

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No.641 of 2012

(Arising out of OIA-CS/11-12/DMN/NDMN/2012-13 dated 04/05/2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-DAMAN)

J B Chemicals & Pharmaceuticals Ltd

.....Appellant

Survey No. 101/2 & 102/1,
Daman Industrial Estate, Kadaiya,
Daman, U T Of Dadra & Nagar Haveli

VERSUS

C.C.E. & S.T.-Daman

.....Respondent

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat-396191

With

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(Arising out of OIA-CS/11-12/DMN/NDMN/2012-13 dated 04/05/2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-DAMAN)

Parmeshwar B Bang

.....Appellant

General Manager Cum Suthorised Signatory Of M/S, J B Chemicals & Pharmaceuticals Ltd,
Survey No. 101/2 & 102/1, Daman Industrial Estate, Kadaiya,
DAMAN, U T OF DADRA & NAGAR HAVELI

VERSUS

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.....Respondent

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
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Vapi, Gujarat-396191

APPEARANCE:

Shri Yogesh B Desai, Advocate for the Appellant
Shri G. Kirupanandan, Superintendent (AR) for the Respondent

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

Final Order No. A/ 11746-11747 /2022

DATE OF HEARING: 14.11.2022
DATE OF DECISION: 28.11.2022

RAMESH NAIR

The issue involved in the present case is that whether the supply of medicaments to Government Institutions such as BHEL, Railway, Government Hospitals, etc. wherein, on the package it is mentioned 'NOT

FOR SALE' and no retail price was printed is liable to be governed by Valuation Provision of Section 4 or Section 4A of the Central Excise Act, 1944.

02. Shri Yogesh B. Desai, learned counsel appearing on behalf of the appellants at the outset submits that on the identical facts and the issue involved, this tribunal has passed various decisions wherein, it was held that when supply was made to institutions such as railways, government hospitals, etc. and on the package it is mentioned as 'NOT FOR SALE' and retail price was not printed, the valuation of the goods shall be governed by Section 4 and not Section 4A. He placed reliance on the following decisions:-

- Zydus Healthcare Ltd.- 2022 (7) TMI 351-CESTAT AHMEDABAD
- Zydus Healthcare Ltd.- 2019 (10) TMI 810- CESTAT AHMEDABAD
- USV LTD.Parvez K Kumana, Dilip A Pandit, Jayesh K Vasavda- 2019 (5) TMI 507- CESTAT AHMEDABAD
- Biochem Pharmaceutical Industries- 2017-TIOL-2477-CESTAT-AHM
- J B Chemicals & Pharmaceuticals Ltd. vide Order-in-Original No. DMN-IV/AC/ADJ/01/19-20 dated 18.12.2019

03. On the other hand, Shri G. Kirupanandan, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order. He placed reliance on the Hon'ble Apex Court judgment in the case of M/s. JAYANTI FOOD PROCESSING (P) LTD.- 2007 (215) E.L.T. 327 (S.C.).

04. We have carefully considered the submissions made by both the sides and perused the records. We find that the fact is not under dispute that the medicaments have been supplied by the appellant to institutions such as BHEL, Railways and other government hospitals and on the package of the goods it is stated as 'NOT FOR SALE' and no MRP was printed. On this identical facts, this tribunal in the case of MEDLEY PHARMACEUTICALS LTD. vide Final Order No. A/11292-11295/2022 dated 26.10.2022, after considering the decision in USV Ltd. & Zydus Healthcare Ltd. (supra) 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.	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 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.

4.11 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.

4.2 The 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 4.3.40 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 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. 4.3.4.1 After the detailed analysis of the said para nos 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 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 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.

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.

(Pronounced in the open court on 28.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul