CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 815 of 2012

(Arising out of Order-in-Original No. 37/2011 dated 27.12.2011 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

M/s. AG-VET Pharmachem,
A 281/2, 6th Main Road,
Peenya II Stage, Peenya SSI,
Bangalore Urban,
Bangalore – 560 058,
Karnataka.

Appellant(s)

VERSUS

The Commissioner of Central Excise, Bangalore II Commissionerate,
Central Revenue Buildings,
Queen's Road, P.B.No. 5400,
Bangalore – 560 001.

Respondent(s)

With

1. **Central Excise Appeal No. 812 of 2012 (Makam Pharmachem)**

   (Arising out of Order-in-Original No. 37/2011 dated 27.12.2011 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

2. **Central Excise Appeal No. 813 of 2012 (M.S. Venkatachalapathy, Managing Partner, M/s. Makam Pharmachem)**

   (Arising out of Order-in-Original No. 37/2011 dated 27.12.2011 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

3. **Central Excise Appeal No. 814 of 2012 (M.S. Chandraprakash, Partner, M/s. Makam Pharmachem)**

   (Arising out of Order-in-Original No. 37/2011 dated 27.12.2011 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

4. **Central Excise Appeal No. 1271 of 2012 (M/s. Ivorychem India Pvt. Ltd.)**

   (Arising out of Order-in-Original No. 05/2012 dated 25.01.2012 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

5. Central Excise Appeal No. 1288 of 2012 (M/s. Makam Pharmachem.)

(Arising out of Order-in-Original No. 05/2012 dated 25.01.2012 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

6. Central Excise Appeal No. 1289 of 2012 (M.S. Venkatachalapathy, Director, M/s. Ivorychem India Pvt. Ltd.)

(Arising out of Order-in-Original No. 05/2012 dated 25.01.2012 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

7. Central Excise Appeal No. 1290 of 2012 (M.S.Chandraprakash, Director, M/s. Ivorychem India Pvt. Ltd.)

(Arising out of Order-in-Original No. 05/2012 dated 25.01.2012 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

APPEARANCE:

Mr. B.V. Kumar, Advocate, for the Appellant

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

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20615 - 20622 /2024

DATE OF HEARING: 05.04.2024
DATE OF DECISION: 05.08.2024

PER : DR. D.M. MISRA

These appeals are filed against respective Orders-in-Original. Since all these appeals involve common issues, they are taken up together for hearing and disposal.

2. The duty and penalty confirmed in each of the appeal is detailed as below:

Sl. No.	Appeal No.	OIO No./ Date	Period	Demand	Penalty
1	E/815/2012	No.37/2011 dt.30.09.2011	2006-2011	Rs.80,63,594/-	Rs.80,63,594/-
2	E/812/2012	No.37/2011 dt.30.09.2011	2006-2011	-	Rs.8,06,000/-

Sl. No.	Appeal No.	OIO No./Date	Period	Demand	Penalty
3	E/813/2012	No.37/2011 dt.30.09.2011	2006-2011	-	Rs.8,06,000/-
4	E/814/2012	No.37/2011 dt.30.09.2011	2006-2011	-	Rs.8,06,000/-
5	E/1271/2012	No.5/2012 dt.25.01.2012	2007-2010	Rs.68,01,595/-	Rs.68,01,595/-
6	E/1288/2012	No.5/2012 dt.25.01.2012	2007-2010	-	Rs.6,80,000/-
7	E/1289/2012	No.5/2012 dt.25.01.2012	2007-2010	-	Rs.6,80,000/-
8	E/1290/2012	No.5/2012 dt.25.01.2012	2007-2010	-	Rs.6,80,000/-

3. The facts common in all these appeals briefly are that the appellants M/s. Ivorychem India Pvt. Ltd. (hereinafter referred as M/s. Ivorychem) and M/s. A. G. VET Pharmachem (hereinafter referred as M/s. AG Vet) are registered with the Central Excise department for manufacture of Veterinary Medicaments falling under Chapter Heading 30 of Central Excise Tariff Act (CETA), 1985. The said goods were manufactured under Loan Licensee Agreement with M/s. Makam Pharmachem and were notified under Section 4A of the Central Excise Act, 1944 for Maximum Retail Price (MRP) based assessment. They had availed SSI benefit under Notification No.8/2003-CE dated 01.03.2003 during the period in question. On the basis of intelligence, the factory premises of M/s. Makam Pharmachem, M/s. AG Vet and M/s. Ivorychem had been visited by the Central Excise Preventive units and detailed mahazars were drawn on 23.6.2010 retrieving records and also recorded the processes carried out in the premises declared by M/s. Makam Pharmachem, M/s. Ivorychem and M/s. AG Vet and. During the course of mahazar proceedings, it was noticed that the factory of M/s. Makam Pharmachem were operating in a premises at measuring 50*200 sq. ft. area. The Veterinary Medicaments are manufactured in the said premises with the labels of M/s. Makam Pharmachem and also of with brand name of the customers of M/s. Ivorychem and M/s. AG Vet. It revealed that M/s. Makam Pharmachem was manufacturing Veterinary Medicaments on loan licensee basis for M/s. Ivorychem and M/s. AG Vet. Besides

