
(2015) 07 SC CK 0050
In the Supreme Court Of India
Case No : C.A. Nos. 465-466 of 2006

Biochem Pharmaceuticals Ind. Ltd.

APPELLANT

Vs

Commissioner of Central Excise, Daman, Vapi

RESPONDENT

Date of Decision : 31-07-2015

Acts Referred:

Central Excise (Valuation) Act — Section 4, 4(1)

Central Excise (Valuation) Rules, 1975 — Rule 11, Rule 3, Rule 4, Rule 5, Rule 6

Citation : (2015) 322 ELT 808 : (2015) 8 SCALE 612

Hon'ble Judges : A.K. Sikri, J; Rohinton Fali Nariman, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The Appellant herein is a Pharmaceutical Company which manufactures various kinds of medicines. Apart from selling the medicines in the market, some medicines are distributed to the physicians as samples for which the Appellant is not charging any amount from those physicians. To put it otherwise, these are distributed free to the physicians. The question which has arisen in the present appeals is the valuation of these samples. We may mention at the outset that even when these samples are distributed free to the physicians, they are exigible to the excise duty. These issues have already been settled by various judgments of this Court, the latest one being Medley Pharmaceuticals Ltd. Vs. The Commissioner of Central Excise and Customs, Daman, (2011) 186 ECR 18 : (2011) 2 JT 53 : (2011) 1 RCR(Civil) 888 : (2011) 1 SCALE 480 : (2011) 2 SCC 601 : (2011) 1 SCR 741 : (2011) 1 UJ 298 : (2011) AIRSCW 757 . Because of this reason Mr. Lakshmikumaran, Learned Counsel appearing for the Appellant, rested his arguments on another aspect altogether i.e. pertaining to the cost of the samples. He submitted, in the first instance, that even if these are exigible to excise duty, these samples have to be treated at zero cost because of the reason that the cost of manufacturing of these samples is already taken into account and added in the manufacture of those medicines which are sold in the open market. We find that this argument also does not have any merit as identical

argument was rejected by this Court in *Bharat Heavy Electricals Ltd. Vs. Commissioner of Cus. and C. Ex., Indore*, (2003) 88 ECC 10 : (2003) 154 ELT 10 : (2003) 9 SCC 185 .

2. The only question is as to whether the valuation has to be pro rata or on the cost basis. We may point out at the outset that in the case of *Medley Pharmaceuticals Ltd. Vs. The Commissioner of Central Excise and Customs, Daman*, (2011) 186 ECR 18 : (2011) 2 JT 53 : (2011) 1 RCR(Civil) 888 : (2011) 1 SCALE 480 : (2011) 2 SCC 601 : (2011) 1 SCR 741 : (2011) 1 UJ 298 : (2011) AIRSCW 757 this Court has opined that it is to be on pro rata basis. The discussion goes, somewhat, like this:

"Now, coming to the valuation of the physicians" samples for the purpose of levy of excise duty, in our view, this issue need not detain us long in view of the decision of this Court in *CCE v. Bal Pharma Ltd.* This Court has upheld the conclusion of the Tribunal that the physicians" samples have to be valued on pro rata basis. The Tribunal, while arriving at the aforesaid conclusion, had relied upon its earlier decision in *CCE, Calicut v. Trinity Pharmaceuticals (P) Ltd.* which has been accepted by the Department. Therefore, we hold that physicians samples have to be valued on pro rata basis for the relevant period."

3. Mr. Lakshmikumaran, Learned Counsel pointed out that while arriving at the aforesaid conclusion, the Court took into consideration its decision in *Bal Pharmaceutical Ltd.* He took us through the judgment of *Bal Pharmaceutical*. A perusal thereof would demonstrate that there were two sets of appeals which were decided in -the said decision. In the first set of appeals the Court took note of the Tribunal's judgment in *CCE, Calicut v. Trinity Pharmaceuticals P. Ltd.* (2005 (188) ELT 42 (Tri)) and with the observations that the said decision of the Tribunal was accepted by the Revenue, appeal of the Revenue was dismissed. There is no discussion of the Tribunal's decision in *Trinity* case. Because of this reason he took us to the judgment of the Tribunal in *Trinity Pharmaceuticals Pvt. Ltd.* and pointed out that in that case the Tribunal had adopted cost method and not pro rata method. Therefore some clarification on legal aspect is required.

