metronidazole 200 MG. The Government could have fixed different prices for uncoated, coated and dispersible tablets, but, in its wisdom, it chose to fix a uniform price for all such tablets. If the manufacturers of coated tablets were aggrieved on account of a uniform price being fixed for coated as well as uncoated tablets, the remedy open to them was to seek revision of the price of coated tablets on account of difference in the conversion cost and process loss of raw material for uncoated tablets

and coated tablets. As noted earlier, in their reply dated 23.03.2000, the petitioner, while distinguishing dispersible tablets from conventional tablets, referred to the conventional Gramogyl tablets as film coated, whereas dispersible tablets were referred as uncoated tablets. The contention of the petitioner in the reply was that no ceiling price had been notified for the dispersible tablets. This was not the contention in the reply that the coated tablet also did not attract the price fixed under the Drugs (Prices Control) Order 1995. In this reply, the petitioner also acknowledged that earlier it had been manufacturing conventional tablets (coated tablets) and had introduced dispersible tablets after stopping manufacture of the conventional tablets for which a specific manufacturing licence was obtained by it.

It was also contended by the learned counsel for the petitioner that dispersible tablet has a higher cost of manufacturing since sweeteners and taste modifiers are required to be added so that the bitter taste imparted by the drugs gets masked and the palatability is improved and thereafter flavours are added as an adjunct to sweeteners, to impart improved organoleptic property along with colours complementing flavour of the products for enhancing the aesthetic appeal. In my view, even if the cost of manufacturing dispersible tablets was higher than the

cost of manufacturing conventional tablets, the remedy of the petitioner was to seek revision of the price in respect of the dispersible tablets on account of addition of sweeteners and taste modifiers, flavours and colourants, but so long as such a revised price for dispersible tablets was not fixed, they could not have charged more than the price fixed under the notification dated 03.09.1996, as amended vide notification dated 09.03.1998.

12. It was pointed out by the learned counsel for the petitioner that the notification dated 03.09.1996 applied only to tablets sold in the back of 6 and 10 and the petitioner was not selling the medicines in question either in pack of 6 or in pack of 10 tablets. As noted earlier, the scope of the present writ petition is confined to demand for the period from February, 1998 to December, 1999 and vide notification dated 27.01.1998, the Government had expressly notified that manufacturers of all the scheduled formulations packs, different from the notified pack size under sub-para (i) and (ii) of para 9 of the Drugs (Prices Control) Order 1995 shall work out the price of such pack size on pro rata basis. Even in the absence of notification dated 27.01.1998, the manufacturers selling tablets in different pack sizes were required to work out the price on pro rata basis of the selling price fixed for such formulations, since

any other interpretation would defeat the purpose behind bringing the medicine under Drugs (Prices Control) Order 1995 as the manufacturers would be able to get out of the price fixed under the said order, merely by selling the medicines in a pack size different from the pack size mentioned in the notification, whereby the price of the drug is fixed.

13. It is stated in the written synopsis filed by the petitioner that the formulation being manufactured by the petitioner was different from the scheduled formulation since the petitioner was not manufacturing conventional tablets. The price of coated tablets was expressly fixed vide notification dated 09.03.1998. Admittedly, no prior approval for the price of dispersible tablet was obtained by the petitioner from the Government. Clause 8(6) of the Drugs (Prices Control) Order 1995, as extracted in the earlier part of this judgment, prohibits the manufacturers of a drug from marketing a new formulation from the existing scheduled formulation, without obtaining the prior approval of its price from the Government. The fact that the petitioner did not seek any prior approval for the price of dispersible tablets is a clear indicator that the price fixed vide notifications dated 03.09.1996 and 09.03.1998 covered dispersible tablets as well. It would be appropriate to note here that every Gramogyl tablets is a scheduled formulation, as defined in clause 2(v) of the Drugs

(Prices Control) Order 1995, since it contains bulk drugs specified in the first scheduled.

14. It is also stated in the written synopsis filed by the petitioner that NPPA has been fixing different rates for plain, coated and dispersible tablets such as Aspirin, Disprin, Ibuprofen and Paracetamol, Famotidine plain, chewable and coated variants, ranitidine, dispersible and film coated variants. Even if that be so, the remedy available to the petitioner was to seek revision of the price of dispersible tablets and it would not be correct to say that dispersible tablets were out of the purview of the notifications dated 03.09.1996 and 09.03.1998.

Issue No. 2

15. During the course of arguments, it was contended by the learned senior counsel for the petitioner that since para 14 of DPCO gives fifteen (15) days time, from the date of Notification, to the manufacturer, to carry into effect the price of a bulk drug or formulation, as the case may be, fixed by the Government, the respondent can recover, from the petitioner, only that amount which had accrued in respect of the drug sold after fifteen (15) days from the date of the relevant notification. In support of his contention the learned

senior counsel for the petitioner relied upon the decision of this Court in **Glaxo Smithkline Pharmaceuticals India Limited** 164 (2009) DLT 30 DB and the decision of the Allahabad High Court in Civil Miscellaneous Writ Petition No.33753/2009 titled **M/s TC Healthcare Pvt. Ltd. & Anr. vs. Union of India and Another**, decided on 20.4.2010. The learned counsel for the respondent, on the other hand, contended that the petitioner is liable to pay the excess amount in respect of drug sold w.e.f. fifteen (15) days from the date of the relevant notification. In support of his contention, the learned counsel for the respondent relied upon a decision of Karnataka High Court **Smithkline Beecham Pharmaceuticals (India) Ltd. vs. Union of India**, W.P. 38973 of 1998, decided on 12.11.2002. He also submitted that both, the decision of this Court in **Glaxo Smith** (supra) as well as the decision of Allahabad High Court in **T.C. Healthcare Pvt. Ltd.** (supra) have been challenged by them before the Hon'ble Supreme Court and the operations of the impugned judgments have already been stayed.

The learned senior counsel for the petitioner submitted in this regard that in terms of para 14.2 of DPCO, the manufacturer is required to display the retail price of the formulation, as notified in the Gazette, on the packing of the drug and since the manufacturer is given 15 days

time to carry the price fixed by the Government into effect, it is required to print the notified price only on the drug which is manufactured after 15 days from the date of the notification and the drug which is manufactured up to 15 days from the date of the notification can be sold by the manufacturer at any price deemed appropriate by it. The learned counsel for the respondent, on the other hand, pointed out that under clause 14.3, the manufacturer is required to issue a price list indicating reference to the price fixed by the Government and para 16 of the said order prohibits sale to any consumer at a price higher than the price specified in the price list or the price indicated on the label of the pack whichever is less. The submission of the learned counsel for the respondent was that since the manufacturer is under a legal obligation to issue a price list, containing the price of the drug fixed by the Government and after 15 days from the date of notification, the retailer cannot sell the drug at a price higher than the price so fixed by the Government, if the contention of the petitioner is accepted that would result in a situation where the manufacturer will be able to charge, from the retailer in respect of the drugs manufactured within 15 days from the date of notification, but sold after 15 days from the date of the notification, a price higher than the price fixed by the Government,

whereas the retailer will not be able to sell the same drug to the consumer at a price higher than the notified price and such a situation could never have been envisaged by the Government while issuing the Drug Price Control Order. He also submitted that if the contention of the petitioner that up to 15 days from the date of notification, they can manufacture any quantity of the drug and sell the same at uncontrolled price, even after 15 days from the date of the notification, that would partially frustrate the purpose behind fixing the price of the drug, since the purchaser even after 15 days from the date of notification may have to pay a price higher than the maximum retail price fixed under the provisions of DPCO. According to the learned counsel, the correct interpretation on a conjoint reading of the various clauses of the DPCO would be that irrespective of the date of manufacture, the manufacturer after 15 days from the date of the notification cannot sell the drug at a price higher than the price fixed under the provisions of DPCO. His contention was that immediately on issue of notification, whereby the price of a drug is fixed by the Government, the manufacturer should start indicating the price so fixed by the Government on the packing of the drug and after 15 days from the date of notification, the drug should be sold only in accordance with the price fixed by the Government. He

further contended that even if the drug manufactured before expiry of 15 days from the date of notification is lying unsold with the manufacturer, the price fixed under the provisions of DPCO should be indicated on the packing of the drug, if necessary, by affixing a slip containing notified price of the drug on the packing in which the drug is sold.

I find that in **Glaxo Smithkline** (supra), a Division Bench of this Court was called upon to decide whether the new price stipulated under DPCO 1987 would be operative in respect of all sales subsequent to 15 days from the receipt of the said order or the new price would be applicable only in respect of batches of the said drug manufactured after the said 15th day. Rejecting the contention of the respondent, the Division Bench was of the view that the manufacturer is given 15 days time to continue to manufacture the drug at old price and it is only on the 16th day that the new price becomes effective and effective batch number represents the cutoff point from the new pricing.

The Karnataka High Court in **Smithkline Beecham Pharmaceuticals (India) Ltd.** (supra), however, held that the manufacturer will be liable to sell formulations from the date of the revised price list which it is required to publish within 15 days from the date of notification, at the revised price and not the price mentioned on

the label of the container or pack. The High Court rejected the contention that the revised price will apply only to the new batches of drugs and formulations to be manufactured after 15 days of the notification.

Since I am bound by the view taken by the Division Bench in *Glaxo Smithkline Pharmaceutical Ltd.* (supra), I hold that respondent can recover from the petitioner the excess price charged by it only in respect of the drug manufactured after 15 days from the date of the relevant notification.

Issue No. 3:

Para 19(1) of DPCO, to the extent it is relevant, mandates a manufacturer to sell a formulation to a retailer at a price equal to the retail price as notified by the Government minus 16% thereof in the case of scheduled drugs. The manufacturer, therefore, does not get the whole of the retail price charged from the consumer, he gets only 84% of the said price. Clause 13 of the DPCO, to the extent it is relevant, provides that the Government shall by notice require the manufacturer to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government. Since the manufacturer is required to pay

16% as trade margin to the retailer, the amount which can be said to have accrued due to charging of a price higher than the notified price of the drug, would be only 84% of the retail price of the drug, notified by the Government. This issue came up for consideration of this Court in **Best Laboratories Pvt. Ltd. vs. Union of India** 187(2012) DLT 434 and relying upon the decision of Allahabad High Court in **TC Healthcare Pvt. Ltd. (supra)**, the following view was taken:-

10. It has not been shown by the Respondents how vis--vis the manufacturer, the overcharged amount can be calculated with reference to the printed MRP when Para 19 (1) DPCO 1995 makes it incumbent on the manufacturer or the wholesaler as the case may be to sell the product to the retailer at the retail price minus 18%. This is plain from the wording of Para 19(1) that a manufacturer, distributor or wholesaler "shall sell a formulation to a retailer" at a price "excluding excise duty, if any, as specified by an order or notified by the Government, minus sixteen percent thereof in the case of Scheduled drugs." By definition under the DPCO 1995 the "retail price" includes the ceiling price. Likewise, under Para 19(2) DPCO 1995, the central government can fix the price at which the formulation can be sold to the retailer. Mr. Ganesh pointed out that the trade margin to be provided to the retailer was determined at 8% which was exclusive of the 16% margin to be allowed to the wholesaler under Para 19(1) DPCO 1995. Merely stating, as the Respondents have in their written submissions, that the trade margin is already included in the 100% MAPE which is factored in the ceiling price

fails to explain whether in the calculation of the overcharged amount the trade margins mandated in terms of Paras 19 (1) and 19 (2) DPCO 1995 have been accounted for. The statement by the Respondents in their written submissions that: "If the manufacturers are not made to pay for the higher MRP there will be a definite attempt on the part of the manufacturers to provide higher MRP on the label with higher trade margins than permitted" is based on conjecture and fails to explain the statutory requirement of the manufacturer having to allow trade margins in terms of Paras 19 (1) and 19 (2) DPCO 1995. In fact there is no reply to the assertion by BLPL that the MRP less the mandated trade margins have alone accrued to it as the manufacturer.

11. The Respondents have also no reply to the submission that the case of BLPL stands covered by the decision of the Allahabad High Court in T.C. Healthcare. The said decision, to the extent it decides the two issues urged by BLPL, i.e. trade margin and interest under Section 7A EC Act, is not shown to have been challenged by the Union of India. Consequently, this Court is inclined to follow the reasoning adopted by the Allahabad High Court in T.C. Healthcare and hold that the impugned demand raised by the NPPA against BLPL requires to be re-worked after accounting for the trade margin allowed by BLPL to its wholesalers and retailers. It will of course be incumbent upon BLPL to demonstrate this to the satisfaction of the NPPA."

I am in full agreement with the view taken in Best Laboratories (supra) and hold that the trade margin is required to be excluded while assessing the amount recoverable from the petitioner though the onus

would be upon the petitioner to demonstrate the exact trade margin paid by it, which in any case cannot exceed 16% of the MRP of the drug.

Issue No. 4

Section 7A of the Essential Commodities Act, to the extent it is relevant, provides that where any person liable to pay any amount in pursuance of an order made under Section 3 makes any default in paying such amount or any part thereof, such amount shall be recoverable by the Government, from him, together with interest computed at the rate of 15% per annum from the date of such default to the date of recovery of such amount. The contention of the learned counsel for the petitioner is that unless a demand in terms of para 13 of the DPCO is raised by the Government, there is no default on the part of the manufacturer and consequently the interest in terms of Section 7A of the Act cannot be recovered. The learned counsel for the respondent, on the other hand, contended that since the excess price from the purchaser is charged by the manufacturer at the time of the sale of the drug, he must pay interest from the date of the sale of the drug and a contrary view would result in unjust enrichment of the manufacturer who will be able to utilize the excess money recovered from the purchaser for years together till the Government comes to know of the excess price charged

by him and sends a demand after working out the excess amount charged by the manufacturer. He further submitted that if the interest is allowed only from the date of demand, that would encourage the manufacturer to unlawfully realize excess price from the purchaser since he knows that even if he is made to pay the excess amount so recovered by him from the Government, he would be substantial gainer since he would be able to utilize, for years together, the excess amount recovered by him, without paying any interest on that amount.

This issue came up for consideration before this Court in **Best Laboratories** (supra) and the following view was taken:

“12. As regards charging interest under Section 7A EC Act, the Division Bench of the Allahabad High Court in T.C. Healthcare pointed out that the liability to pay simple interest shall arise after a default is committed in making payment of the demanded amount within the time stipulated therein. The wording of Section 7A EC Act makes it clear that the interest has to be paid in the event of default committed by the drug manufacturer in not paying the demand within time. When a fixed time is prescribed for making payment of demand, as has been done in the instant case by the impugned demand letter dated 27th November 2008 which requires BLPL to make payment by 5th December 2008, the failure to pay the amount will arise only after the expiry of that date and not earlier. In the instant case therefore interest in terms of Section 7A EC Act could have been charged only for the period after

5th December 2008. This conclusion is consistent with the decision in T.C. Healthcare and Ranbaxy Laboratories Pvt. Ltd.”

In view of the aforesaid decision, I hold that the petitioner is liable to pay interest only from the date, the excess amount was demanded for the first time.

Conclusion:-

16. For the reasons stated hereinabove, I hold that

- (i) the respondent is entitled to recover from the petitioner the excess amount charged by it on sale of Gramogyl tablets between 01.02.1998 to 31.12.1999 irrespective of whether such tablets were coated, uncoated or dispersible.;
- (ii) the respondent shall be entitled to recover the excess amount charged only in respect of the drug manufactured by it after 15 days from the date of the relevant notification;
- (iii) the respondent shall deduct the trade margin, not more than what is specified under DPCO, while working out the amount recoverable from the petitioner and;

- (iv) the petitioner shall be liable to pay interest on the excess amount charged by it only from the date the demand was raised for the first time;

17. The petitioner is granted four weeks from today to furnish complete information to the respondent in respect of Gramogyl tablets manufactured by it between 01.02.1998 to 31.12.1999 as well as the trade margins paid by it in terms of the provisions of DPCO. If the requisite information is not furnished, within four weeks from today, the respondent shall be entitled to work out the amount recoverable from the petitioner on the basis of such material as is available with it and the petitioner shall be precluded from raising any objection to the amount, so worked out by the respondent. The case of the petitioner is that since the trademark Gramogyl was transferred by it to OSCAR Pharma on 23.08.1999 and, therefore, it did not manufacture or distribute the said drug. It will be open to the petitioner to substantiate this assertion by producing relevant evidence in this regard, within four weeks from today. The revised amount shall be worked out by the respondent and conveyed to the petitioner, within 12 weeks from the date of this order.

I find that the principal amount demanded by the respondent from the petitioner was Rs 3,29,71,014/-. That amount will now have to be

re-worked by the respondent in terms of this order. The demand was raised by the respondent vide notice dated 24.02.2000. More than 13 years have expired, since the aforesaid notice was issued. The petitioner has deposited some amount pursuant to an interim order passed by this Court. Taking into consideration all the facts and circumstances of the case, I direct that the impugned demand shall remain stayed till a revised demand is worked out and conveyed to the petitioner in terms of this order, subject to the petitioner depositing a further sum of Rs 3 crore with the respondent within one week from today.

The writ petition stands disposed of accordingly. There shall be no order as to costs.

OCTOBER 21, 2013
RD/BG

V.K. JAIN, J.