CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WASTE ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

Excise Appeal No. 715 of 2011

[Arising out of OIO-01/DEM/DAMAN/2011 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN]

M/s Alkem Laboratories Ltd **.....Appellant**
Plot No. 333/1, Silicon Industrial Estate, Kachigam,
Daman, Daman (U.T.)

VERSUS

C.C.E. & S.T.-Daman **.....Respondent**
3rd Floor, Adarsh Dham Building, Vapi-Daman Road,
Opp. Vapi Town Police Station,
Vapi, Gujarat-396191

WITH

1. **Excise Appeal No. 716 of 2011 (Suresh R Singh)**
2. **Excise Appeal No. 717 of 2011 (Galpha Lab Ltd)**
3. **Excise Appeal No. 718 of 2011 (Narshinsh Sanjeev Shenoy)**
4. **Excise Appeal No. 192 of 2012 (Galpha Lab Ltd)**
5. **Excise Appeal No. 193 of 2012 (Suresh R Singh)**
6. **Excise Appeal No. 194 of 2012 (Alkem Laboratories Ltd)**
7. **Excise Appeal No. 274 of 2012 (Galpha Lab Ltd)**
8. **Excise Appeal No. 275 of 2012 (Alkem Laboratories Ltd)**
9. **Excise Appeal No. 276 of 2012 (Suresh R Singh)**
10. **Excise Appeal No. 277 of 2012 (Galpha Lab Ltd)**
11. **Excise Appeal No. 278 of 2012 (Alkem Laboratories Ltd)**

[Arising out of OIA-CS/155-158/DMN/NDMN/2011-12 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN]

[Arising out of OIA-CS/212-214/DMN/SDMN/2011-12 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-DAMAN]

[Arising out of OIA-CS/215-217/DMN/SDMN/2011-12 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-DAMAN]

[Arising out of OIO-01/DEM/DAMAN/2011 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN]

APPEARANCE:

Sh. A. Nainawati, Advocate for the Appellant
Sh. G. Jha, Authorized Representative for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A/ 11404-11415/2019

DATE OF HEARING: 15.07.2019
DATE OF DECISION: 15.07.2019

RAMESH NAIR

The issue involved is that whether the supplies made of medicament on DPCO price to hospital and other institution will be valued under Section 4A or Section 4 of Central Excise Act, 1944.

2. Sh. A. Nainawati Ld. Counsel appearing on behalf of the appellant submits that identical issue has been considered by this Tribunal in the case of Zydus Healthcare Ltd vide Final Order No. A/11057-11059/2019 dated 28.06.2019 and in case of USV Ltd vide Final Order No. A/10790-10799/2019 dated 06.05.2019. He also placed reliance on the following judgments:

- Jayanti Food Processing (P) Ltd 2007 (215) ELT 327 (SC)
- Accrapac (India) Pvt. Ltd 2010 (257) ELT 84 (Guj.)
- Naman Singh Sekhawat 2008 (225) ELT 638 (T)
- Castrol India Ltd 2008 (223) ELT 638 (T)
- Anand Nishikawa Co. Ltd 2005 (188) WLT 149 (SC)
- Cadila Pharmaceuticals Ltd 2017 (349) ELT 694 (Guj.)
- Apex Electricals Pvt. Ltd 1992 (61) ELT 413 (Guj.)

3. Sh. G. Jha Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that even goods are covered under DPCO, the provision of Standard of Weights & Measures Rules is applicable. Consequently, the medicament supplied by the appellant is liable to be valued under Section 4A of Central Excise Act, 1944.

4. Heard both the sides and perused the records. We find that very identical issue has already been considered by this Tirbunal in the case of Zydus Healthcare Ltd and USV Ltd (supra), wherein this Tribunal has passed following order:

> *"4. We have carefully considered the rival submission. We find that the issue involved in this case relates to the applicability of assessment under section 4A to supplies of pharmaceuticals made for institutional buyers who are running hospitals and where the pharmaceuticals are intended for consumption in the hospitals and not for retail sale. Ld. Counsel has produced some certificates for various institutional buyers which confirm this fact. Revenue has not produced any evidence that the said goods are sold by the institutional buyers and similarly no evidence has been produced to assert that the said pharmaceuticals are not consumed in the hospitals by these institutional buyers themselves. In the case of USV ltd., following has been observed:*
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> *"4. We have gone through rival submissions. We find that these products were brought into the fold of section 4A assessment by notification No. 2/2005-CE(NT) dated 07.01.2005 which reads as*

under:"Medicaments — Assessments on basis of retail sale price (MRP)In exercise of the powers conferred by sub-section (1) and sub-section (2) of section 4A of the Central Excise Act, 1944 (1 of 1944), the Central Government hereby specifies the goods mentioned in column (3) of the Table below and falling under Chapter or Heading No. or Sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) mentioned in the corresponding entry in column (2) of the said Table, as the goods to which the provisions of the said subsection (2) shall apply, and allows as abatement the percentage of retail sale price mentioned in the corresponding entry in column (4) of the said Table :- 4 E/12757-12758/2008, E/778/2011-DB hhh TABLES. No. Chapter or Heading No. or Sub-heading No. Description Abatement as a percentage of retail sale price(1)(2)(3)(4)1.3003. 10Patent or proprietary medicaments, other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homoeopathic or Biochemic35%2.3003. 20Medicaments (other than patent or proprietary) other than those which are exclusively used in Ayurvedic, Unani, Siddha, Homoeopathic or Biochemic systems35%This notification2. shall come into force on the 8th day of January, 2005.Explanation. -For the purposes of this notification, "retail sale price" means the retail price displayed by the manufacturer under the provisions of the Drugs (Prices Control) Order, 1995." It is noted that for the purpose of this notification, the retail sale price means the retail sale price displayed the manufacturer under the provision of Drugs (Price Control) Order 1995. The Drug (Price Control) Order 1995 in para 14 and 15 mandates as follows:-"14. Carrying into effect the price fixed or revised by the Government, its display and proof thereof: 1. Every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as the case may be, as fixed by the Government from time to time, within fifteen days from the date of notification in the Official Gazette or receipt of the order of the Government in this behalf by such manufacturer or importer. 2. Every manufacturer, importer or distributor of a formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation, notified in the Official Gazette or ordered by the Government in this behalf, with the words 'retail price not to exceed' preceding it, and "local taxes extra" succeeding it, in the case of Scheduled formulations. Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata retail price of the main pack rounded off to the nearest paisa.15. Display of prices of non-Scheduled formulations and price list thereof: 1. Every manufacturer, importer or distributor of a non-Scheduled formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation with the words "retail price not to exceed" preceding it "local taxes extra" succeeding it, and the words "Not under Price Control" on a green strip: Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata retail price of the main pack rounded off to the nearest paisa."A perusal of the aforesaid provisions shows that the requirement of printing the MRP is in respect of products "offered for retail sale". Therefore, if the product is not offered for retail sale, the said provision of Rule 14 & 15 will not apply. In the present facts and circumstances, we need to examine whether if the provisions of Rule 14 or 15 could be attracted.4.1It is seen that investigations were extended to various customers/ dealers and in para 9 of the impugned order the list of customers has been enumerated. The gist of the investigation is reproduced in para 10,11,12 and 13 of the impugned order. The investigations confirmed that no evidence of printing of MRP on institutional supplies made through dealers was found. In fact whatever evidence was produced showed that the products contained the marking "hospital supply-not for sale"only.4.2The impugned order has picked up the words "formulation intend for sale" appearing in