M/s. Makam Pharmachem, was also manufacturing their own Veterinary Medicaments falling under Chapter 30 of CETA, 1985 by using the same machineries installed in their premises. Statements of various persons were recorded and documents were seized in the premises of M/s. Makam Pharmachem, M/s. AG Vet and M/s. Ivorychem during the course of investigations. On completion of the investigation, show-cause notices were issued on 30.09.2011 to M/s. AG Vet and on 20.10.2011 to M/s. Ivorychem proposing recovery of Central Excise duty of Rs.80,63,594/- and Rs.68,09,595/- with interest and penalty, respectively. Also, penalty proposed against M/s. Makam Pharmachem and other employees of the appellant-companies. On adjudication, demands and penalties were confirmed; and the amounts paid during the course of investigation have been appropriated. Hence, the present appeals.

4. The learned advocate for the appellants has submitted that the appellants viz., M/s. Ivorychem and M/s. AG Vet were registered with the Central Excise department for manufacture of Veterinary Medicaments falling under CESH 3003 9090. They were manufacturing the said Veterinary Medicaments on "loan licensee basis" in the factory of M/s. Makam Pharmachem. He has submitted that M/s. Makam Agrochem Pvt. Ltd. was set up in 1984 at Plot No.280 whereas M/s. Makam Pharmachem was set up in 1998 at Plot No.281/1, 6th Main Road, 2nd Stage, Peenya Industrial Area, Bangalore, for manufacture of Agricultural Pesticides, whereas M/s. Makam Pharmachem manufactures Ectoparasites (Animal Healthcare Products). It is a partnership firm comprising of S/Shri M. S. Venkatachalapathy, M.S. Chandraprakash, M.S. Gopalakrishna as partners. M/s. Makam Pharmachem discharged duty on its clearances and had not availed exemption under Notification No.8/2003-CE dated 1.03.2003. M/s. Ivorychem India (P) Ltd. was started in 2006 and took on rent Shop No.A-281/1 from M/s. Makam Pharmachem. The composition of the said unit consists of following directors viz., S/Shri Rajeev Aiyappa, Akshata Uthappa,

M.S. Venkatachalapathy, M.S. Chandraprakash, M.S. Gopalakrishna. M/s. AG Vet is located at A-281/2 and also manufactures Animal Healthcare Products on loan license basis. These are independent and separate legal entities.

4.1 As manufacturer of Animal Healthcare Products require a license from Drug Controller and since M/s. Makam Pharmachem had surplus manufacturing capacity, on approaching the Drug Controller with a request letters from M/s. Ivorychem, M/s. AG Vet and also from M/s. Makam Pharmachem to get the veterinary products manufactured in the factory of M/s. Makam Pharmachem as loan licensee, the Drug Controller granted license on 16.10.2006 which was valid up to 05.10.2011, later the said license was renewed. The loan license was granted in terms of Rule 69A of Drugs and Cosmetics Rules, 1945.

4.2 All the inputs required for manufacture of Veterinary Medicaments were supplied by the Appellants and sent to M/s. Makam Pharmachem against material movement slips. M/s. Makam Pharmachem converted the bulk formations as indicated in the material movement slips and returns to the Appellant’s factory who in turn repack them to retail pack of 5 ml, 10 ml, 15 ml, 250 ml, 500 ml and 1 litre with the help of semi-automatic filling machine. After packing, these bottles were sealed with aluminium tamper proof seals and affixed with labels. He has submitted that the process carried out by M/s. AG Vet and M/s. Ivorychem amounts to manufacture in terms of Chapter Note 6 of Chapter 30 of CETA, 1985.

4.3 Rebutting the findings of the learned Commissioner that M/s. Ivorychem is affixing the brand name of RFCL/VETNEX/PFIZER during the period 2007-08 to 2009-10, he has submitted that an Assignment Agreement was entered between RFCL and M/s. Ivorychem for manufacture of branded animal healthcare product. Necessary communication has been addressed to the jurisdictional Deputy Commissioner intimating that they would avail benefit of SSI Exemption Notification No.08/2003-CE dated 01.03.2003 as amended from time to time and would obtain registration once the clearance value exceeds Rs.1.50 crores. Also, they have submitted monthly 'NIL' Returns along with the letters were filed from time to time. Once they exceeded the clearance value in January 2009, they commenced discharging duty for clearances made thereafter and filed quarterly returns accordingly as prescribed for SSI units. He has submitted that M/s. Makam Pharmachem and M/s. AG Vet are registered with respective Income Tax Department, Sales Tax, VAT, Industries Department, JDGFT, Central Excise department, etc., and each one of the said unit is a separate local entity and the partners of M/s. Makam Pharmachem are different from directors of M/s. AG Vet and M/s. Ivorychem. He has submitted that a private limited and partnership company are distinct legal entity and their clearances cannot be clubbed. In support, he has referred to the judgments:

(i) Binod Kumar Maheswari vs. CCE, Calcutta-I: 1995 (80) ELT 438 (T)
(ii) Surface Graphics Pvt. Ltd. & Ors. Vs. CCE, Mumbai-III: 2000 (39) RLT 355 (T)
(iii) S.K.N. Gas Appliances & Anr. Vs. CCE, New Delhi: 2000 (39) RLT 528 (T)
(iv) P.K. Industries vs. CCE, Chandigarh: 2004 (163) ELT 204 (Tri.-Del.)

