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

Date of Decision : 06.02.2020

+ W.P.(C) 1586/2016

M/S OBSURGE BIOTECH LTD. ..... Petitioner
Through: Mr.Udit Chauhan, Mr.A.P.Arora, Advs.

versus

UNION OF INDIA & ANR. ..... Respondents
Through: Mr.Akshay Makhija, CGSC with Ms.Kirti Awasthi, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed by the petitioner challenging the three demand notices all dated 23.09.2015, issued under paragraph 20 of the Drugs (Prices Control) Order, 2013 (hereinafter referred to as "DPCO") with respect to Ultracid suspension, Venosuf capsule and Kulfi Syrup manufactured by the petitioner.

2. As common questions of fact and law are involved regarding the interpretation to be placed to paragraph-20 of the DPCO, the facts in relation to Ultracid suspension are being taken note of to explain the contour of the disputes.

3. It is an admitted case of the parties that for the said drug, the petitioner was charging a Maximum Retail Price (MRP) of Rs.89.90 till February, 2014. It is further admitted that in terms of paragraph-20 of the DPCO, the petitioner was entitled to a 10% increase in the MRP with effect from March, 2014. The controversy arose because the petitioner increased its MRP to Rs.99/- in March, 2014. This increase is justified by the petitioner placing reliance on the minutes of the 160th and 28th meeting of the Authority under the DPCO held on 12.04.2016. The relevant paragraph of the same is reproduced hereinbelow:

> *"**Agenda item no 5(ii):- Overcharging on account of fixation of ceiling price for formulation upto two decimal points based on WPI of preceding financial years.***
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> *5.2 The agenda point was discussed. It was decided that NPPA would not pursue those overcharging cases which arose out of purely mathematical calculation due to rounding off of decimal points as per the general mathematical practice and no other malafide intention on the part of the company was evident."*

4. The learned counsel for the petitioner, placing reliance on the above Minutes of Meeting submits that as 10% increase would have made the petitioner entitled to MRP of Rs.98.89, on rounding of, MRP of Rs.99/- was fixed and is permissible. While the learned counsel for the respondents contends that the Minutes of Meeting applied only to the 'Schedule Formulation' as defined in paragraph 2 (zb) of the DPCO.

5. The second limb of dispute between the parties is that while the petitioner claims that in March, 2015, the petitioner would again be entitled to a 10% increase in the MRP, the respondents contend that the petitioner having unlawfully availed of an increase in MRP beyond the permissible limit of 10% in the March 2014, would not be entitled to the benefit of the 10% increase in the subsequent year. To put it differently, the petitioner claims that it would be entitled to an increase of 10% in the MRP over and above Rs.98.89 as determined for March, 2014, whereas the respondents contend that such increase will not be permitted as the petitioner had increased the MRP to more than Rs.98.89 in March, 2014.

6. To answer the above questions, it is essential to note paragraph 20 of the DPCO and the same is reproduced herienbelow:

> *"**20. Monitoring the prices of non-scheduled formulations:-***
>
> *(1) The Government shall monitor the maximum retail prices (MRPs) of all the drugs, including the non-scheduled formulations and ensure that no manufacturer increases the maximum retail price of a drug more than ten percent of maximum retail price during preceding twelve months and where the increase is beyond ten percent of maximum retail price, it shall reduce the same to the level of ten percent of maximum retail price for next twelve months.*

(2) The manufacturer shall be liable to deposit the overcharged amount along with interest thereon from the date of increase in price in addition to the penalty."

(Emphasis Supplied)

7. A reading of the above provision would clearly show that a manufacturer is entitled to increase the maximum retail price of a drug not more than 10% of the maximum retail price during 'preceding' twelve months. It further provides that where the manufacturer of a drug increases the price beyond 10% of the maximum retail price, 'it shall reduce the same to the level of 10% of maximum retail price for next twelve months.' The paragraph uses the word 'preceding' and 'next' and clearly, therefore, what is intended is that where the manufacturer increases the MRP by more than 10%, the Government is empowered to ensure that the manufacturer reduces the MRP to the level of maximum 10%.

8. The consequence of a manufacturer having increased the MRP and having obtained certain amounts because of the same from the consumers is in the sub paragraph-(2) of paragraph 20, wherein the manufacturer is being made liable to deposit the overcharged amount along with interest thereon from the date of increase in price in addition to the 'penalty'.

