
(2015) 10 SC CK 0111

In the Supreme Court Of India

Case No : Civil Appeal Nos. 3742-3744 of 2007 and C.A. Nos. 6984 of 2009, 9876-9878 of 2013, 1990-1992, 3338 of 2012, 268-269 of 2015, 6571-6575 of 2015, 3387-3389 of 2005, 2431-2432 of 2008 and 3263 of 2009

Commissioner of C. Ex. and Cus.

APPELLANT

Vs

Sun Pharmaceuticals Inds. Ltd.

RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

Central Excise (Valuation) Rules, 1975 — Rule 6

Central Excises and Salt Act, 1944 — Section 3(2), 4, 4(1)

Citation : (2015) 326 ELT 3

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : A.K. Panda, V. Sridharan and Vikram S. Nankani, Sr. Advocates, Zoheb Hossain, Aruna Gupta, B. Krishna Prasad, Alok Yadav, Somnath Shukla, Udit Jain, Praveen Kumar, Kedar Nath Tripathy, M.P. Devanath, Hemant Bajaj, Aditya Bhattacharya, Anandh K., T.D. Sati

Final Decision : Disposed Of

Judgement

Civil Appeal Nos. 3742-3744 of 2007; Civil Appeal No. 3263 of 2009:

1. In these two sets of appeals, the Assessee is M/s. Sun Pharmaceuticals Industries Limited (SPIL). Though the issue involved is identical, as would be noted (hereinafter, the Customs, Excise and Service Tax Appellate Tribunal hereinafter referred to as "CESTAT") has rendered conflicting decisions which is precisely the reason that one appeal is filed by the Revenue against the judgment dated 10-11-2006 passed by the CESTAT, West Zonal Bench, Ahmedabad, and the other appeal is filed by the Assessee-respondent which challenges the judgment dated 27-2-2009 passed by the same West Zone Bench, Ahmedabad of the CESTAT [2009 (245) E.L.T. 749 (Tri.-Ahmd.)]. The dispute pertains to the "transaction value" that is to be fixed in respect of goods sold by the SPIL to its distributors as physician samples. It is not in dispute that insofar

as the Assessee is concerned, it is selling these physician samples to its distributors for a price. However, since these are physician samples, the distributors in turn, supplied these samples to the physicians free of cost. Apart from above, the Assessee is also selling the goods in market which are for further sale to the ultimate consumers and are known as "trade pack". The price at which the goods of the later category are sold is higher than the price at which physician samples are sold. It is because of this reason that various show cause notices were issued to the Assessee, inter alia, stating that officers had found that the Assessee had manufactured trade pack as well as physician sample pack products and sold at different prices. It was alleged in the show cause notice that since these physician samples were cleared for free distribution and not sold within the meaning of Clause (a) of Sub-section (1) of Section 4 of the Central Excise Act, 1944 (hereinafter referred to as "Act") (as no consideration was involved), therefore, the value was required to be maintained as per Clause (b) of Sub-section (1) of Section 4 of the said Act. Thus, bringing the case out of Section 4(1)(a) of the Act and putting it under Clause (b) thereof. A reference was made to the Central Excise Valuation Rules, 1975 (hereinafter referred to as "Rules"). In the show cause notice, thus, provisions of Rule 6(b) of the Rules was sought to be applied and on that basis, it was proposed to have the same value at which the trade pack goods were sold. In the reply given by the Assessee, the Assessee contented that the difference in the price of trade pack and physician sample pack was due to the fact that the physician sample pack were for free distribution.

2. The defence of the Assessee was not accepted and the demand in the show cause notice was upheld. This order of the Assessing Authority was affirmed by the Commissioner (Appeals) as well. However, in further appeal to the CESTAT, vide its judgment dated 10-11-2006, CESTAT accepted the plea of the Assessee and quashed the demand raised in the show cause notice. Against this order, Revenue is in appeal for which Civil Appeal Nos. 3742-3744 of 2007 is filed.

3. Same kind of show cause notice was issued for different periods wherein Assessing Officer as well as Appellate Authority confirmed the demand contained in the show cause notice. In the appeal filed by the Assessee before the CESTAT, the two members of the CESTAT gave conflicting opinion. The Technical Member, inter alia, held that since the physician samples were sold to the distributors which were meant for distribution to the physicians free of cost and that would mean that distributors did not sell the physician samples, it was not understood as to why distributors shall purchase the samples from manufacturer and then distribute the same free of cost to the physicians. According to him, a specific question was put to the counsel for the Assessee in this behalf but no satisfactory answer was given or was forthcoming from records. Giving this reason, the Technical Member took the view that price was not the sole consideration and therefore, requirement of Section 4(1)(a) of the Act was not fulfilled. Judicial Member took contrary view. However, the third Member has concurred with the view taken by the Technical Member on the same reason as

was given by the Technical Member. Against this order, Assessee has filed Civil Appeal No. 3263 of 2009.

4. We may first take up Civil Appeal No. 3263 of 2009. This has to be allowed for simple reason that the aforesaid reasons given by the CESTAT in support of its view clearly reveals that CESTAT has gone beyond the show cause notice inasmuch as this was not even the case set up by the Department in the show cause notice.

5. As already noted above, the only ground which was mentioned in the Show Cause Notice was that since the goods had not been sold, the provisions of Section 4(1)(a) of the Act could not be applied. We find that in the show cause notice, the Department has, thus, accepted that no monetary consideration or any other consideration had been received by the Assessee or the distributors from a doctor or concerned to whom free distribution of sample packs had been made. Further there was no allegation in the show cause notice that the price at which the goods were sold by the Assessee to the distributors was not sole consideration. In fact, the genuineness of the price at which the physician samples were sold by the Assessee to the distributors was not even doubted. It is only on the ground that the goods were not actually sold by the distributors to the physicians, which was the ground on which it was contended that the case was not covered under Section 4(1)(a). The CESTAT, therefore, in our opinion, has gone beyond the Show Cause Notice and on this ground alone, the judgment of the CESTAT dated 27-2-2009, which is the subject matter of Civil Appeal No. 3263 of 2009, warrants to be set aside. Civil Appeal No. 3263 of 2009 is, accordingly, allowed.

6. We now advert to the central issue, viz., whether provisions of Section 4(1)(a) of the Act are applicable or not.

7. Section 4 reads as under:

"Section 4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the Assessee, for delivery at the time and place of the removal, the Assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation. - For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the Assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the Assessee in connection

with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under Sub-section (2) of Section 3.

(3) For the purpose of this section, -

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be "related" if -

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii.) amongst them the buyer is a relative and distributor of the Assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other;

(c) "place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed;

(cc) "time of removal", in respect of the excisable goods removed from the place of removal referred to in Sub-clause (iii) of Clause (c), shall be deemed to be the time at which such goods are cleared from the factory;

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the Assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

8. As per the aforesaid provision, it is the transaction value which is to be determined and on which excise duty is payable.

9. As mentioned above, the Assessee had put up the defence that since physician samples were not meant for sale by distributors but were to be given free of cost to the physicians, the Assessee had charged lesser price. This statement of the Assessee had not been doubted. The only reason in the show cause notice given was that since the physician samples were given free of cost by the distributors and no price was charged, the case was not covered by the provisions of Section 4(1)(a) of the Act. This is clearly fallacious and wrong reason. The transaction in question was between the Assessee and the distributors. Between them, admittedly, price was charged by the Assessee from the distributors. What ultimately distributors did with these goods is extraneous and could not be the relevant consideration to determine the valuation of excisable goods. When we find that price was charged by the Assessee from the distributors, the show cause notice is clearly founded on a wrong reason. The case would squarely be covered under the provisions of Section 4(1)(a) of the Act. In view thereof, the Central Excise Rules would not apply in the instant case.

10. As a result, we are of the opinion that the decision dated 10-11-2006 rendered by the CESTAT depicts the correct position of law and rightly holds that the case would be covered by the provisions of Section 4(1)(a) of the Act and in view thereof Rule 6(b)(ii) of the Rules would not apply. Resultantly, Civil Appeal Nos. 3742-3744 of 2007 of the Revenue fail and are hereby dismissed.

C.A. No. 6984/2009; C.A. No. 9876-9878/2011; C.A. No. 1990-1992/2012; C.A. No. 3338/2012; C.A. No. 268-269/2015; C.A. No. 6571-6575/2015; C.A. No. 3387-3389/2005; C.A. No. 2431-2432/2008

Since the same issue arises for consideration, following the aforesaid order, all the appeals of the Revenue stand dismissed.