

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1201 of 2010

(Arising out of Order-in-Appeal No. 125/2010 dated 08.03.2010 passed by
the Commissioner of Central Excise(Appeals), Mangalore.)

Wallace Laboratories P. Ltd.

Plot No.231(P) to 240(P),
Kiadb Ind Area,Belur,
Dharwad

.....Appellant(s)

VERSUS

Commissioner of Central Excise, Belgaum

No.71, Club Road,
Belgaum – 590 001.

.....Respondent(s)

WITH

Central Excise Appeal No. 1661 of 2011

(Arising out of Order-in-Appeal No. 28/2011 dated 07.03.2011 passed by the
Commissioner of Central Excise(Appeals), Mangalore.)

Wallace Laboratories P. Ltd.

Plot No.231(P) to 240(P),
Kiadb Ind Area,Belur,
Dharwad

.....Appellant(s)

VERSUS

Commissioner of Central Excise, Belgaum

No.71, Club Road,
Belgaum – 590 001.

.....Respondent(s)

AND

Central Excise Appeal No. 3593 of 2012

(Arising out of Order-in-Appeal No. 448/2012 dated 13.09.2012 passed by
the Commissioner of Central Excise(Appeals), Mangalore.)

Wallace Laboratories P. Ltd.

Plot No.231(P) to 240(P),
Kiadb Ind Area,Belur,
Dharwad.

.....Appellant(s)

VERSUS

Commissioner of Central Excise, Belgaum

No.71, Club Road,
Belgaum – 590 001.

.....Respondent(s)

Appearance:

Mr. M.P. Baxi, Advocate for the Appellant

Mr. H. Jayathirtha, Superintendent (AR) For the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 20136 - 20138 /2024

Date of Hearing: 22.09.2023

Date of Decision: 14.03.2024

Per : D.M. MISRA

These 3(three) appeals are filed against the respective Orders-in-Appeal passed by the Commissioner of Central Excise (Appeals), Mangalore. Since common issues are involved, the appeals are taken up together for hearing and disposal.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of P & P medicaments falling under Chapter sub-heading 30001000 of Central Excise Tariff Act, 1985 on loan licence basis for M/s. Wallace Pharmaceuticals Ltd. During the relevant period i.e. from January 2005 to April 2010, they have cleared physician samples without payment of duty on retail sale price basis but discharged duty on 110% of cost of production. Alleging that the value should be determined in terms of Rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, differential duty was demanded by issuing show-cause notice periodically for the said period. In the first show-cause notice, extended period of limitation was invoked. On adjudication, the demands were confirmed with interest and penalty. On appeal, the learned Commissioner (Appeals) confirmed the demand for normal period (appeal No.E/1201/2010) with interest and penalty of equivalent amount under Rule 25 of Central Excise Rules, 2002; also the demands for normal period in appeal No. E/1661/2011 and also appeal No. E/3593/2012 involving period October 2007 to April 2010 have been confirmed with interest and penalties. Hence the present appeals.

3. The learned advocate for the appellant has submitted that the appellants are selling physician samples along with trade packs either outright to brand name owners of P&P medicaments or manufactured and cleared on job work basis. It is his contention that in both the situation, there was no retail sale; hence the provisions of Section 4A of Central Excise Act read with Rule 4 and Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 are not attracted and they have correctly determined the value applying the provisions of Section 4(1)(a) of the Central Excise Act, 1944. In support, they have referred to the judgment of the Hon'ble Supreme Court in the case of **CCE, Surat Vs. Sun Pharmaceuticals [2015(326) ELT 3 (SC)]**, **CCE, Goa Vs. Cosme Farma Laboratories Ltd. [2015(318) ELT 545 (SC)]** and the decision of Tribunal in the case of **CCE, Bangalore Vs. Banner Pharmacaps (India) Ltd. [2017(347) ELT 686 (Tri. Bang.)]**.

4. *Per contra*, the learned AR for the Revenue has submitted that for the clearance of physician samples, the value cannot be determined under Section 4(1)(a) and it should be under Section 4(1)(b) of the Central Excise Act read with Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 inasmuch as these physician samples are not different from the medicaments in the trade packs in quality / characteristics / inputs used in the manufacture of medicines. Further he has submitted that in view of the Board's Circular dated 25.04.2005, the valuation of physician's samples was required to be carried out in terms of Rule 4 read with Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Further he has submitted that vide Notification No.2/2005-CE(NT) dated

07.01.2005, the P&P medicaments falling under Chapter sub-heading 3003.10 has been notified under Section 4A of the Central Excise Act, 1944 to be assessed on MRP basis. In support, he referred to the judgment of the Larger Bench of CESTAT in the case of **Blue Cross Laboratories** [2006(202) ELT 182 (Tri. LB)]. Further he has submitted that adoption of Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 by discharging 110% of the cost of production is not applicable as the said rule applies to goods cleared for captive consumption. In support, he has referred to the judgment of the Bombay High Court in the case of **Indian Drug Manufacturer's Association Vs. UOI** [2008(222) ELT 22 (Bom.)]. Thus, the physician samples cleared by the appellant to the principal manufacturer is to be assessed in terms of Rule 4 and Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. In support, he has referred to the following judgments:-

- i. **Medley Pharmaceuticals** [2011(263) ELT 641 (SC)]
 - ii. **Indian Drug Manufacturers Association** [2008(222) ELT 22 (Bom.)]
 - iii. **Cadila Pharmaceuticals Ltd.** [2008(232) ELT 245 (Tri. LB)]
 - iv. **Themis Pharmaceuticals** [1998(98) ELT 187 (Tri. Del.)]
 - v. **Goa Antibiotics & Pharmaceuticals** [2014(314) ELT 546 (Tri. Mum.)]
 - vi. **Amazon Drugs Pvt. Ltd.** [Final Order No.21191/2023 dt. 30/08/2023 – CESTAT, Bangalore]
 - vii. **Elvina Pharmaceuticals Ltd.** [Final Order No.21191/2023 dt. 30/08/2023 – CESTAT, Bangalore]
 - viii. **Elvina Pharmaceuticals Ltd.** [Final order No.21164/2023 dt. 31/10/2023 – CESTAT Bangalore]
5. Heard both sides and perused the records.

6. The short issue involved for consideration is whether the physician samples cleared by the appellant to the principal manufacturer or manufactured and cleared on job work basis to be assessed under Rule 4 read with Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 or Rule 8 of the said Rules; whether penalty is imposable under Rule 25 of the Central Excise Rules.

7. 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."

8. 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."

9. We also find that the Larger Bench of the Tribunal in the case of **Cadila Pharmaceuticals Ltd.** (supra) has held as under:-

22. *Medicaments came to be notified as specified goods under Section 4A of the Act in January, 2005. Thus, when sold in packages or bottles, the MRP is to be treated as the value of medicines for purpose of Central Excise duty. The point for consideration is what shall be the assessable value of physician's samples which are not sold in market and are supplied free of cost. Since the physician's samples are not sold and they do not have MRP mentioned on them, the assessable value has to be determined in accordance with the provisions of the Valuation Rules - as per the mandate of Section 4(1)(b) of the Act. There is no dispute between the parties on this score.*

23. *As mentioned above, Rules 4 to 11 of the Valuation Rules contain provisions as to the manner of determination of values. However, learned advocate for the appellant and learned SDR for the Revenue fairly agreed that none of the rules - from Rule 4 to Rule 10 (Rule 10A was inserted later in 2007) - covers the case of free supply of goods by manufacturers and, therefore, aid has to be taken of the residuary rule i.e.; Rule 11 of the Valuation Rules. Rule 11 lays down:*

"If the value of any excisable goods cannot be determined by the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act."

On a plain reading, it would appear that where the value of any excisable goods cannot be determined under the

preceding Rules i.e rules 4 to 11 which are the substantive rules laying down the manner or formula for determination of value, that is, if none of the substantive rule is per se applicable, the value is to be determined as per the principles and general provisions of the Rules as well as Section 4(1) of the Act. In other words, when no particular rule or rules can be strictly applied per se, the value shall be determined using reasonable parameters consistent with the express provisions of the Rules and sub-section (1) of Section 4 of the Act. However, the rule itself does not contain any formula and, therefore, cannot be applied independently de hors the provisions of Rules 4 to 10 and Section 4(1) of the Act.

23. *Both sides, again, very fairly agreed that the provisions of Rules 5, 6, 7, 9 & 10 are not applicable and, therefore, the answer has to be found in either Rule 4 or Rule 8. According to the parties, Rules 4 and 8 are the competing rules applicability whereof is to be decided. These Rules have been referred to by Member (Judicial) in her opinion; however, for the sake of convenience, they may be quoted again as under:*

"Rule 4. *The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.*

Rule 8. *Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be (one hundred and ten per cent) of the cost of production or manufacture of such goods."*

24. *The same question as to whether the assessable value of the physician's samples is to be determined as per the provisions of Rule 4 or Rule 8 came up for consideration in the Bombay High Court in the case of Indian Drugs Manufacturer's Association v. Union of India - 2008 (222) E.L.T. 22 (Bom.). After elaborate discussion, the High Court came to the conclusion that rule 4 squarely applies to clearances of physician's free samples and they cannot be valued under Rule 8. Before we notice the relevant observations, it may be mentioned that the decision was rendered in the context of challenge to the validity of a circular of the Central Board of Excise & Customs, being Circular No. 813, dated 25-4-2005, clarifying that the valuation of physician's free samples should be determined under Rule 4 instead of Rule 8 of the 2000 Rules. Earlier, by Circular No. 643, dated 1-7-2002 the Board had held that the valuation be done under rule 11 read with rule 8 of the Rules.*

25. *The Bombay High Court noticed that prior to 1-7-2000 the concept of valuation of excisable goods was based on the deemed value. The deemed value as per Section 4(1)(a) of the Act, as it stood prior to 1-7-2000, was the normal price at which such goods were ordinarily sold for delivery at the time and place of removal to a buyer who was not a related person and price was the sole consideration. Where, however, the normal price could not be ascertained for the reason that such goods were not similar or for any other reason, the value was to be determined in the manner prescribed - as laid down in Section 4(1)(b). For determining the value of excisable goods under Section 4(1)(b), the Central Government had framed Central Excise (Valuation) Rules, 1975. (I shall refer to the relevant rules a little later.) The concept of valuation underwent a drastic change with the amendment of clause (a) of Section 4(1) with effect from 1-7-2000. The concept of deemed value was done away with and substituted by the concept of the transaction value as*

the basis of valuation. With the introduction of the concept of valuation based on transaction value, the Central Government framed new rules in 2000, namely, Central Excise Valuation (Determination of Price of the Excisable Goods) Rules, 2000 with which we are concerned in this case.

26.

27.

28. ...

29. *In order to attract Rule 4 there need not be another sale. The rule has been quoted above but in order to bring home the point, the relevant part of it may be quoted again as under:*

"The value of the excisable goods" (read physician's sample) "shall be based on the value of such goods sold by the assessee.....".

It would thus appear that there need be another sale of the goods, that is, medicines in the present case. The expression 'such goods' must necessarily be understood as referring to the goods which are subject matter of assessment, that is to say, physician's sample in the instant case. It cannot be contended that physician's samples are different from the goods (medicines) sold notwithstanding that they may be sold in lesser quantities or in a different pack having different label, colour, etc. As held by the Bombay High Court, physician's samples are physically, chemically and functionally the same goods (medicines) which are sold in the market. I am in complete respectful agreement with their Lordships of the Bombay High Court that Rule 4 is the general rule and unless found to be inapplicable, would govern valuation of physician's samples. It is to be kept in mind that even if certain ingredients of Rule 4 are found lacking, it would make no difference, for, by virtue of Rule 11 of the Valuation Rules, it is the principle underlying the rule

which needs to be applied consistent with other statutory provisions. The situation contemplated in Rule 8 on the other hand is completely different and alien. Rule 8 applies to cases where goods are cleared for use and consumption in the production or manufacture of other articles i.e. for captive consumption. Physician's samples are not supplied for being captively used for production or manufacture of any article; they are final products like any 'medicine' sold in regular packs, and, therefore, the method of valuation provided in Rule 8 cannot be applied for valuation of physician's samples.

30. *The fact that medicines/medicaments are specified goods within the meaning of Section 4A of the Act since January, 2005, does not appear to have been brought to the notice of the Bombay High Court but this would hardly make any difference, for, the MRP is to be treated as value of the goods i.e. deemed value in place of the transaction value under Section 4(1)(a) and it does not take the goods out of the pale of Rule 4. Besides, it is to be kept in mind that the Bombay High Court was seized of a legal issue in the context of challenge to the validity of a circular issued on 25-4-2005, that is, in the aftermath of the notification under Section 4A(1).*

31. *In view of the above discussions, I am of the opinion that notwithstanding the non-availability of the normal sale price under Section 4(1)(a) of the Act, by reason of the goods being specified under Section 4A(1) making the retail sale price i.e. MRP as its deemed value, the appropriate rule governing the valuation of physician's samples would continue to be Rule 4 and the decision of the Larger Bench in Blue Cross Laboratories Ltd.'s case (supra) mutatis mutandis continues to be good law. The reference is accordingly answered in the affirmative in favour of the Revenue and against the appellant/assessee.*

10. Consequently, following the aforesaid judgments, we find that the physician samples cleared to their principal manufacturer are assessable under Rule 4 read with Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Also, the physician samples manufactured and cleared on job work basis for free distribution also be assessed on the value of retail sale price of similar goods and not under Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, since the same were not cleared for captive consumption as observed by the Tribunal in the case of **Goa Antibiotics & Pharmaceuticals** (supra). Consequently, the demand of differential duty with interest confirmed in the impugned orders does not warrant interference. However, since the issue relates to interpretation of valuation rules, we do not find merit in imposing penalty on the appellant under Rule 25 of the Central Excise Rules, 2002. In the result, the impugned orders are modified to the extent of setting aside the penalty, while upholding the demand of differential duty with interest in all the appeals. Appeals are disposed of as above.

(Order pronounced in Open Court on 14.03.2024)

(D.M. Misra)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)