9. Clearly by denying the petitioner increase in the MRP which he is otherwise entitled to, would amount to a penalty

being imposed even in paragraph 20 (1), which does not flow from a bare reading of the provision nor intended.

10. Paragraph 20(1) of the DPCO in no unambiguous terms provide that a manufacturer would be entitled to increase the MRP of the drug by a maximum of 10% of the MRP during the 'preceding' twelve months and incase the manufacturer is found to have increased the MRP beyond the limit of 10%, the Government would be entitled to direct reduction of the same to the level of 10% for the period of next twelve months from the date when the manufacturer became entitled to such increase.

11. To put it differently and explaining it by an example, if the MRP of a drug is Rs.100 for the period from 2013-14, the manufacturer would be entitled to increase the MRP of the drug to a maximum of Rs.110 for the period 2014-15 and incase it is found that the manufacturer has increased the MRP beyond the ceiling limit, the Government can direct the manufacturer to reduce the MRP to the level of Rs.110 for the period 2014-15 whereafter again, the manufacturer will be entitled to increase the MRP of the drug by a maximum of another 10% of Rs.110.

12. The learned counsel for the petitioner, in fact, relying upon the reply dated 23.11.2015 received from the respondents under the Right to Information Act, 2005 submits that the respondents do not impose any penalty even under paragraph 20(2) of the DPCO as in its opinion, the same does not provide

any penalty amount and does not specify the factors to be taken into consideration for calculating the penalty.

13. I need not consider the above submission as in any case, the case of the respondents is not that it has disallowed the petitioner the subsequent increase of MRP by exercising its powers under paragraph-20(2) of the DPCO. Therefore, the said question would not be relevant in the present case.

14. As far as the rounding up of the MRP is concerned, the submission of the learned counsel for the respondents cannot be accepted.

15. A reading of the DPCO would clearly show that the same, in fact, is intended to regulate the pricing of the essential drugs. The same is also evident from the 'National Pharmaceuticals Pricing Policy, 2012'. The objectives of the Policy are stated as under:

> *"**2. <u>OBJECTIVES OF THE PRESENT POLICY</u>***
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> *As stated above in its present form, the Drug Policy of 1994 needs to be modified in the context of changed global environment for industry as well required changes in the mechanism to make available essential medicines to the masses. The objective is to put in place a regulatory framework for pricing of drugs so as to ensure availability of required medicines - "essential medicines" – at reasonable prices even while providing sufficient opportunity for innovation and*

competition to support the growth of industry, thereby meeting the goals of employment and shared economic well being for all. The reasons are further elaborated later in the Policy Document."

16. The drugs that have been placed in the National List of Essential Medicines (NLEM) have been incorporated by the respondents in form of the Schedule to the DPCO. The pricing of such drugs is regulated and, in fact, fixed under the control price regime under the DPCO. For the Non-Schedule Formulation, paragraph 20 allows the manufacturers of drugs to fix the MRP based on the market conditions, however, such prices are to be monitored by the Government and the only condition imposed is that the increase in the MRP should not be more than 10%. Therefore, keeping in view the objective of the DPCO and the Policy, it cannot be accepted that the decision taken in the meeting as referred hereinabove would be confined only to the Schedule Formulations. If the Schedule Formulations would be entitled to round of the pricing to the next whole number, then the same benefit cannot be denied to a Non-Schedule Formulation who, otherwise, are allowed liberty to fix the MRP keeping in view the market conditions. Such interpretation, therefore, would be absurd and is to be avoided.

17. Even otherwise, the Minutes of Meeting reproduced hereinabove are for determination of 'ceiling price' for 'formulation'. 'Ceiling price' is also determined in paragraph 20(1) of the DPCO and the Non-Schedule Formulation is also a

'formulation' under the meaning of the terms in the DPCO. Therefore, there is absolutely no justification for excluding the Non-Schedule Formulations from the scope of the decision taken in the meeting and was, in fact, never so intended.

18. In view of the above, the Impugned Demand Notices cannot be sustained and are set aside, leaving it open to the respondents, if so advised, to re-initiate an enquiry based on the observations as laid down by the present judgment.

19. The amount deposited by the petitioner pursuant to the Impugned Demand Notices shall be refunded to the petitioner within four weeks from today.

20. The petition is allowed in the above terms. There is no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 06, 2020
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