CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, BANGALORE

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 1040 of 2010

[Arising out of Order-in-Appeal No. 94/2010 dated 16/02/2010 passed by the Commissioner of Central Excise (Appeals) Mangalore]

Elvina Pharmaceuticals Ltd.
P.B. Road, Kotur
Dharwad

Appellant(s)

VERSUS

Commissioner of Central Excise, Customs and Service Tax, Belgaum
No. 71, Club Road
Central Excise Building
Belgaum - 590 001

Respondent(s)

APPEARANCE:

None for the Appellant
Mr. P. Saravana Perumal, AR for the Respondent

CORAM:

HON'BLE DR. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

Final Order No. 21191 / 2023

Date of Hearing: 30/08/2023
Date of Decision: 30/08/2023

Per: D.M Misra

This appeal is filed against the Order-in-Appeal No. 94/2010 dated 16/02/2010 passed by the Commissioner of Central Excise (Appeals) Mangalore.

2. Briefly stated the facts of the case are that the appellants

are manufacturers of P&P Medicines falling under Chapter Sub Heading 3003.10.00 of Central Excise Tariff Act, 1985. They manufacture the said goods on loan license basis for M/s. Wallace Pharmaceuticals Ltd. During the relevant period i.e. from 08/01/2005 to 30/09/2007, they cleared physician samples by discharging duty @ 110% of the cost of production. Alleging that the method of valuation adopted by the appellant is not correct as the said physician samples cleared attracts valuation under Section 4/4A of Central Excise Act, 1944. Two show-cause notices were issued one on 03/10/2007 for the period from 08/01/2005 to 31/03/2007 demanding duty of Rs. 20,92,278/- (Rupees Twenty Lakhs Ninety Two Thousand Two Hundred and Seventy Eight only) and second show-cause notice dated 07/02/2008 for the period September 2006 to September 2007 demanding duty of Rs.7,35,167/- (Rupees Seven Lakhs Thirty Five Thousand One Hundred and Sixty Seven only) with interest and proposal for penalty. On adjudication demands were confirmed. Aggrieved by the said order, they filed appeal before the Commissioner (Appeals). The learned Commissioner (Appeals) partly allowed all the appeals on limitation by setting aside the demand for the period 08/01/2005 to 31/03/2007 upholding the confirmation of the demand for the period September 2006 to September 2007. Hence the present appeal.

3. None present for the appellant despite notice. Heard the learned AR for the Revenue. The learned AR for the Revenue

submitted that even though the notices were sent to the appellant in the past fixing the date of hearing on 27/06/2023 and 27/07/2023, none appeared for the appellant nor there was any request for adjournment. It is his contention that further adjournment will not yield any result. Consequently, the appeal is taken for hearing on the basis of records and after hearing the learned AR for the Revenue.

4. Learned AR submits that the issue of valuation of physician sample is no more *res integra* and covered by the recent judgment of Tribunal at Bangalore in the case of ***M/s. Amazon Drugs Pvt. Ltd. Vs. CCE, Bangalore vide Final Order No. 20687/2023 dated 14/07/2023***. He submits that the Tribunal taking note of the principle of law settled by the Larger Bench of the Tribunal in the case of ***Cadila Pharmaceuticals Ltd. Vs. Commr. of C.Ex. Ahmedabad-II 2008 (232) E.L.T. 245 (Tri.-LB)*** and Hon'ble Supreme Court in ***Medley Pharmaceuticals Ltd. Vs. Commr. of C. Ex. & Cus., Daman - 2011 (263) E.L.T. 641 (S.C)*** held that the physician samples cleared adopting Rule 8 of the Central Excise (Valuation) Rules, 2000 is contrary to the law laid down by the Hon'ble Supreme Court and the correct method of valuation is under Section 4 of Central Excise Act, 1944 read with Rule 4 of the Central Excise (Valuation) Rules, 2000. He submits that the appeal is thus liable for dismissal.

5. We have carefully considered the grounds of appeal and submissions of appellant advanced by the learned AR for the

Revenue. The short issue for determination is, whether the valuation of physician sample be in accordance with Rule 8 or Rule 4 of the Central Excise (Valuation) Rules, 2000. We find that the Hon'ble Supreme Court in Medley Pharmaceuticals case (supra) has laid down the principle as follows:

> *"**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."*

This principle has been followed by this Tribunal in **Amazon Drugs Pvt. Ltd.** and it is observed as follows:

> *"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."

6. We do not find any reason not to follow the judgment of this Tribunal in Amazon Drugs Pvt. Ltd's case. Consequently, following the said judgment, the impugned order is upheld and the appeal being devoid of merit, accordingly is dismissed.

(Dictated and pronounced in open court)

(D.M. MISRA)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

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