para14 and para15 of the Drugs (Price Control) Order 1995 and come to the conclusion that it was mandatory in the facts and circumstances of the case to print the MRP. The arguments is summarized in para 4.3.4of the impugned order in following words."4.3.4Now, deliberate on the said DPCO, 1995. I observe that as per its para no. 14(2), every manufacturer of distributor of a „formulation intended for sale" shall display in indelible print mark, on the label of the container of the formulation and the „minimum 5 E/12757-12758/2008, E/778/2011-DB hhh pack there offered for retail sale", the retail price of that formulation, notified in the official Gazette or referred to by the Govt. in this regard, with the words „retail price not to exceed" similar type of provisions have also been made in the para 15(1) of the said order in respect of non-scheduled formulations the only difference being that the words „retail price not to exceed" preceding it. And local taxes extra" succeeding it, in the case of scheduled formulations. Similar type of provisions have also been made in the para no. 15 (1) of the said order in respect of non-scheduled formulations, the only difference being that the words „retail price not to exceed" preceding it, and „local taxes extra" succeeding it, have been replaced by the words maximum retail price" preceding it and the words „inclusive of all taxes" succeeding it.4.3.4.1After the detailed analysis of the said para no.s 14(2) and 15(1) of the said DPCO, 1995, the following facts are extracted there-from;4.3.4.1.1.Who is required to adopt it? : Every manufacturer or importer or distributor of a scheduled or non-scheduled formulation.4.3.4.1.2.When are the said formulations intended for sale?4.3.4.1.3 What action is required to be taken? : shall display in indelible print mark;4.3.4.1.4.On which shall such action be taken? : (i) On the label of a container of the formulation & (ii) On the minimum pack thereof offered for retail sale.4.3.4.1.5.What will be displayed thereon? : (i) „retail price not to exceed" & local taxes extra applicable for scheduled formations & (ii) „maximum retail price" (MRP) inclusive of all taxes in respect of nonscheduledformulations.4.3.4.2.As discussed at para 4.3.4.1.1- 4.3.4.1.5hereinabove I come to the conclusion that as and when a manufacturer or distributor or importer of scheduled or non-scheduled formulations intends to sell the said formulations, he shall display, in indelible print mark, on the label of the container of the formation as well as on the minimum pack thereof offered for retail sale, the retail price or maximum retail price thereof."The argument in the impugned order being that the goods intended for ultimate sale to institutional buyers, are first sold to dealer/ distributors. Thus, when they are sold to dealers/ distributors the provision of DPCO 1995 get attracted. It is seen that the DPCO 1995 mandates, printing of „retail sale price" on containers" as well as on minimum pack thereof offered for retail sale". From above it is apparent that what is covered in DPCO is only the items which are sold in retail. If a container is sold in retail, the container must contain retail sale price and if the content of such container are also sold in retail then each such pack sold in retail must have the MRP printed on it. From above it is apparent that the provisions are attracted only on goods „offered for retail sale". In the impugned order, it is seen that the words „offered for retail sale" appearing in DPCO 1995 have been overlooked. The said order only relies on the word „sale" and upholds the applicability of the DPCO 1995 to all sales. We find that the sale appearing in para 14 and 15 of DPCO 1995 is only to be read in respect of the goods „offered for retail sale". In the instant case the evidence brought on record does not dispute the claim that the goods sold to institutional buyers were not sold (or offered for sale) in retail sale. In these circumstances, we hold that provisions of para 14 and 15 of DPCO 1995 are not attracted in respect of sales to institutional buyers which are not further offered for retail sale. The demand, therefore, cannot be upheld. The appeals of USV is allowed. The penalties imposed are set aside and consequently the appeals of other appellants are also allowed. The appeal of revenue is dismissed."

In view of above, we find that there is no merit in Revenue's allegation that such medicaments which are intended for consumption by the institutional buyers and 6 E/12757-12758/2008, E/778/2011-DB hhh not intended for retail sale are liable to be assessed under section 4A.

Consequently, appeal nos. E/12757/2018 and E/12758/2018 are allowed.

4.1 The Appeal no. E/778/2011 against Zydus Healthcare Ltd. (earlier known as Biochem Pharmaceuticals Industries Ltd.) is dismissed as infructuous as the same was filed against the earlier OIO which was remanded by the Tribunal vide order no. A/10920-10926/2017 dated 09/05/2017. Thus, appeal no. E/778/2011 is dismissed as infructuous."

5. Above decision was given considering this Tribunal decision in case of USV Ltd. (supra). As per above judgment, the issue is no longer res-integra and under the same set of facts in respect of medicament supplied to hospitals, it has been held that the value should be done under Section 4 and not under Section 4A. As regard submission of Ld. AR that even though the supplies are made under DPCO, the provision of SWM shall apply. We find that there is specific exemption under Rule 34 wherein, the supply made under DPCO shall not cover under SWM. The same is reproduced below:

> **"Rule 34: Exemption in respect of certain packages:-**
> *(e) It contains scheduled formulations and non-scheduled formulations covered under the Drugs (Price control) Order, 1995 made under section 3 of the Essential commodities Act, 1955 (10 of 1955)"*

From the above provision, it is clear that nothing contained under provision of SWM shall apply in case where the supplies of medicament are made under DPCO.

6. As per our above discussion, the impugned orders are set aside. Appeals are allowed.

(Dictated & Pronounced in the open court)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Seema