CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

EXCISE Appeal No. 10862 of 2015
(Arising out of OIA-VAD-EXCUS-002-APP-06-2015-16dated 08.04.2015passed by Commissioner of Central Excise, Customs and Service Tax- Vadodara-II)

Shine Pharmaceuticals Ltd. **...Appellant**
Plot No. 132, Karjan Veramedi Road,
JuniJithardi, Taluka : Karjan,
Vadodara-Gujarat

VERSUS

C.C.E. – Vadodara-ii **...Respondent**
1st Floor, Room No.101,
New Central Excise Building,
Vadodara, Gujarat-390023

(i) Excise Appeal No. 10993/2015 (Shine Pharmaceuticals Ltd);
(ii) Excise Appeal No. 10994/2015 (Shine Pharmaceuticals Ltd);
(iii) Excise Appeal No. 11367/2015 (Shine Pharmaceuticals Ltd);
(iv) Excise Appeal No. 11884/2016 (Shine Pharmaceuticals Ltd);
(v) Excise Appeal No. 12025/2015 (Shine Pharmaceuticals Ltd);

(Arising out of OIA-VAD-EXCUS-002-APP-36-37-2015-16 dated 16.04.2015 passed by Commissioner of Central Excise, Customs and Service Tax- Vadodara-II)

(Arising out of OIA-VAD-EXCUS-002-APP-125-2015-16 dated 08.06.2015 passed by Commissioner of Central Excise, Customs and Service Tax- Vadodara-II)

(Arising out of OIA-VAD-EXCUS-002-APP-311-2015-16 dated 26.10.2015 passed by Commissioner of Central Excise, Customs and Service Tax- Vadodara-II)

(Arising out of OIA-VAD-EXCUS-002-APP-174-2015-16 dated 29.06.2016 passed by Commissioner of Central Excise, Vadodara-I (Appeal))

APPEARANCE:
Shri R.C. Saxena, Advocate appeared for the Appellant
Shri A.K. Samota, Superintendent(Authorized Representative) for the Respondent

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

Final Order No. 11123-11128 /2024

DATE OF HEARING: 04.04.2024
DATE OF DECISION:03.06.2024

RAMESH NAIR

The brief facts of the case are that the appellant are engaged in the manufacture of medicaments and clearing the same on payment of duty. The value of medicaments during the relevant period is covered by section 4A of Central Excise Act, 1944 read with abatement Notification No. 49/2008-CX(NT) dated 24.12.2008. The appellant cleared medicament to dealers partly for retail sale and partly for sale to institution. In case of retail sale, the appellant are affixing their price as per Drug Price Control Order and claiming the abatement in terms of Notification 49/2008-CE (NT) and paying the duty after deducting the abatement. In case of sale meant for institution, the appellant are not affixing the MRP and the valuation of the same is done on the basis of section 4 i.e. on the transaction value. The case of the department is that the entire sale i.e. whether sale in retail or for institution should be covered under by Section 4A for the valuation purpose accordingly, with this contention, the differential duty demand was raised in the show cause notices. There is another small issue i.e. demand of cenvat credit in respect of removal and retention of control samples. The appellant have not contested the duty demand on this amount, however due to diversion views, they pray to set aside the penalty. All the show cause notices have been adjudicated and demands were confirmed against the appellant. Being aggrieved by the orders-in-original, the appellant filed appeals before the Commissioner (Appeals) who affirmed the view of the adjudicating authority and rejected all the appeals. Therefore, the present appeals before this Tribunal.

2. Shri R.C. Saxena, learned counselappearing on behalf of the appellant submits that since the sale for institution is not a retail sale but the same is for consumption by various institutions like hospital, valuation of the same is not governed by Section 4A, therefore, the duty paid in terms of Section 4 of the Central Excise Act, 1944 in respect of supplies made for institution is correct and legal. He submits that the issue is no longer res-integra as the same has been

decided in catena of case laws. He placed reliance on the following cases:

- USV Ltd. 2019 (5) TMI 507
- Medley Pharmaceuticals Ltd. 2022 (11) TMI 41 CESTAT Ahmedabad
- Zydus Healthcare Ltd. 2019 (10) TMI 810 CESTAT Ahmedabad
- JB Chemicals & Pharmaceuticals Ltd. 2023 (7) TMI 301 CESTAT AHM
- Sri Kaliswari Fireworks 2009 (237) ELT 324 (Tri. Chennai)
- Controls and Switchgears Contractors Ltd. 2005 (183) ELT 95 (Tri. D)

3. Shri A. K. Samota, Learned Superintendent(Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records.

5. We find that the issue to be resolved in the present appeal is whether the appellant is liable to pay excise duty on the product namely, medicament which are supplied to institution under Section 4 or Section 4A of the Central Excise Act, 1944. We find that this issue is no longer res integra as has been decided in various judgments that whether medicaments which supplied for use of institution and no retail sale price is affixed on the pack of the medicament., the assessment of value for the purpose of payment of excise duty shall be done under Section 4 of the Central Excise Act, 1944. Some of the judgments are given below:

6. In the case of USV Ltd., this Tribunal considering the same issue whether the partly medicament were sold through dealer in retail and partly to the institution, the Tribunal held that the goods which were supplied for the consumption of institution, the valuation provision which is correctly applicable is section 4 of Central Excise Act and not Section 4A. The relevant order is reproduced below:

"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 sub-section (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 :-

TABLE

S. No.	*Chapter or Heading No. or Sub-heading No.*	*Description*	*Abatement as a percentage of retail sale price*
(1)	*(2)*	*(3)*	*(4)*
1.	*3003. 10*	*Patent or proprietary medicaments, other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homoeopathic or Biochemic*	*35%*
2.	*3003. 20*	*Medicaments (other than patent or proprietary) other than those which are exclusively used in Ayurvedic, Unani, Siddha, Homoeopathic or Biochemic systems*	*35%*

This notification 2. 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 prorata 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 <u>offered for retail sale</u>, 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 prorata 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 offerred 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.

