
(2023) 07 CESTAT CK 0016

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 1652 Of 2010

M/S. Amazon Drugs Pvt. Ltd

APPELLANT

Vs

Commissioner Of Central Excise

RESPONDENT

Date of Decision : 14-07-2023

Acts Referred:

Central Excise Valuation (Determination Of Price Of Excisable Goods) Rules, 2000 — Rule 4, 8, 11
Drugs And Cosmetics Rules, 1945 — Rule 65(18), 96(1)(ix)
Central Excise Act, 1944 — Section 4A, 4A(1), 4(1)(a), 11A(1), 11AB, 11AC

Citation : (2023) 07 CESTAT CK 0016

Hon'ble Judges : Dilip Gupta, President; R. Bhagya Devi, Member (T)

Bench : Division Bench

Advocate : P. Saravana Perumal

Final Decision : Dismissed

Judgement

Dilip Gupta, President

1. M/s. Amazon Drugs Pvt. Ltd., Bangalore the appellant has filed this appeal to assail the order dated 22.04.2010 passed by the Commissioner (Appeals) by which the order dated 31.12.2008 passed by the Assistant Commissioner has been upheld and the appeal has been dismissed.

2. The appellant is a manufacturer of P or P Medicines and the valuation of the goods manufactured by the appellant is undertaken with reference to the retail sale price under section 4A of the Central Excise Act, 1944 the Excise Act.

3. The department noticed that during the period from 25.04.2005 to 31.03.2007 the appellant cleared the physician samples by taking the assessable value as 115% / 110% of the cost of production of such goods by applying rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 the 2000 Rules and the Board Circular dated 01.07.2002. The department believed that as per the Circular dated 25.04.2005 issued by the Board, the

value of free samples should be determined under rule 4 of the 2000 Rules and, therefore, the value of the free samples has to be at par with the value of the goods under section 4A of the Excise Act. The following chart shows the differential duty that the appellant would have to pay:

Period

Assessable value on which physicians samples actually cleared

Assessable value under section 4A

Differential value

Differential Duty

25.04.2005 to 31.03.2007

1,88,115/-

4,25,386/-

2,37,271/-

38,723/-

01.04.2006 to 31.03.2007

1,95,028/-

4,56,991/-

2,61,963/-

42,800/-

Total

3,83,143/-

8,82,377/-

4,99,234/-

81,523/-

4. Accordingly, a show cause notice dated 30.11.2007 was issued to the appellant to show cause as to why central excise duty amounting to Rs. 81,523/- may not be demanded from the appellant under section 11A(1) of the Excise Act with interest and penalty.

5. The appellant filed a reply dated 28.01.2008 to the aforesaid show cause notice and denied the allegations made therein. The main contention of the appellant is reproduced below:

"4. In as much as, the physician samples cleared are not required to be affixed with MRP, as the same are not meant for sale, the question of discharging duty

under section 4A does not arise.

This issue, has already been considered by the Central board of Excise and Customs and a clarification is issued in Circular No. 625/16/2002-CX Dt. 28.02.2002, wherein the board categorically stated that where there is no statutory requirement under the provisions of the Weights and Measures Act, to declare the retail price on the packages, then the provisions of section 4A will not apply even if the goods are notified under the said section. It may be stated that the circular clearly also dealt with the clearance of physician samples. Therefore, the issue of valuation of physician samples would have to be determined under section 4 of the act. At this juncture, it may be stated that circular of the board bearing No. 813/10/2005 CX dt. 25.4.2005 also recognises that such samples are required to be value in terms of the valuation of physician samples should be determined in terms of rule 4 of the said rules."

(emphasis supplied)

6. The Assistant Commissioner did not accept the contentions raised by the appellant and confirmed the demand of duty with interest and penalty. The relevant portion of the order is reproduced below:

"4. In view of the above discussion it is my candid opinion that notwithstanding the non-availability of the normal sale price under Section 4(1)(a) of the Central Excise Act 1944, by the virtue of goods being specified under Section 4A(1) making the retail price i.e. MPR as its deemed value, the appropriate rule governing the valuation of physician's sample would be Rule 4 of Central Excise Valuation Rules 2000. I therefore hold that Rule 4 of Central Excise Valuation Rules 2000 is applicable to the present case on all fours to the facts of the case. Therefore Rule 4 ibid applicable to impugned goods – Section 4 and Section 4A ibid as the case may be."

(emphasis supplied)

7. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), who by order dated 24.04.2010 upheld the order passed by the Assistant Commissioner and dismissed the appeal. The relevant portion of the order is reproduced below:

"5. I have carefully gone through the case records, grounds of appeal and the submissions made during the Personal Hearing. The contention of the appellants is that the physician samples supplied free are not treated as sale of such goods and hence MRP is not applicable even if it is mentioned and for this they took the support of Circular dated 28.2.02 and argued that it should not be under Section 4 - transaction value but it should be under Rule 11 read with Rule 8 of Central Excise Valuation Rules 2000. I do not agree with their contention. Though the physician samples are supplied free, they are of same nature of the main P or P Medicines in function. Board's Circular of 2005 and the recent Circular of 2010 mention that even if it is for marketing purposes, once MRP is mentioned,

valuation should be as per MRP under Section 4A of Central Excise Act, 1944.

They further contend that under the Weights and Measures Act, 1976, they are not required to mention the MRP. Even though it is mentioned, various clarifications made through different circulars and 37 B orders make it clear that these goods not being used for captive consumption are not to be assessed under Rule 11 read with Rule 8 of Valuation Rules nor the transaction value under Section 4 is to be applied. The original adjudicating authority has given clear finding as to valuation and suppression of facts with an intention to evade duty and hence he has imposed mandatory penalty under Section 11AC and demanded interest under Section 11AB. The appellants' further contention is that since the valuation rules and circulars are not free from doubt, they should not be blamed that they had suppressed the facts as discussed supra. The department has issued Show Cause Notice for differential demand and interest based on circulars and clarifications and hence it can be construed that the appellants despite all was deliberately doing this to evade payment of duty. Hence, I do not want to interfere with the order passed by the original adjudicating authority."

(emphasis supplied)

8. On the case being called out no one appeared on behalf of the appellant. The appeal is of the year 2010 and the order sheet reveals than even on earlier occasion no one had appeared on behalf of the appellant. It is, therefore, considered appropriate to decide the appeal on merits after hearing the learned authorized representative appearing for the department.

9. Shri P. Saravana Perumal, learned authorized representative appearing for the department has contended that in view of the decision of the Larger Bench of the Tribunal in Cadila Pharmaceuticals Ltd. vs. Commr. of C. Ex. Ahmedabad-II 2008 (232) E.L.T. 245 (Tri.-LB) and the decision of the Supreme Court in Medley Pharmaceuticals Ltd. vs. Commr. of C. Ex., & Cus., Daman 2011 (263) E.L.T. 641 (S.C.) , the appeal would have to be dismissed.

10. The issue before the Larger Bench in Cadila Pharmaceuticals was also in respect of valuation of physician sample of medicines supplied free of cost. The operative part of views expressed by the majority is as follows:

"31. In view of the above discussions, I am of the opinion that notwithstanding the non-availability of the normal sale price under Section 4(1)(a) of the Act, by reason of the goods being specified under Section 4A(1) making the retail sale price i.e. MRP as its deemed value, the appropriate rule governing the valuation of physician's samples would continue to be Rule 4 and the decision of the Larger Bench in Blue Cross Laboratories Ltd.'s case (supra) mutatis mutandis continues to be good law. The reference is accordingly answered in the affirmative in favour of the Revenue and against the appellant/assessee."

11. The Supreme Court framed the question of law in one of the two Civil

Appeals in Medley Pharmaceuticals:

"Whether Physician samples manufactured and distributed as free samples have to be assessed on the basis of cost of manufacture plus normal profits, if any, earned on the sale under Rule 6(b)(ii) of the Central Excise Valuation Rules, 1975 (for short, "Rules 1975") upto 1st July, 2000 and thereafter, on application of Rule 8 of Central Excise Valuation Rules, 2000 (for short, "Rules 2000") i.e. on cost of manufacture plus 15% profit basis and not on pro-rata basis as has been done by the Revenue?"

12. The following questions were framed by the Supreme Court in the other Civil Appeal:

"(A) Whether "Physician Samples" are excisable goods in view of the fact that they are statutorily prohibited from being sold under the Drugs and Cosmetics Act, 1940 (in short, "Drugs Act") and the Rules made thereunder?

(B) If physician's samples are held to be excisable, then what is the appropriate method of valuing physician samples for the purpose of excise duty?"

13. After considering the earlier decisions, the Supreme Court observed as follows:

"26. Therefore, the prohibition on the sale of Physician Samples intended for distribution to medical practitioners as free samples by Rule 65(18) of the Drugs Rules shall have no bearing or effect upon the levy of excise duty under the Act, since excise is a duty on manufacture, duty is payable whether or not goods are sold. Excise duty is payable even in case of free supply, since sale is not a necessary condition for charging duty under the Act.

27. Even assuming that Shri. Ganesh is correct, when he contends that physician samples are not allowed to be sold in the open market in view of the statutory prohibition on their sale, and hence are not marketable; the Revenue is only concerned with the manufacture of the goods and the possibility of marketability of the goods. When the product is manufactured by a Pharmaceutical Company, it is for the purpose of sale i.e., every such product including Physician Sample is capable of being sold in the open market, but the pharmaceutical company makes the choice to distribute the same as a free sample. In other words, it is not mandatory for the pharmaceutical company to distribute free physician samples of every drug they manufacture. This choice made by the pharmaceutical companies in terms of Rule 96(1)(ix) of the Drugs Rules by overprinting words 'Physician's sample - Not to be sold' on the label of the drugs will not come in the way of the Revenue from levying excise duty on the drugs so manufactured.

41. Now coming to the valuation of the physician 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 the case of Commissioner of Central Excise v. M/s. Bal Pharma [Civil Appeal No. 1697 of 2006] [2010 (259) E.L.T. 10 (S.C.)]. This Court has upheld the conclusion of the Tribunal that the physician's samples have to be valued on pro-rata basis. The Tribunal, while arriving at the aforesaid conclusion, had relied upon its earlier decision in the case of Commissioner of Central Excise, Calicut v. Trinity Pharmaceuticals Pvt. Ltd., reported as 2005 (188) E.L.T. 48, which has been accepted by the department. Therefore, we hold that physician samples have to be valued on pro-rata basis for the relevant period."

14. Thus, the contention of the appellant before the Supreme Court that the free physician samples have to be assessed on the cost of manufacture plus 15% profit as contemplated under rule 8 of the 2000 Rules was not accepted by the Supreme Court.

15. In the present appeal, the appellant has also determined the valuation under rule 8 of the 2000 Rules by adding 15% profit to the cost of manufacture. Such a determination of the assessable value has not been accepted by the Supreme Court. The Commissioner (Appeals), therefore, committed no illegality.

16. The appeal would, therefore, have to be dismissed and is dismissed.