IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.08.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.A.No.2236 of 2019

M/s.Nandini Medical Laboratories
Private Limited,
No.221/5, Bicholi Hapsi Kanadia Road,
Indore, Madhya Pradesh – 452 016. ... Appellant / Petitioner

Vs.

M/s.Tamil Nadu Medical Services
Corporation Limited,
Represented by its Managing Director,
No.417, Pantheon Road,
Egmore, Chennai – 600 008. ... Respondent / Respondent

Prayer: Appeal under Clause 15 of the Letters Patent, against the order dated 22.04.2019 passed in W.P.No.33465 of 2006.

For Appellant : Mr.N.Viswamathan

For Respondent : Mr.K.Balamurali
for M/s.Shivakumar and Suresh

JUDGMENT

(Judgment of the Court was delivered by **C.SARAVANAN, J.**)

The appellant has filed this Writ Appeal against the order dated 22.04.2019 passed by the Writ Court in W.P.No.33465 of 2006 (hereinafter referred to as the impugned order).

2. By the impugned order dated 22.04.2019, the Writ Court had dismissed the above Writ Petition filed by the appellant herein.

3. In the said Writ Petition, the appellant/petitioner had challenged the proceedings of the respondent dated 10.10.2005 bearing Ref.No.10586/TNMSC/CS/2005 and to direct the respondent to pay the appellant/petitioner a sum of Rs.13,11,074/- together with interest at 18% per annum, which amount was deducted towards unpaid Excise Duty.

4. The facts of the case are that the appellant/petitioner is engaged in manufacture of drugs and had participated in a tender floated by the respondent herein. The appellant/petitioner was declared as the successful bidder. A contract was awarded to the appellant/petitioner to supply drugs as specified in

the contract at the rates prescribed therein. As a condition of the Tender Document/Contract, the appellant/petitioner was bound by the following clauses:-

Clause 14	Clause 19
Rates inclusive of Excise Duty, transportation, insurance, and any incidental charges, but exclusive of Sales Tax should be quoted for each of the required drugs, medicines etc., separately on door delivery basis according to the unit asked for. Tender for the supply of drugs, medicines etc., with conditions like "AT CURRENT MARKET RATES" shall not be accepted. Handling, clearing, transport charges etc., will not be paid. The deliveries should be made as stipulated in the purchase order placed with successful tenderers.	If at any time during the period of contract, the price of tendered items is reduced or brought down by any law or Act of the Central or State Government or by the tenderer himself, the tenderer shall be morally and statutorily bound to inform the Managing Director, TNMSC Limited, Chennai, immediately about such reduction in the contracted prices. The Managing Director, Tamil Nadu Medical Services Corporation Limited, Chennai, is empowered to unilaterally effect such reduction as is necessary in rates in case the tenderer fails to notify or fails to agree for such reduction of rates. In case of any enhancement in Excise Duty due to statutory Act of the Government after the date of submission of tenders and during the tender period, the quantum of additional Excise Duty so levied will be allowed to be charged extra as separate item without any change in price structure of the Drugs approved under the tender. For claiming the additional cost on account of the increase in

Clause 14	Clause 19
	Excise Duty, the tenderer should produce a letter from the concerned excise authorities for having paid additional Excise Duty on the goods supplied to TNMSC and also must claim the same in the invoice.”

5. The appellant/petitioner being a Small Scale Industry (SSI), had availed the benefit of Value Based Exemption under Exemption Notification No.8/2003-CE dated 01.03.2003 and thus had supplied the drugs to the respondent without payment of excise duty. The rate quoted by the appellant/petitioner was inclusive of excise duty.

