**(2010) 05 SHI CK 0182**

**In the High Court Of Himachal Pradesh**

**Case No :** CEA No. 3 of 2005

Commissioner of Central Excise — APPELLANT

Vs

Dabur India Ltd. — RESPONDENT

**Date of Decision :** 12-05-2010

**Acts Referred:**

Central Excise Rules, 1944 — Rule 11, 140, 21, 47, 49
Central Excises and Salt Act, 1944 — Section 11AC, 1A, 35G

**Citation :** (2011) 267 ELT 452

**Hon'ble Judges :** V.K. Sharma, J;R.B. Misra, J

**Bench :** Division Bench

## Judgement

R.B. Misra, J.—In reference to order dated 9.2.2005 passed by Customs, Excise & Service Tax Appellate Tribunal (in short ''CESTAT'') in appeal No. E/4039, 4043-44/03 NB (C) arising out of the order in appeal No. 965-967/CE/CHD/2003 dated 6.10.2003, passed by Commissioner (A) Central Excise, Chandigarh, the following question has been referred by the Commissioner Central Excise, Chandigarh, for declaring the same as substantial question of law:

Whether excise duty is leviable on "control Samples" drawn and retained by the party, considering it to be deemed removal under Rule 9 & Rule 49 of the erstwhile Central Excise Rules, 1944.

2. In order to deal the present appeal, it is necessary to give the brief facts of the case that M/s Dabur India Ltd. Baddi (hereinafter referred to as the ''PARTY'') is the manufacturer of Medicaments falling under chapter 30 of the Central Excise Tariff Act, 1985. The "PARTY" has asked for the refund claim amounting to Rs. 15,73,215/-, Rs. 34,444/- and Rs. 17,433/- on the grounds that these were paid as Central Excise duty on Control samples preserved/drawn during 1999-2000, however, as per Chapter-11 of the New Excise Procedure when a manufacturer preserves/retains the samples of their product for some period for investigation of complaints, if any, no duty should be charged on these samples considering that the goods remain within the factory.

The Adjudicating Authority rejected the claim for refund on the ground that samples drawn and retained were not exempted by any notification during the relevant period.

Being aggrieved with the order of the Adjudicating Authority, the ''PARTY'' filed appeal to Commissioner (Appeals) Central Excise, on the ground that since there is no removal from the factory, no duty can be demanded. The Commissioner (Appeals) allowed the appeal of the ''PARTY'' and set aside the orders of the Adjudicating Authority on the grounds that no duty can be demanded on the excisable goods unless they are cleared from the factory gate or captively consumed within the factory. The ''PARTY'' has placed reliance on the decision of ''CEGAT'' in the case of 1999 (80) ECR 362 wherein it has been held that samples meant for retention in the factory (not for sale), are not liable to duty, in view of the Notification No. 171/70-CE dated 1.1.1970.

The Excise Department, being aggrieved with above order, preferred an appeal before ''CESTAT''. The matter was referred to a Larger Bench because there were conflicting decision of the ''CESTAT'' on the issue of the dutiability of samples retained in the factory.

The Larger Bench of ''CESTAT'' vide misc. order No. M/37/05-NBC dated 8.2.2005 has held that the Basic Excise Manual issued by the Central Board of Excise and Customs (CBEC''s) and the supplementary instructions to the Excise Manual from 1.9.2001 clarified the position that the samples required for laboratory test in the factory and for preservation for investigation of complaints, may be allowed to be drawn provided that the proper account of receipt and utilization in the test in the laboratory is maintained and no duty should be charged on these samples but such samples should be maintained in the account in the prescribed form, however, if at any time the manufacturer desires to clear these samples then these should be assessed to duty as applicable. The control samples as long as these are kept in the factory and not cleared from there shall not be chargeable to duty provided proper account is maintained. When these samples are cleared for test or for destruction at that time assessment should be made for duty, if any, liviable as per law.

3. In the facts and circumstances, for success of present appeal preferred u/s 35-G of the Central Excise Rules, 1944, we have to see as whether the above question referred is really a substantial question of law or not. In order to deal with the above question, it is necessary to refer the relevant provisions of Rules 9 and 49 of the Central Excise Rules, 1944:

Rule 9. Time and manner of payment of duty.- (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the [Commissioner] in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the [Commissioner] may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form:

[Provided that the molasses produced in a Khandsari sugar factory may be removed without payment of duty leviable thereon and the duty of excise leviable on such molasses shall be paid by the procurer, as if such molasses has been manufactured by such procurer, on the date of receipt of such molasses in his factory]

[Provided also] that the [Commissioner] may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or form a store-room or warehouse duly approved, appointed or [registered] by him, keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at intervals, not exceeding one month, and the account-holder shall periodically make deposit therein sufficient in the opinion of the [Commissioner] to cover the duty due on the goods intended to be removed from the place of production, curing, manufacture or storage.

[(1A) Where a person keeping an account-current under the third proviso to Sub-rule (1) makes an application to the [Commissioner] for withdrawing an amount from such account-current, the [Commissioner] may, for reasons to be recorded in writing, permit such person to withdraw the amount in accordance with such procedure as the [Commissioner] may specify in this behalf.]

[(2) If any excisable goods are, in contravention of Sub-rule (1), deposited in, or removed from, any place specified therein, the producer or manufacturer thereof shall pay the duty liviable on such goods upon written demand made [within the period specified in Section 1A of the Act] by the proper officer, whether such demand is delivered personally to him, or is left at his dwelling house, and shall also be liable to a penalty which may extend to two thousand rupees, and [such goods] shall be liable to confiscation.]

[Explanation].- For the purposes of this rule, excisable goods produced, cured or manufactured in any place and consumed or utilized-

(i) as such or after subjection to ay process or processes; or

(ii) for the manufacture of any other commodity; Whether in a continuous process or otherwise, in such place or any premises appurtenant thereto, specified by the [Commissioner] under Sub-rule (1), shall be deemed to have been removed from such place or premises immediately before such consumption or utilisation.]

Rule 49. Duty chargeable only on removal of the goods from the factory premises or from an approved place of storage.- [(1) Payment of duty shall not be required in respect of excisable goods made in a factory until they are about to be issued out of the place or premises specified under Rule 9 or are about to be removed from a store-room or other place of storage approved by the [Commissioner] under Rule 47:

Provided that the manufacturer shall on demand pay the duty liviable on any goods which are not accounted for in the manner specifically provided in these rules, or which are not shown to the satisfaction of the proper officer to have been lost or destroyed by natural causes or by unavoidable accident during handling or storage in such store-room or other approved premises:

Provided further that the proper officer may not demand duty due on any goods claimed by the manufacturer as unfit for consumption or for marketing subject to such conditions as may be imposed by the [Commissioner] by order in writing.]

(2) Notwithstanding anything contained in Sub-rule (1),excisable goods made in a factory to which provisions of Chapter VII of these rules have been extended by the Central Government by notification in the Official Gazette, may be removed from the factory in which they are made to any warehouse [registered] under Rule 140 for the storage of such goods and situated outside the [registered] premises of the factory and subject to such exemptions, limitations and conditions as may, from time to time, be specified in this behalf by the Central Government.

[(3) Notwithstanding anything contained in Sub-rule (1), the Central Government, under-circumstances of exceptional nature, allow, by notification in the Official Gazette, any excisable goods to be removed from the factory in which they are produced [without payment of, or only on pat payment of, duty] leviable thereon subject to such conditions and limitations (including payment of interest on the balance amount of duty) as may, from time to time, be specified by the Central Government. The manufacturer of such excisable goods shall execute a bond in the proper form with [such surety or security] as the [Commissioner] may approve.]

[(4) * * * *] [Explanation].- For the purposes of this rule, excisable goods made in a factory and consumed or utilized-(i) as such or after subjection to any process or processes; or (ii) for the manufacture of any other commodity, whether in a continuous process or otherwise, in such factory or place or premises specified under Rule 9 or store-room or other place of storage approved by the [Commissioner] under Rule 47, shall be deemed to have been issued out of, or removed from such factory, place, premises, store-room or other place of storage, as the case may be, immediately before such consumption or utilization.]

4. Mr. Sandeep Sharma, Learned Assistant Solicitor General of India submitted for and on behalf of the Appellant that in view of Rule 9 and the explanation of Rule 9 and 49, if goods manufactured and consumed or utilized as such or for the manufacture of any other commodity in the place of manufacture, goods shall be deemed to have been removed from place of manufacture. The ''PARTY'' has to draw reference samples and retain them for a specified period under the Drugs and Cosmetics Rule. Such drawing of samples and retaining the same for a

 

specified period is nothing else but utilization of manufactured excisable goods, as such, in the place of manufacture itself and in view of Explanation to Rule 9 and 49 shall be deemed to have been removed from place of manufacture.

5. In order to strengthen his submission, Mr. Sandeep Sharma has submitted as follows:

(A) The legislature used two expressions ''consumed'' or ''utilized''. There can be utilization of goods without destroying its identity. Mr. Sharma has placed reliance on the observations of Supreme Court in Union of India v. V.M. Salgaoncar and Bros. [P) Ltd., 1998 (99) ELT 3 "the word ''consumption'' may involve in the narrow sense using the article to such an extent as to reach the stage of its non-existence. But the word ''consumption'' in fiscal law need not to confined to such a narrow meaning. It has a wider meaning in which any sort of utilization of the commodity would as well amount to consumption of the article, albeit that article retaining its identity even after use.

(B) Supreme Court in Kathiawar Industries Ltd. v. Jaffrabad Municipality AIR 19790 SC 1721, has observed that precise meaning to be given to these words would depend upon the context in which they are used. The words ''consumption'' in its primary sense means the act of consuming and in ordinary parlance means the use of an article in a way which destroys, wastes or uses up that article. But in some legal contexts, the word ''consumption'' has a wider meaning. It is not necessary that by the act of consumption the commodity must be destroyed or used up''. The word ''use'' has a wider import than ''consumption''. In view of the observations made by Supreme Court in Kathiawar''s case (supra), the retaining of samples shall mean utilization of the goods as such for the purpose of the Rule 9 and 49.

(C) Larger Bench in its order dated 8.2.2005 has relied upon the basic excise manual issued way back in 1979, when there was no concept of deemed removal. The concept of deemed removal has only been introduced in Central Excise Rules, 1944 by way of an explanation inserted w.e.f. 20.2.1982 in Notification No. 20/82-C.Ex dated 20.02.1982. The supplementary instructions were issued only w.e.f. 1.9.2001 whereas, the issue in question pertains to period prior to 1.9.2001, hence, the instructions issued w.e.f. 1.9.2001 cannot be made applicable to period prior to 1.9.2001.

(D) In order to strengthen the submissions, Mr. Sharma has also relied upon the decision of Albert David Ltd. v. Commissioner of Central Excise, Meerut 2002 (148) ELT 1183 , 2001 (96) ECR 367 , 2000 (121) ELT 386

In Albert David''s case (supra) it was observed that when samples are retained for control samples only if quality control test carried out on other samples is successful. Once the test has been carried out the goods have become liable to Central Excise Duty and mere fact that the control samples had been removed prior to the test will not make them non-excisable., In Mapra Laboratories'' (supra) it has been observed that taking of sample for retaining inside the factory in accordance with Drugs and Cosmetics Act deemed as clearance, hence excise duty payable by the Appellant under the Rule 9 and 49 of Central Excise Rules, 1944.

In Aristo Pharmaceuticals'' (supra) it has been observed that drawing the samples and retaining for the same for specified period is nothing but utilization of manufactured excisable goods, as such, in the place of manufacture the samples shall be deemed to have been removed from the place of manufacture.

In ITC Ltd. (supra) it has been observed that the samples drawn after fully manufactured products are liable to the excise duty and where the samples were drawn once the medicines were fully manufactured, the duty is leviable on control samples.

6. According to Mr. Sandeep Sharma, learned ASG, the concept of deemed removal has not been considered by the Larger Bench in its order dated 8.2.2005, whereas, the submissions of ''PARTY'' i.e. M/s Dabur India Ltd., have been given weightage. Learned ''CESTAT'' has observed in paragraph-3 of order dated 8.2.2005 as below:

The Basic Manual of Departmental Instructions on Excisable Manufactured Product as on 31.12.1979 deals with samples in para 113 and para 14. It gives the various categories of samples drawn which are as under:

(i) for supply as trade samples to customers for trial;

(ii) for test purposes;

(iii) for supply against contracts or orders from the government or for enforcement of control measures;

(iv) For display at exhibitions, fairs and in show cases.

(v) For market inquiries by Central Excise Officers Procedure for the drawal and accounting of these samples.

I. Trade samples

II. Samples for test purposes

The samples from this category will generally include-

(a) Samples required for laboratory test in the factory and for preservation for investigation of complaints;

(b) Samples required for tests at sister concerns and independent testing agencies;

(c) Samples for Government Departments; and

(d) Samples required to be sent to the Chemical Examiners for test.

 

In the case of samples at (a) above, required by laboratory for testing qualities and accuracy of the specification of various kinds of products, the same may be allowed and drawn as and when they are required without notice to the Range Officer, provided a proper account of receipts and the quantity utilized in the test is maintained in the laboratory. Issue entries for the goods already accounted for in RG I or EB 4 (or both) should be made in the register in the form given in Appendix XVIII and put upto the Range Officer for his information. While no duty will be charged on these samples, remnants of samples after the analysis must be returned to the process. Certain manufacturers also preserve the samples of their product for some period for investigation of complaints, if received. No duty should be charged on these samples also, but an account of such samples should be maintained in the form prescribed in Appendix XIX.

7. The ''CESTAT'' has also noted that the supplementary instructions to Excise Manuals effective from 1.9.2001, the same position is repeated in Chapter 11 and it is clarified in para 3.3.1 of the said Chapter at (iii), (iv) and (v) of para 2.1 above the procedure specified in paragraph 3.2 shall be followed. However, it is clarified that when a manufacturer preserve the samples of their product for some period for investigation complaints, if received, no duty should be charged on these samples considering that goods remain within the factory. Duty shall be charged, unless exempted by a notification, once the samples are cleared from the factory. If at any time the manufacturer desires to destroy these samples, procedure specified in Rule 21 of the said rules shall be followed.

8. The ''CESTAT'' in its order dated 8.2.2005 has observed that the Basic Excise Manual issued by CBEC''s and the supplementary instructions to the Excise Manual from 1.9.2001 clarifies that the samples required for laboratory test in the factory and for preservation for investigation of complaints may be allowed to be drawn provided that the proper account of receipt and utilization in the test in the laboratory is maintained. Manufacturer can preserves the samples of their product for some period for investigation of complaints, if any. No duty should be charged on these samples but an account of such samples should be maintained in the prescribed form. If at any time the manufacturer desires to clear these samples then there should be assessed to duty as applicable. The Customs, Excise & Service Tax Appellate Tribunal has further held that the control samples as long as these are kept in the factory and not cleared from there, these will not be chargeable to duty if proper account is maintained. When these samples are cleared for test or for destruction at that time assessment should be made for duty, if any, liviable as per law.

9. On the other hand, learned Counsel for ''PARTY'' (Dabur India Limited) has submitted that once circular has been issued by CBEC''s the same is binding on Department- The Department cannot be permitted to urge that such circulars are not binding on it, in view of the decision of Hon''ble Supreme Court in Union of India v. Arviva Industries (1) Ltd. 2008 (10) S.T.R 534 (S.C.).

10. Learned Counsel for Dabur India Ltd. has invited the attention of this Court

 

to the basic manual of departmental instructions on excisable manufactured products corrected up to 31.12.1979 and has submitted that sub-para (ii) of para 3 deals with samples for test purposes For convenience instructions are extracted as below:

II. Samples for test purposes

The samples from this category will generally include-

(a) Samples required for laboratory test in the factory and for preservation for investigation of complaints;

(b) Samples required for tests at sister concerns and independent testing agencies;

(c) Samples for Government Test house and other Government Departments; and

(d) Samples required to be sent to the Chemical Examiners for test.