4. Since provisions of Section 4(i)(a) are not applicable, as per Clause (b) of Sub-section (1) of Section 4, the valuation has to be determined as prescribed in the Rules, namely, Central Excise (Valuation) Rules, 1975. It is an admitted case that Rules 3 to 5 have no application in such a case Rule 6(a) & (b) reads as under:

"RULE 6. If the value of the excisable goods under assessment cannot be determined Under Rule 4 or Rule 5, and-(a) where such goods are sold by the Assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the Assessee would have sold such goods in the course of wholesale trade to a person other than a related person:

Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other

relevant factors;

(b) where the excisable goods are not sold by the Assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based-

(i) on the value of the comparable goods produced or manufactured by the Assessee or by any other Assessee:

Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

(ii) if the value cannot be determined under Sub-clause (i), on the cost of production or manufacture including profits, if any, which the Assessee would have normally earned on the sale of such goods."

5. Even Rule 6 does not apply as that Rule is applicable only in those cases where such goods are either sold by the Assessee in retail or are used or consumed by him or on his behalf in the production or manufacture of other articles. In this scenario Rule 7 becomes applicable. As per which proper officer is to determine the value of such goods according to the best of the judgment. This Rule further mentions that for arriving on the best of his judgment he may have regard "among other things" to any one or more of the methods provided for in the earlier rules, namely, Rules 3 to 6. Rule 7 is as under:

"RULE 7. if the value of excisable goods cannot be determined under the foregoing rules, the proper officer shall determine the value of such goods according to the best of his judgment, and for this purpose he may have regard, among other things, to any one or more of the methods provided for in the foregoing rules."

6. Thus, to arrive at valuation under this Rule, the proper officer may adopt the principles contained in Rule 6(b). Rule 6(b) deals with two methods:

"(1) In case these are comparable goods, the value of comparable goods produced or manufactured by the Assessee, can be the basis and thus pro rata method can be applied:

(2) In case aforesaid method can't be applied, then the second method can be resorted to viz. cost of production or manufacture including profits, if any, which the Assessee would have normally earned on sale of goods."

7. In these cases the physicians' samples which are given free of cost are clearly comparable with the goods that are manufactured by the Assessee and sold in the market as the two goods are identical. In fact out of the same lot manufactured some are distributed as samples. Therefore, even while exercising his power Under Rule 7 the proper officer can choose any of the aforesaid two methods prescribed in Rule 6(b) of the Rules. No doubt it is the discretion of the

proper officer to determine the value as it is his best judgment which he has to exercise. However, the Rule also mentions that while exercising his best judgment, he has option to give regard to any of the methods, prescribed in the earlier rules. The words "among other things would indicate that regard can be to other material also which is produced. Thus while exercising his discretion as to which method is most suitable in a given situation, the proper officer will have to look into entire relevant material furnished before him.

8. At this stage, some subsequent developments that have taken place in these appeals may be taken note of. Insofar as appeal No. 1273/2004 before CESTAT is concerned, the Appellant had filed the rectification application taking the ground of limitation with the submission that the show cause notice dated 11.2.2000 issued in the said case, which covered the period from April 1998 to March 2000 and submission was the period from April 1998 to 30th November 1999. was time barred. This rectification application was allowed by the Tribunal vide order dated 4.1.2001 and the matter was remanded back to the Commissioner to decide the issue of limitation. We are informed by the Learned Counsel for the Revenue, on instructions that after remand, the Commissioner has decided the issue of limitation in favour of the Assessee thereby holding that the demand from the period from April 1998 to till November 1999 was time barred. Thus, the only period for which the duty is payable under the aforesaid show cause notice is from December 1999 to March 2000.

9. Other appeal No. 3657/2004 before CESTAT covered the following period in three show cause notices as under:

- "1. April 2000 to March 2001;
- 2. April 2001 to November 2001;
- 3. December 2001 to November 2002"

10. In these cases also, rectification application was filed by the Assessee on the ground that CESTAT overlooked the fact that part of the demand is for the period after 1.7.2000. This plea of the Assessee has been accepted by the CESTAT vide its order dated 4.1.2006 thereby allowing the appeal partly. In the circular dated 1.7.2002 some of the points of dispute have been clarified. Doubt No. 13 with which we are concerned, and the clarification thereto reads as under:

11. It is clear from the above that the CESTAT has accepted that the method of valuation would be "cost of production or manufacture of the goods". To this extent the grievance of the appellant herein stands redressed.

12. The aforesaid developments would show that the question of valuation in respect of which excise duty is payable in terms of the impugned judgment is now limited to the period December 1999 to March 2000.

13. Insofar as the present case is concerned, since substantial relief is already granted to the Appellant in the rectification orders passed by the CESTAT. it is not

necessary to deal with the remaining period which shall be covered the order passed by the Tribunal in the instant case. The appeals are disposed of in the above terms.