(2010) 05 SHI CK 0285

In the High Court Of Himachal Pradesh

Case No : CEA No. 26 of 2007

Commissioner of Central Excise — APPELLANT

Vs

Ozone Ayurvedic — RESPONDENT

Date of Decision : 12-05-2010

Acts Referred:

Central Excise Rules, 2001 — Rule 4
Central Excise Rules, 2002 — Rule 10, 11, 4, 6, 8
Drugs and Cosmetics Rules, 1945 — Rule 78

Citation : (2010) 05 SHI CK 0285

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.B. Misra, J.—The present appeal has been preferred by the Applicant Commissioner of Central Excise, Chandigarh in reference to order dated 16.12.2005 passed by Custom, Excise and Service Tax Appellate Tribunal (in short ''CESTAT'') in reference to order No. 100/07- SM (BR) & Stay order No. S/51/07 dated 7.12.2006 to declare that of the following question is a substantial question of law and to entertain the present appeal accordingly:

Whether excise duty is liviable on "Control Samples" drawn and retained by the ''Party'', considering it to be deemed removal under Rule 4, 10, 11 & 6 of the Central Excise Rules, 2002.

2. In order to adjudicate the present appeal, it is necessary to give the factual background of the present case. M/s Ozone Ayurvedic, 34, HPSIDC Indl. Area, Baddi (HP) (hereinafter referred to as "the ''Party''") are engaged in the manufacture of Ayurvedic medicines & beauty or make-up preparation falling under Chapter heading 3003 & 3004 respectively of the First Schedule to the Central Excise Tariff Act, 1985, (5 of 1986). During the course of Audit by the AG (HP) Shimla, it was pointed out that the ''Party'' was drawing batch control samples of medicines after labeling and packing in terms of Rule 78 of the Drugs

and Cosmetics Rules, 1945. On being pointed out, the ''Party'' vide their letter dated 21.10.2003 intimated that during the period April 2002 to March, 2004 they had retained 684 Nos. as control samples which all collectively valued at Rs. 48,782/- involving Central Excise Duty amounting to Rs. 7805/-. No duty was being paid by the ''Party'' on these control samples although no exemption was available. Accordingly, Show Cause Notice was issued to the ''Party'' vide C. No. V(30)D/S/67/03/4232-34 dated 29.4.2003 for demand of C.E. duty of Rs. 5478/-, C. No. V(30)D/S/1256/03/843-44 dated 20.1.2004 for C.E. duty of Rs. 1456/- and C. No. V(30 & 33) D/S/64/04/7575-76 dated 16.06.2004 for C.E. duty of Rs. 871/-.

After due process of adjudication, the Adjudicating Authority, vide order-in-original No. 40-42/AC/SML/06 dated 22.3.2006, confirmed the duty amounting to Rs. 7805/-. Aggrieved with the order-in-original the ''Party'' filed appeal with the Commissioner (Appeals) who vide common order-in-appeals No. 641/CE/CHD/2006 dated 27.7.2006, allowed the appeal of the ''Party''.

Being aggrieved the department did not accept the said order-in-appeals and filed appeal before the ''CESTAT'' which vide final order No. 10/07-SM(BR) & S/51/07 dated 7.12.2006 decided the appeal in the favour of the ''Party'' relying upon the larger Bench decision of Tribunal in the case of 2005 (99) ECC 787a

In a similar case of M/s Dabur India Ltd., the ''CESTAT'' vide final order No. 1036-38/05-EX dated 16.12.2005 had decided the case in favour of the ''Party'' relying upon the aforesaid decision of the 2005 (99) ECC 787a in CCE, Chandigah v. Dabur India Ltd. Being aggrieved the department has filed before this Hon''ble Court an appeal e.g. CEA 7 of 2006.

3. Rule 4 of Central Excise Rules 2001/2002 provided that no excisable goods shall be removed from any place where they are manufactured, until the excise duty leviable thereon has been paid. Explanation-II appended to Rule 4 of Central Excise Rules, 2001 reads as under:

Explanation-II for the purpose of this Rule, excisable goods manufactured in a factory and utilized, as such, or after subjecting to any process, for the manufacture of any, or other commodity, in such factory, shall be deemed to have been removed from such factory immediately after such utilization.

4. We have to see that in present appeal the above question is substantial question of law or not. In order to deal with the question, it is necessary to refer to the relevant provisions of Rules 4,6, 10 and 11 of Central:

Rule 4. Duty payable on removal.- (1) Every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided I Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided:

Provided that the goods falling under Chapter 61 or 62 of the First Schedule to the Tariff Act, produced or manufactured by a job worker may be removed without payment of duty leviable thereon and the duty of excise leviable on such goods shall be paid by the person referred to in Sub-rule (3), as if such goods have been produced or manufactured by him, on the date of removal of such goods from his premises registered under rule-9.

Explanation.- It is hereby clarified that where such person has authorized the job worker to pay the duty leviable on such goods under Sub-rule (3), such duty shall be paid by the job worker on the date of removal of such goods from his registered premises.

(2) Notwithstanding anything contained in Sub-rule (1), where molasses are produced in a Khandsari sugar factory, the person who procures such molasses, whether directly from such factory or otherwise, for use in the manufacture of any commodity, whether or not excisable, shall pay the duty leviable on such molasses, in the same manner as if such molasses have been produced by the procurer.

(3) Notwithstanding anything contained in Sub-rule (1) every person who gets the goods, falling under Chapter 61 or 62 of the First Schedule to the Tariff Act, produced or manufactured on his account on job work, shall pay the duty leviable on such goods, at such time and in such manner as may be specified under these rules, whether the payment of such duty be secured by bond or otherwise, as if such goods have been manufactured by such person:

Provided that such person may authorize the job worker to pay the duty leviable on such goods on his behalf and the job worker so authorized undertakes to discharge all liabilities and comply with all the provisions of these rules.

Explanation I.- For the purposes of this rule, the expression "job worker" shall be deemed to mean the person who undertakes the process or processes that brings into existence the finished goods, complete in all respects, falling under Chapter 61 or 62 of the said First Schedule, in his factory. For the removal of doubt, it is further clarified that the job worker may also get part of the processing required for the manufacture of the said goods done by another person but should brig back the same for the completion of the manufacturing process in his factory.

Explanation II. - For the purposes of this rule, excisable goods manufactured in a factory and utilized, as such or after subjecting to any process, for the manufacture of any other commodity, in such factory shall be deemed to have been removed from such factory immediately before such utilization.

(4) Notwithstanding anything contained in Sub-rule (1), Commissioner may, en exceptional circumstances having regard to the nature of the goods and shortage of storage space at the premises of the manufacturer where the goods are made, permit a manufacturer to store his goods in any other place outside such

premises, without payment of duty subject to such conditions as he may specify.

Rule 6. Assessment of duty.- The Assessee shall himself assess the duty payable on any excisable goods:

Provided that in case of cigarettes, the Superintendent or Inspector of Central Excise shall assess the duty payable before removal by the Assessee.

Rule 10. Daily stock account. - (1)Every Assessee shall maintain proper records, on a daily basis, in a legible manner indicating the particulars regarding description of the goods produced or manufactured, opening balance, quantity produced or manufactured, inventory of goods, quantity removed, assessable value, the amount of duty payable and particulars regarding amount of duty actually paid.

(2) The first page and the last page of each such account book shall be duly authenticated by the producer or the manufacturer or his authorized agent.

(3) All such records shall be preserved for a period of five years immediately after the financial year to which such records pertain.

Rule 11. Goods to be removed on invoice.- (1)No excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorized agent and in the case of cigarettes, each such invoice shall also be countersigned by the Inspector of Central Excise or the Superintendent of Central Excise before the cigarettes are removed from the factory.

(2) The invoice shall be serially numbered and shall contain the registration number, description, classification, time and date of removal, rate of duty, quantity and value, of goods and the duty payable thereon.

(3) The invoice shall be prepared in triplicate in the following manner, namely:

(i) the original copy being marked as ORIGINAL FOR BUYER;

(ii) the duplicate copy being marked as DUPLICATE FOR TRANSPORTER;

(iii) the triplicate copy being marked as TRIPLICATE FOR ASSESSEE.

(4) Only one copy of invoice book shall be in use at a time, unless otherwise allowed by the Assistant Commissioner of Central excise, or the Deputy Commissioner of Central Excise, as the case may be, in the special facts and circumstances of each case.

(5) The owner or working partner or the Managing Director or the Company Secretary or any person duly authorized for this purpose shall authenticate each foil of the invoice book, before being brought into use.

(6) Before making use of the invoice book, the serial numbers of the same shall be intimated to the Superintendent of Central Excise having jurisdiction.

(7) The provisions of this rule shall apply mutatis mutandis to goods supplied by a first stage dealer or a second stage dealer.

Explanation.- For the purposes of this rule, "first stage dealer" and "second stage dealer" shall have the meanings assigned to them in CENVAT Credit Rules, 2002.

5. In view of the decision dated 12.5.2010 of this Court (DB.) passed in CEA No. 3 of 2005, (Commissioner of Central Excise, Chandigarh v. M/S Dabur India Limited), this Court (D.B.) while adjudicating the appeal No. 7 of 2006 (Commissioner of Central Excise, Chandigarh v. M/S Dabur India Limited), preferred in reference to order No. 1036-1038/05EX dated 16.12.2005, has dismissed the same. Since CEA No. 7 of 2006 has already been dismissed and the question referred in CEA No. 3 of 2005 has already been said to be not a substantial question of law, therefore, in the light of the order dated 12.5.2010 passed in CEA No. 7 of 2006 and in our order dated 12.5.2010 passed in CEA 3 of 2005, the present CEA No. 26 of 2007 being devoid of any merit is also dismissed, for the reasons indicated in our order dated 12.5.2010 passed in CEA No. 3 of 2005.

6. In our considered view the question of law referred above, is also not a substantial question of law, as such, also the present appeal is dismissed.