4.1 It 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 para 14 and para 15 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 4.3.4 of the impugned order in following words.

"4.3.4 Now, deliberate on the said DPCO, 1995. I observe that as per its para no. 14(2), every manufacturer of distributor of a '<u>formulation intended for sale</u>' shall display in indelible print mark, on the label of the container of the formulation and the 'minimum 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.

4.3.4.1 After 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 non-scheduled formulations.
4.3.4.2. As discussed at para 4.3.4.1.1-4.3.4.1.5 hereinabove 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 case of Medley Pharmaceuticals Ltd. 2022 (11) TMI 41 CESTAT AHM (supra) taking the same view this Tribunal passed the following order:

4. We have carefully considered the submissions made by both the sides and perused the records. We find that as regard the fact of the case there is no dispute that the appellant have supplied Medicament to Government Hospitals and Some Institutional Buyers. In case of such nature of transaction the medicaments are not sold in retail, therefore, retail sale price need not to be affixed. It is the submission of the appellant that they have not affixed retail sale price on such medicament and it is also mentioned on the package of the Medicament that "it is not for a retail sale" and it is for use by Government Hospitals and Some Institutional Buyers. In this fact the medicaments are not sold in retail and the retail sale price need not to be affixed. Consequently, the valuation of the said goods cannot be insisted upon under Section 4A of Central Excise Act, 1944. We find that this bench in the following judgment under the same set of facts held that valuation of Medicament Supplied to Government Hospitals/ Institutional Buyers shall be governed by Section 4 and not Section 4A. The decision in the case of Zydus Healthcare Ltd, wherein the decision of M/s. USV Ltd was considered is reproduced below:

"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:

> "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 sub section (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:-
>
> 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. 4.11t 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 4.3.40f 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 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 & (1) 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 non scheduledformulations.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 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"

From the above decision read with the decision of M/s. USV Ltd (Supra), this Tribunal has already taken a consistent view that the Medicament Supplies to Government Hospitals and Institutional Buyers shall be valued in terms of Section 4 and not Section 4 (A). Therefore, in our considered view the issue is no longer res integra. Following the aforesaid decisions of this Tribunal, the impugned orders are not sustainable. Hence, the same are set aside, appeals are allowed."

The similar issue has also been considered in the case of Zydus Healthcare Ltd (supra) wherein Tribunal has passed the 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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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. 4.11t 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 4.3.40f 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 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 & (1) 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 non scheduledformulations.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 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”

Identical issue has also been considered by this Tribunal in the case of JB Chemicals & Pharmaceuticals Ltd. (supra) where the Tribunal has passed the following order:

“4. We have carefully considered the submissions made by both the sides and perused the record. We find that the issue is not under dispute that whether the medicament supplied to institutional buyers i.e. Indian Railways, Government Hospitals, BHEL for their exclusive use should be valued under Section 4 and Section 4A of Central Excise Act, 1944. We find that since the supplies are not for retails sale but for exclusive used by the government institutes therefore, since the goods are not meant for retail sale nor it is sold to retail buyers. The condition of the Revenue is that value under Section 4A of Central Excise Act, 1944 has no legs to stand. This issue, in the appellant’s own case has been considered by this Tribunal vide Order No. A/ 11746-11747 /2022 dated 28.11.2022 wherein the following order is passed:-

> 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:

"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 sub section (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:-

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 4.3.40f 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 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 & (1) 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 non scheduledformulations.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 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.
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> 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.
>
> From the above decision read with the decision of M/s. USV Ltd (Supra), this Tribunal has already taken a consistent view that the Medicament Supplies to Government Hospitals and Institutional Buyers shall be valued in terms of Section 4 and not Section 4 (A). Therefore, in our considered view the issue is no longer res integra. Following the aforesaid decisions of this Tribunal, the impugned orders are not sustainable. Hence, the same are set aside, appeals are allowed.
>
> 05. From the above decision of this tribunal along with various decision cited by the appellant, the issue is no longer res-integra and in the appellant's case value of goods is clearly governed by Section 4 of Central Excise Act and not under Section 4A therefore, the impugned order is not sustainable hence the same is set aside. Appeals are allowed."
>
> 5. In view of above decision in the appellant's own case the issue stand settled. Accordingly, the impugned orders are set-aside and the appeals are allowed."

In view of above judgments which are exactly on the identical facts of the present case it was consistently held that in case of supply made to institutional buyer, the valuation shall be done under Section 4 and not under Section 4A of the Central Excise Act, 1944. There is other small issue of demand of cenvat credit on removal and retention of control samples. In this regard, the appellant's submission is that since there is a diversion view on this issue even though the appellant have admittedly paid the duty and not contesting the same, their prayer is to set aside the penalty corresponding to the duty of such control samples. We find force in the argument of the appellant, since the appellant have given up the merit in this case, we are not addressing the same, therefore, the payment of cenvat credit/ duty on the control sample is not under dispute and the same is maintained. However, considering the issue being debatable , the penalty is not imposable, hence, the penalty corresponding to the duty on Control Sample is set aside.

7. Considering the above settled legal position, we are of the view that in the present case also, the impugned orders are not sustainable on the main issue. Accordingly, the impugned orders are modified in above terms. Appeals are allowed in above terms.

(Pronounced in the open court on 03.06.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha