(2010) 12 BOM CK 0087

In the Bombay High Court

Case No : Central Excise Appeal No. 94 of 2006

The Commissioner of Central Excise — APPELLANT

Vs

RPG Life Sciences Ltd. — RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Citation : (2011) 264 ELT 346

Hon'ble Judges : R.M. Savant, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Pradeep S. Jetly and S.D. Bhosale, for the Appellant; Prakash Shah and Jas Sanghvi, instructed by PDS Legal, for the Respondent

Judgement

J.P. Devadhar, J.—This appeal was admitted on 29/06/2006 on the following substantial question of law:

" Whether control samples drawn for testing are chargeable to central excise duty under the provisions of Central Excise Act, 1944 and Rules made thereunder ? "

2. The Respondent-Assessee is engaged in the manufacture of bulk drugs. On 30/12/1998, a show cause notice was issued to the Assessee calling upon them to show cause as to why duty should not be recovered in respect of the controlled samples cleared within the factory for testing and why penalty should not be imposed upon the Assessee. In its reply, the Assessee contended that the samples were not removed outside the factory but were drawn by the in house laboratory within the factory premises and were actually consumed during the process of testing itself and, therefore, no excise duty was leviable on the controlled samples drawn for testing. The assessing officer rejected the claim of the Assessee and passed an order confirming duty and levied penalty. Appeal filed by the Assessee was dismissed by Commissioner (Appeals). On further appeal, the Tribunal following the larger Bench decision in the case of 2005 (99) ECC 787a (Tri-LB)held that no excise duty is payable for samples drawn for

testing and accordingly allowed the appeal filed by the Assessee. Hence this appeal is filed by the revenue.

3. Mr. Jetly, learned Counsel for the revenue submitted that the larger Bench decision in the case of Dabur India Ltd. (supra) has been distinguished in a subsequent decision of the Tribunal in the case of 2009 (170) ECR 54 (Tri-Mumbai)wherein it is held that in absence of any exemption notification issued, excise duty would be payable on samples drawn for testing as per Board''s supplementary instructions.

4. In the present case, the specific case of the Assessee is that samples drawn for testing were not cleared out of the factory but were cleared within the factory for testing and that the said samples were consumed in the process of testing. These facts have not been controverted by the revenue. It is not the case of the revenue that the Assessee has failed to maintain the books / accounts as required under the Rules relating to the samples drawn for testing. Where the goods are not cleared out of the factory premises but were drawn for testing within the factory and in fact were consumed within the factory during the process of testing, the question of demanding any duty on those samples does not arise. We draw support for this view from the decision of the Apex Court in the case of I.T.C. Ltd. Vs. Collector of Central Excise, Patna, , particularly para 11 thereof.

5. Decision of the Tribunal in the case of Positive Packaging Industries Ltd. (supra) relied upon by the counsel for the revenue is distinguishable on facts. In that case the samples were cleared out of the factory and sold as scrap, whereas, in the present case, the samples are consumed / destroyed within the factory during the process of testing. Therefore, the decision of the Tribunal in the case of Positive Packaging Industries Ltd. (supra) has no relevance to the facts of the present case.

6. In these circumstances, in our opinion, the decision of the Tribunal, in the facts of the present case cannot be faulted. In the result, the appeal is dismissed by answering the question in favour of the Assessee and against the revenue. There shall be no order as to costs.