6. The respondent referred to Clauses 14 and 19 of Tender Document/Contract mentioned above and proceeded to pass an order dated 10.10.2005 whereby, the request of the appellant/petitioner for refund of the amount deducted by the respondent towards excise duty was rejected with the following observations:-

> “TNMSC at the time of processing the bills for payment, it was found that the drug supplied by you have not incurred excise, but TNMSC has deducted the sum of excise as quoted in the price structure of the tender documents. We would like to mention the condition in the tender document in Clause 19, which is reproduced

below:

> "19. If at any time during the period of contract, the price of tendered items is reduced or brought down by any law or Act of the Central or State Government or by the tenderer himself, the tenderer shall be morally and statutorily bound to inform the Managing Director, TNMSC Limited, Chennai, immediately about such reduction in the contracted prices. The Managing Director, Tamil Nadu Medical Services Corporation Limited, Chennai, is empowered to unilaterally effect such reduction as is necessary in rates in case the tenderer fails to notify or fails to agree for such reduction of rates."

In view of the above, TNMSC is not in a position to process the bill with excise duty, which has not been actually incurred by you, but claimed in the commercial invoices and hence your request for refund of Excise Duty will not be considered by us for the reasons stated above."

7. The case of the appellant/petitioner is that the appellant/petitioner has purchased several inputs in the manufacture of final products/final goods and had suffered excise duty as also additional duty of customs paid under the Customs Tariff Act, 1975 on which, no Input Tax Credit was availed. Thus, the appellant/petitioner has been subjected to a loss on account of recovery made by the respondent.

8. The further case of the appellant/petitioner is that although the appellant/petitioner had not paid excise duty on the drugs manufactured and

cleared to the respondent under the tender floated by the respondent since the appellant/petitioner availed the benefit of Value Based Exemption under Exemption Notification No.8/2003-CE dated 01.03.2003, the appellant/petitioner had borne the incidence of excise duty and additional duty of customs paid under the Customs Tariff Act, 1975 on various inputs and therefore, the price quoted was inclusive of the excise duty component on various inputs which would go into the cost of the drugs manufactured and supplied to the respondent.

9. It is therefore submitted that there was no justification in deducting an amount of **Rs.13,11,074/-** by invoking to Clause 19 of the Tender Document/Contract as extracted above.

10. Learned counsel for the appellant would submit that the learned single Judge of this Court also committed grave error while passing the impugned order. Learned counsel for the appellant has also filed copies of 5 sample invoices raised in the month of July 2005.

11. On the other hand, learned counsel for the respondent would submit that the impugned order dated 22.04.2019 of the learned single Judge of this

Court upholding the impugned order of the respondent dated 10.10.2005 does not warrant any interference. It is submitted that the impugned order is well reasoned and therefore does not call for any interference.

12. It is submitted that in the affidavit filed in support of the writ petition itself, the appellant/petitioner has categorically admitted that no excise duty was paid by the appellant/petitioner on the final products/final goods and therefore, invocation of Clause 19 of the Tender Document/Contract cannot be found fault with. It is submitted that the appellant/petitioner is attempting to get unjust profit and thus unjust enrichment. Hence, prays for dismissal of the writ appeal.

13. By way of rejoinder, the learned counsel for the appellant would submit that since no duty was paid, there is no question of unjust enrichment. It is further submitted that even if excise duty was to be paid, part of the tax liability would have been discharged out of the Input Tax Credit availed under the provisions of the CENVAT Rules, 2004 and thus, there should be a restriction.

14. Learned counsel for the appellant would further submit that the

respondent invited tender for supply of veterinary drugs and medicines for the year 2004-2005. The appellant/petitioner participated in the tender and was successful in getting orders for supply of various items of veterinary drugs and medicines. As per Clause 14 of the Tender Document/Contract, the appellant/petitioner submitted the tender and quoted the rates inclusive Excise Duty etc. Accepting the same, the respondent has given contract to the appellant/petitioner. Thereafter, taking advantage of Clause 19 of the Tender Document/Contract, the respondent has deducted the amount claimed towards excise.

15. Learned counsel for the appellant would further submit that exemption under Notification No.8/2003-CE dated 01.03.2003 was given to manufacturers having clearance not exceeding Rs.3,00,00,000/- in the preceding financial year and not availing CENVAT scheme up to an aggregate value of clearances of Rs.1,00,00,000/-. He would further submit that in the absence of any provision extending the benefit to the consumers or purchasers, the respondent is not entitled to withhold the amount which represents the excise duties for drugs on the ground that the appellant/petitioner did not pay the excise duty. It is submitted that if at all the goods have been exempted from excise duty, then only the respondent can claim that there was reduction in the

price.

16. However, the notification does not exempt the goods from levy of excise duty and only gives benefit to the manufacturer up to clearance of Rs.1,00,00,000/- of total value of clearance if the total value of clearance during the preceding financial year was below Rs.3,00,00,000/-. It is therefore submitted that under the circumstances, the benefit given by the Central Excise Department to the appellant/petitioner cannot be denied by the respondent by deducting the duty amount of bills for the supplies received by them.

17. Learned counsel for the appellant would submit that the respondent having accepted the rates quoted by the appellant/petitioner and the exemption in Notification No.8/2003-CE dated 01.03.2003 does not amount to reduction in price, the respondent is bound to pay the full amount as per the bill. He would further submit that the respondent has no right to deduct any amount on the ground that the excise duty was not enclosed. He would further submit that the deduction of excise duty is straight loss to the appellant/petitioner as the inputs of finished goods already suffered excise duty which is non-refundable from the Excise Department. In the circumstances, the respondent is not entitled to deduct any amount claimed by the appellant/petitioner towards

excise duty and the respondent is duty bound to pay the total sum of **Rs.13,11,074/-**, deducted out of bills payable to the appellant/petitioner. The respondent is also liable to pay interest at 18% per annum.

18. We have considered the arguments advanced by the learned counsel for the appellant and the learned counsel for the respondent.

19. As mentioned above, the quotation of the appellant/petitioner was inclusive of excise duty. Admittedly, in this case, the appellant/petitioner has neither discharged excise duty liability nor has passed on the incidence of the excise duty, as the appellant/petitioner opted to avail the benefit of Exemption Notification No.8/2003-CE dated 01.03.2003. At the same time, it is quite possible that the appellant/petitioner would have borne the incidence of excise duty on the inputs including packing materials used by the appellant/petitioner for manufacturing and packing drugs sold to the respondent under the tender.

20. If the appellant/petitioner had crossed the threshold limit under the above notification during the period in dispute, incidence of excise duty would have been passed on to the respondent, in which case, the appellant/petitioner would have been entitled to set off part of the Input Tax Credit for discharging

tax liability. To that extent, the cash outflow from the appellant/petitioner would have been restricted, if excise duty was payable by the appellant/petitioner.

21. The Hon'ble Supreme Court in **Collector of Central Excise, Pune and others** Vs. **Dai Ichi Karkaria Limited and others**, (1999) 7 SCC 448, while dealing with valuation of “excisable goods” under Section 4 of the Central Excise Act, 1944 and the Rules made thereunder, has explained the concept of Modified Value Added Tax (MODVAT) credit as it stood then under the Central Excise Rules, 1944 which was later renamed as Central Value Added Tax (CENVAT) with the advent of CENVAT Credit Rules, 2001 which was replaced by CENVAT Credit Rules, 2002 and later by CENVAT Credit Rules, 2004. The Court referred to the extract from a Compendium of Guidance Notes of the Institute of Chartered Accountants as revised up to 31.03.1990 in the context of valuation of excisable goods.

22. Relevant portion from the said Judgment reads as under:-

> ***“24. The learned Attorney General referred to an extract from a compendium of Guidance Notes of the said Institute as revised up to 31-3-1990. It states:***
>
> ***“****Where excise duty is paid on excisable goods and*

such goods are subsequently utilised in the manufacturing process the ***duty paid on such goods becomes a manufacturing cost and must be included in the valuation of work in progress or finished goods arising from the subsequent processing of such goods."***

It is not clear whether this Guidance Note was issued in relation to excise duty paid on an input under the MODVAT Scheme.

25. We think it is appropriate that the cost of the excisable product for the purposes of assessment of excise duty under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules should be reckoned as it would be reckoned by a man of commerce. We think that such realism must inform the meaning that the courts give to words of a commercial nature, like cost, which are not defined in the statutes which use them. A man of commerce would, in our view, look at the matter thus:

> ***"****I paid Rs.100/- to the seller of the raw material as the price thereof. The seller of the raw material had paid Rs.10/- as the excise duty thereon. Consequent upon purchasing the raw material and by virtue of the MODVAT Scheme,* ***I have become entitled to the credit of Rs.10/- with the Excise Authorities and can utilise this credit when I pay excise duty on my finished product****. The real cost of the raw material (exclusive of freight, insurance and the like) to me is, therefore, Rs.90/-. In reckoning the cost of the final product I would include Rs.90/- on this account****."***

This, in real terms, is the cost of the raw material (exclusive of freight, insurance and the like) and it is this, in our view, which should properly be included in computing the cost of the excisable product.

26. The view we take about the cost of the raw material is borne out by the Guidance Note of the Indian Institute of

Chartered Accountants, and there can be no doubt that this Institute is an authoritative body in the matter of laying down accountancy standards.

27. To answer the question involved in these appeals, in determining the cost of an excisable product covered by the MODVAT Scheme under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules the excise duty paid on raw material also covered by the MODVAT Scheme is not to be included."

23. If the appellant/petitioner was liable to pay tax, the appellant/petitioner would have been entitled to neutralize the incidence of duty borne on the inputs by way of CENVAT credit under the provisions of the CENVAT Credit Rules, 2004.

24. In this case, since the appellant/petitioner had availed the benefit of the Value Based Exemption under Exemption Notification No.8/2003-CE dated 01.03.2003, the appellant/petitioner therefore could not have availed CENVAT credit under the CENVAT Credit Rules, 2004 on the duty borne on inputs which were utilized in the manufacture of the final products viz., drugs cleared to the respondent.

25. The respondent has recovered a sum of **Rs.13,11,074/-** from the appellant/petitioner by treating the invoiced amount as Cum Duty Value. Since

the aforesaid amount has been recovered from the appellant/petitioner, the proportionate Input Tax Credit albeit CENVAT credit value borne on inputs has to be naturally reduced from **Rs.13,11,074/-** recovered purportedly in terms of Clause 19 of the Tender Document/Contract.

26. The value of the Input Tax Credit, which the appellant/petitioner could not avail and legitimately pass on its incidence to the respondent is to be reduced from **Rs.13,11,074/-**, deducted from the appellant/petitioner.

27. Therefore, we inclined to come to a decision that retention of the entire amount of the excise duty component without reducing the excise duty borne on inputs would be unfair as admittedly the cash outflow on account of the excise duty component on inputs would be the net off the CENVAT credit available on the inputs used in the manufacture of the final products/final goods namely the drugs supplied to the respondent.

28. If required, the appellant/petitioner may furnish a Cost Accountant's/Chartered Accountant's Certificate duly certifying duty paid on inputs which would have been available as CENVAT credit, as the appellant/petitioner was not entitled to avail the benefit of Exemption

Notification No.8/2003-CE dated 01.03.2003 and was liable to pay excise duty.

29. To the extent, the excise duty and additional duty of customs were borne on various inputs which would have been otherwise eligible as CENVAT credit are to be reduced from the aforesaid deduction made. Therefore, we set aside the impugned order dated 22.04.2019 passed by the respondent and remit the case back to the respondent to pass a fresh order.

30. This Writ Appeal stands disposed with the above observations. No costs.

[R.S.K., J.] **[C.S.N., J.]**

21.08.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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To

M/s.Tamil Nadu Medical Services
Corporation Limited,
Represented by its Managing Director,
No.417, Pantheon Road,
Egmore, Chennai – 600 008.

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