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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2527 OF 1999

1. Macleods Pharmaceuticals Ltd.

A Company Incorporated under the Companies Act, 1956 and having its office at Atlanta, 3rd Floor, Churchgate, Near Leela Hotel, Andheri-Kurla Road, Andheri (East), Mumbai 400 059.

2. Govind Ruia,

of Mumbai Inhabitant having his office at Atlanta, 3rd Floor, ChurchRoad, Near Leela Hotel, Andheri -Kurla Road, Andheri (East), Mumbai – 400 059.

...Petitioners

Versus

1. The Union of India

2. The Commissioner of Central Excise

Having its office at Nav Prabhat Chambers, Ranade Road, Dadar (West), Mumbai 400 014.

3. The State of Maharashtra

4. The Commissioner of State Excise
having his office at Thane

...Respondents

Mr. Hormaz Daruwalla, with Mr. Ravi Gandhi, i/b M/s. Kanga & Co. for the Petitioners.

Mr. Jitendra B. Mishra, for Respondents Nos. 1 and 2.

Mr. A.I. Patel, AGP for Respondents Nos. 3 & 4.

**CORAM: A.S. OKA &
RIYAZ I. CHAGLA, JJ.**

JUDGMENT RESERVED ON 10TH AUGUST 2017

JUDGMENT PRONOUNCED ON 12TH SEPTEMBER 2017

O R A L J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. The issue which arises for determination in this Petition is whether formulations containing less than 135 mgs. i.e. 65 mgs of Dextropropoxyphene can be classified as 'Narcotic Drug' or 'Narcotic' within the meaning of Section 2(h) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (**"for short M & TP Act"**) and liable to State Excise Duty.

The brief facts that arise in the present case are as under :-

2. The first Petitioner is a company manufacturing Pharmaceutical formulations viz. Ibruvon Forte, Centricon and Spasmovan (in short subject formulations) under Chapter

30 of the schedule to the Central Excise Tariff Act, 1985. The second Petitioner is the Chief Executive of the first Petitioner. The Petitioners are having a factory, *inter alia*, at Palghar, Dist. Thane.

3. By a notification dated 12th June 1986, the first Respondent *inter alia*, declared Dextropropoxyphene to be a 'Narcotic Drug' for the purpose of the M & TP Act and entry No.86 was inserted, which read thus :-

“(+) – 4 – dimethylamino – 1 – 2 diphenyl – 3 – methyl – 2 – butanol propionate, (the international non-proprietary name of which is Detropoxyphene), and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except preparations for oral use containing not more than 125 milligrams of Dextropropoxyphene base per dosage unit or with a concentration of not more than 2.5 percent in undivided preparations, provided that such preparations do not contain, provided that such preparations do not contain any substance controlled under the Convention on psychotropic substances, 1971 adopted by the United Nations Conference at Vienna in February, 1971”.

4. The Petitioners had been advised that the subject formulations were liable to duty under Chapter 30 of the

Central Excise Tariff Act, 1995 and not covered by the M & TP Act 1955 since they contained 65 milligram of Dextropropoxyphene i.e. less than 135 mgs per doze under the Notification. The Petitioners had claimed the subject formulations were liable to duty under Chapter heading 30.03 of Central Excise Tariff Act, 1985 and not under the M & T P Act.

5. Respondent No.4 issued a show cause notice on 24th October 1997 calling upon the Petitioners to submit information in a form attached to the notice. The Petitioners submitted the information called for by the show cause notice on 15th December, 1997. The Respondents addressed a communication dated 17th November 1998 and claimed that the Petitioners were manufacturing the subject formulations which were Narcotic substance without permission and had committed a criminal offence. The Petitioners were called for a personal hearing on 30th November 1998 but which could not be attended by the Petitioners due to the non-availability of the concerned person. The Petitioners informed Respondent No.4 on 12th December 1998 that the subject

formulations contained only 65 mgs of Dextropropoxyphene and since the notification issued by the first Respondent provided for formulations having more than 135 mgs of Dextropropoxyphene to be classified as a narcotic substance, the subject formulations would not be covered by the definition of Narcotic under the M & TP Act.

6. The Inspector of State Excise department, Vashi on 29th December 1998 visited the factory of the Petitioners and seized the stock of the subject formulations on the ground that the Petitioners had evaded State Excise Duty and that the Superintendent of State Excise Department issued an alleged order dated 16th December 1998 which was not served upon the Petitioners. The Petitioners informed the Superintendent of Central Excise by their communications dated 5th January 1999, 3rd February 1999 and 11th February 1999 that the State Excise Authorities are demanding duty on the subject formulation under the M & TP Act and that no Central Excise Duty is payable under the Central Excise Tariff Act, 1985. The Petitioners having not

received any communication from the Central Excise Authorities filed this Petition.

7. The Petition came up for admission on 4th May 1999 when the Division Bench of this Court passed an order wherein the Petitioners were directed to pay duty at the rate of 20% to the State Government under the M & TP Act and the Petitioners were directed not to deposit any duty with the Central Excise Authorities under the Central Excise Act till the hearing of the Petition. In the event that the Petitioners were to succeed in the Petition, the State Government shall remit the amount payable by way of duty to the authorities under the Central Excise Act out of the amount deposited by the Petitioners by virtue of the said order. In so far as the duty already paid @ 15% / 16% to the Union of India under the Central Excise Act the Petitioners were to furnish particulars of the duty paid in the past under the Central Excise Act and the State Government was to find out the differential amount payable by the Petitioners, in the event it was held that the M & TP Act is applicable. This was to be intimated to the Petitioners and Petitioners were to deposit the said amount

within four weeks of the receipt of the intimation by the State Government. By a further order dated 13th February 2006 passed in a Civil Application taken out by the Petitioner, order dated 2nd February 2005, by which the Petition was dismissed for default was recalled and Rule was issued.

8. An Affidavit has been filed by one Pratapsinh Damodar Golekar, Deputy Commissioner of State Excise (Medicinal and Toilet Preparations), Maharashtra State, Mumbai dated 3rd May 1999 in Reply to the Petition. In the said Affidavit the deponent has relied upon an order of the Government of India dated 13th April 1999, which rejected a revocation application by one DWD Pharmaceuticals Ltd. and placed reliance upon a judgment of the Supreme Court in ***M/s. Baidyanath Ayurved Bhavan Ltd., Vs. Excise Commissioner, UP and Ors***¹ where it was held that mere presence of alcohol in a medicine is sufficient to make the medicine dutiable under the M & T P Act. The formulations containing less than 135 mg. Dextropropoxyphene was held to be dutiable under the M & TP Act by the said Government

1 AIR 1971 SC 378.

order. An Affidavit has also been filed in reply to the Petition by the Commissioner of Central Excise, Vasai-II, Division Thane II dated 7th November 2003, wherein it is stated that the Central Board of Excise and Customs vide their communication dated 3rd April 2000 had informed the Respondents that the commodity viz. Dextropropoxyphene was correctly dutiable under the M & TP Act. It was stated that the Petitioners ought to have claimed refund of the duty paid under the Central Excise Act and having not claimed the refund, the Petitioners claim had become time barred and they were not entitled to make any claim.

9. Mr. Daruwalla, the learned counsel appearing for the Petitioners has submitted that the above issue is no more *res integra*. This issue has been answered by the Division Bench of this Court in ***USV Limited Vs. State of Maharashtra***² paragraph 13, of which reads thus:-

13. Plain reading of the Notification dated 12th June 1986 would disclose that any medicinal preparations containing Dextropropoxyphene base per dosage unit not more than 135 mg are

² 2007 (3) Bom. C.R. 316.

excluded from being classified as narcotic drug or narcotic within the meaning of the said expression under Section 2(h) of the said Act. Once the product of the petitioners discloses Dextroropoxyphene-HCL which in terms contains Dextroropoxyphene base to the extent of 70 mg, which fact has not been disputed by the respondents at any stage of the proceedings, even in the affidavit in reply filed by them, obviously such a product would stand exempted in terms of the said notification and would not be classifiable as narcotic drug or narcotic under the said Act.