In the case of samples, at (a) above, required by laboratory for testing qualities and accuracy of the specification of various kinds of products, the same may be allowed and drawn as and when they are required without notice to the Range Officer, provided a proper account of receipts and the quantity utilized in the test is maintained in the laboratory. Issue entries for the goods already accounted for in RG.i or EB.4 (or both) should be made in the register in the form given in Appendix XVIII and put upto the Range Officer for his information. While no duty will be charged on these samples, remnants of samples after the analysis must be returned to the process. Certain manufacturers also preserve the samples of their product for some period for investigation of complaints, if received. No duty should be charged on these samples also, but an account of such samples should be maintained in the form prescribed in Appendix XIX. If at any time the manufacturer desires to destroy these samples, he may present a ''nil'' duty AR.i for the quantity to be destroyed quoting the relevant code numbers or any other distinguishing marks namely, batch No. , etc. in the clearance application and on obtaining the permission from the Superintendent for such destruction, the Sector Officer will supervise their destruction.

11. In sequel to the departmental instructions subsequent instructions were issued on 1.9.2001 and in Chapter 11 dealing with the samples, Clause 3.2 deals with samples for test purposes. For convenience it is extracted as below:

3.2 Samples for test purposes:

3.2.1 The samples of this category will generally include:

(i) Samples drawn by in-house laboratory for testing quality and adherence to product specifications;

(ii) Samples drawn for preservation for investigation of complaints;

(iii) Samples drawn for test at other concerns and independent testing agencies;

 

(iv) Samples required to be sent to Government Test Centers including the Chemical Examiners for test.

3.2.2 The Assessee is required to maintain a proper account of receipts and the utilization of samples in the test, in the laboratory. The removal shall be in the same manner as the goods are removed for home consumption. The manufacturer shall prepare invoice under Rule 11 of the said Rules and make, issue entries for the goods (samples) in the Daily Stock Account. Appropriate duty shall be paid by the Assessee on these samples before their removal for test purposes unless otherwise exempted by a duty exemption notification.

3.3 Samples for other purposes.

3.3.1 Where samples are required for the purposes specified at (iii), (iv) and (v) of paragraph 2.1 above, the procedure specified at paragraph 3.2 shall be followed. However, it is clarified that when a manufacturer preserves the samples of their product for some period for investigation of complaints, if any, no duty should be charged on these samples considering that the goods remain within the factory. Duty shall be charged, unless exempted by a notification, once the samples are cleared from the factory. If at any time the manufacturer desires to destroy these samples, procedure specified in Rule 21 of the said Rules shall be followed.

12. In the light of these instructions, it has been submitted by Mr. Dev Nath, learned Counsel for the ''PARTY'' (i.e. M/S Dabur India Limited) that right from 1979 upto the present time same instructions are being followed and the clarification has bee made by these circulars indicating that the control samples cannot be subject matter of excise duty in terms of Rule 9 read with Rule 49 of Central Excise Rules, 1944. In view of the decision of in The Delhi Cloth and General Mills Co. Ltd. and Another Vs. The Joint Secretary, Govt. of India and Another, Wherein reference to Rule 9 and 49, it has been observed that the question of collection of any excise duty cannot arise unless and until the goods are removed from the factory.

13. Mr. Dev Nath, learned Counsel for the ''PARTY'' has further placed reliance on an another decision of High Court of Punjab & Haryana (D.B.), in Commissioner of C. Ex. Panchkula v. Malcom Pharmaceuticals 2008 (225) E.L.T. 428 (P&H). Where following question of law was to be tested as substantial question of law:

Whether excise duty is leviable on "control Samples" drawn and retained by the ''PARTY'', considering it to be deemed removal under Rule 9 & Rule 49 of the erstwhile Central Excise Rules, 1944.

While approving the decision of learned 2005 (99) ECC 787a has observed that control samples retained in factory for laboratory tests are not chargeable to excise duty. The High Court (D.B.) (P&H) has further held that above question is not a substantial question of law. The relevant paragraphs of Malcom Pharmaceuticals (supra) are as below:

 

5. Against the said order, the Assessee filed an appeal before the CESTAT, who vide his order dated 11.2.2005 allowed the same and set aside the order of the Additional Commissioner (AE), Central Excise, while following its decision in CCE, Chandigarh v. Dabur India Limited, wherein it was held that the control samples retained in the factory premises for the purpose of laboratory tests are not required to be charged to duty.

6. On January 28, 2008, Counsel for the Appellant was directed to place on record copy of the order passed by the Tribunal in case of CCE v. Dabur India Limited. The same has been placed on record. The Tribunal in that case, while following the Basic Manual of Departmental Instructions on Excisable Manufactured Produce as on 31.12.1979 and the supplementary instructions of Excise Manuals effective from 1.9.2001, held that when a manufacturer preserve the samples of their product for some period for investigation of complaints, no duty shall be charged on these samples considering that those goods remain within the factory. It was held that the duty shall be charged only when the samples are cleared from the factory.

7. In view of the said decision, which is based upon the instructions issued by the department, we do not find any illegality in the impugned order.

8. Counsel for the Appellant further argued that the Assessee is liable for penalty u/s 11AC of the Act for not accounting the control sample in the daily stock account register. We do not find any substance in this argument, as in the case of CCE v. Dabur India Limited CEA No. 2 of 2005 (supra), it was held that no duty is to be charged on the control sample, but the proper account of receipts and utilization of such sample in the laboratory should be maintained. In the instant case, there is no allegation that the proper account was not being maintained, but it is said that the sample is to be accounted in the daily register. In our view, in the daily account register only those items are to be entered, which are withdrawn from the factory. Hence, in this appeal, no substantial question of law is arising from the order of the CESTAT.

14. In view of settled position of law, that the circulars are binding on the department and the department cannot be allowed to say that different interpretation could be given to Rule 9 and Rule 49 of Central Excise Rules, 1944. We are not sitting as an appellate authority to test the legality and validity of order dated 8.2.2005 passed by the Larger Bench of ''CESTAT'' We are more concerned as to consider whether in the facts and circumstances, the above question of law is a substantial question of law or not. Rule 9 and Rule 49, as referred above have been understood and regulated by departmental instructions corrected upto 31.12.1979 and in that sequence same are accelerated by way of supplementary submissions as on 1.9.2001 indicating that the control samples cannot be subject matter of the excise duty. The departmental circulars issued by way of clarificatory instructions proved the correct meaning meaning of Rule 9 and Rule 49 and, as such, are allowed to prevail. The explanations which are appended in Rule 9 and Rule 49 cannot be diluted to give different meaning to

 

the provisions other than the departmental circulars. The explanation utmost could be to facilitate the understanding of the provisions of Rule 9 and Rule 49 regarding point of levy of excise duty. On the mere reading of explanation to Rule 9 and Rule 49, it appears that nothing expressly has been dealt with about the imposition of excise duty on control samples.

15. In our respectful consideration the goods kept for control samples cannot be said to be consumed or utilized as has been indicated by the Lager Bench of ''CESTAT'' provided the control samples have been kept in the prescribed form.

16. The High Court of P&H (D.B.) has considered the verdict of ''CESTAT'' passed on 16.12.2005 in 2005 (99) ECC 787a and has approved the said verdict of ''CESTAT'' and while considering the similar question of law as mentioned above, which is also similarly for consideration before us in the present CEA No. 3 of 2005, has taken a view that the above question of law is not a substantial question of law. In our considered view also in view of the foregoing analysis, the departmental circulars issued in the form of clarificatory instructions, it is clear that control samples retained in the factory for laboratory tests are not chargeable to excise duty.

17. In view of the above mentioned analysis, the above question of law is not a substantial question of law, as such, the appeal fails.