10. The said judgment of this Court has considered the notification dated 12th June 1986 and its applicability and as set out above held that the subject formulation of Dextropropoxyphene being less than 135 mg viz. 70 mg would stand exempted in terms of the said notification and not classified as a narcotic drug or narcotic under the said Act. The said judgment has also considered the Supreme Court judgment relied upon in the Central Government order dated 13th April 1999, in paragraph 15, which reads thus:

The decision of the Apex Court in (M/s Baidyanath Ayurved Bhawan Pvt. Ltd., Jhansi Vs. The Excise Commissioner, UP and Ors.), reported in AIR 1971 S.C. 378 was on totally different issue where the quantity of Dextroropoxyphene or any similar such product was not in issue. The issue in that

case was, whether the medicinal preparations contain alcohol or not. The quantity of alcohol was not subject matter to adjudicate. In the matter in hand, the quantity of Dextro-ropoxyphene is most relevant factor to decide, whether the product can be called as narcotic drug or narcotic under the said Act and as already seen above, the product of the Petitioners cannot be considered as containing narcotic drug or narcotic.

11. Mr. Daruwalla has accordingly submitted that the very same issue having already been answered by the Division Bench of this Court in favour of the Petitioner the demand of duty payable under the M & TP Act in the present case is thoroughly untenable. It was held in the said judgment that the State Government shall reimburse the Central Government regarding the liability of the Petitioners for Central Central Excise duty during the period for which the Petitioners have paid duty @ 20%. Mr. Daruwalla has submitted that in the present case the Petitioners had stopped manufacturing of the subject formulations upon the interim order dated 4th May 1999 having been passed. However, the above judgment would squarely apply in the present case and the Petitioners having suffered loss on account of the wrongful seizure of the subject formulations by

the Respondents Nos. 3 and 4, and costs should be awarded to them.

12. Mr. Patel, AGP appearing for Respondents Nos. 3 & 4 and Mr. Jitendra Mishra, learned Advocate appearing for Respondents Nos. 1 & 2 have supported the action taken by the Respondents.

13. Having heard the arguments, we are of the view that this Petition is squarely covered by the judgment of this Court in ***USV Ltd. (Supra)***. The term “Narcotic Drug” or “Narcotic” with which we are concerned with in the present case has been defined under Section 2(h) of the M & T P Act to mean a substance which is coca leaf, or coca derivative, or opium, or derivative of opium, or Indian hemp and shall include any other substance, capable of causing or producing in human beings dependence, tolerance and withdrawal syndromes and which the Central Government may, by notification in the Official Gazette, declare to be a Narcotic Drug or Narcotic. Under the notification dated 12th June 1986, issued by the Central Government in terms of the said provisions of the M

& T P Act, substances have been declared as Narcotic Drug or Narcotic. The plain reading of item No. 86 in the notification extracted above which is the relevant item in the present case a Narcotic Drug or Narcotic would include only formulations containing more than 135 mgs of Dextropropoxyphene per dosage unit. In the present case admittedly the subject formulations contain less than 135 mgs i.e. 65 mgs of Dextropropoxyphene and hence cannot be classified as a Narcotic drug or Narcotic in view of the said Notification.

14. We accordingly hold and declare that the subject formulations of the Petitioners containing less than 135 mgs i.e. 65 mgs of Dextropropoxyphene are excluded from being classified as a Narcotic Drug under the Section 2(h) of the M & T P Act. We find that the view taken by the Respondents viz. that the Petitioners are liable to the State Excise Duty under the M & T P Act is thoroughly untenable and we quash the impugned demand notices.

15. We direct the Respondents to pay the Petitioners costs of Rs. 50,000/- for the loss caused to the Petitioners on account of the wrongful seizure of the subject formulations. The Petitioners are permitted to withdraw the amount deposited with the Registry pursuant to the interim order dated 4th May 1999 together with interest, if any, accrued thereon.

16. Rule is made absolute in the above terms.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J.)