4.4 Further, he has submitted that the commonality of premises, telephone, shed, Directors cannot be a ground for treating the units as related for clubbing of clearances. In this connection, reliance is placed on the following decisions:

(i) Vivomed Labs Pvt. Ltd. vs. CCE: 1991 (53) ELT 152 (T) confirmed by Supreme Court-1992 (62) ELT A119 (SC)
(ii) Rang Udyog vs. CCE, Ahmedabad: 1996 (83) ELT 648 (T) confirmed by Supreme Court - 1999 (106) ELT A66 (SC)
(iii) Gajanan Fabrics Distributors vs. CCE, Pune: 1997 (92) ELT 451 (S.C.)
(iv) Padma Packages (P) Ltd., vs. CCE, Coimbatore: 1997 (90) E.L.T. 175 (T)
(v) Spick-N-Span Steel Wools Pvt. Ltd. v. CCE., Nagpur: 2011(274) E.L.T. 568 (Tri. Mum.)

4.5 Further, he has submitted that it is a settled law that if there is an assignment of Trademark/Brand name in favour of the assessee, the assessee is entitled to the benefit of SSI Exemption. In this connection, reliance is placed on the following decisions:

(i) CCE Ahmedabad vs. Vikshara Trading & Invest. P. Ltd. 2003 (157) ELT 4 (S.C)
(ii) CCE, Goa vs. Primella Sanitary Products 2005 (184) ELT 125 (S.C))
(iii) Relief Pharmaceuticals Pvt. Ltd., vs. CCE Aurangabad 2006 (195) ELT 78 (T-Mum.)

(iv) CCE Chennai vs. MEL Systems & Services Ltd. 2008 (232) ELT 4 (Tri – Che.)
(v) Abdul ValiHafizi vs. CCE Mumbai - 2008 (227) ELT 89 (Tri - Mum)
(vi) Sri Vidya Mineral Processors Pvt. Ltd. vs. CCE Hyderabad - 2008 (222) ELT 226 (Tri- Bang)
(vii) CCE Chennai vs. Sree Ram Perfumery Works - 2009 (241) ELT 89 (Tri - Che)

4.6 He has also submitted that it is a settled law that if a Loan Licensee manufactures goods carrying its own brand name, under its own supervision and control, but in the factory of another assessee, is a manufacturer and is entitled to the benefit of SSI Notification. In this connection, reliance is placed on the following decisions:

(i) Indica Laboratories Pvt. Ltd. vs. UOI - 1990 (50) ELT 210 (Guj)
(ii) CCE Calcutta I vs. Diochem - 2002 (145) ELT 94 (Tri - Kol)
(iii) CCE Mumbai vs. G & Y Soap Works - 2006 (199) ELT 744 (Tri - Mum)

4.7 He has also referred to judgement in the case Pushpam Pharmaceuticals Co. vs. Collector: 1995 (78) ELT 401 (S.C) and submitted that extended period of limitation is not applicable just for any omission on the part of the assessee.

4.8 It is a settled law that even if a Declaration is not made, and duty is demanded, an assessee is entitled to take Cenvat Credit on the inputs utilized in the manufacture of finished goods. It is also settled law that when duty is demanded, for the purposes of quantification, the assessable value of the goods should be taken as cum-duty value. In this connection, reliance is placed on the following decisions:

(i) Chamundi Steel Rolling Mills vs. CCE, Bangalore 1996 (81) ELT 563 (Tri - Del)
(ii) Varalakshmi Plastics vs. CCE, Chennai-2003 (158) ELT 611 (T-Che).
(iii) Srichakra Tyres Ltd. vs. Collector 1999(108) ELT 361 (Tri. - LB)

4.9 In the light of the above submissions, he submits that the differential duty and interest demanded and confirmed against M/s. Ivorychem and M/s. AG Vet is not sustainable in law. For the same reasons, the penalties imposed on M/s. Ivorychem under Section 11AC of Central Excise Act (CEA), 1944 read with Rule 25 of Central Excise Rules (CER), 2002. For the same reasons, the penalties imposed on M/s. Makam Pharmachem, S/Shri M.S, Chandraprakash, M.S. Venkatachalapathy, under Rule 26 of CER, 2002 are also not sustainable in Law. The Appellants M/s. Ivorychem have paid voluntarily an amount of Rs. 15,35,794/-.

5. Per contra, the learned Authorised Representative (AR) for the Revenue has submitted that both the appellants are manufacturing medicaments on loan licensee basis in the premises of M/s. Makam Pharmachem. M/s. Makam Pharmachem's factory premise measures 50*200 sq. ft. and the medicaments are manufactured in their factory for M/s. AG Vet and M/s. Ivorychem on loan license basis. In the Mahazar, it is noted that the said factory has two stirring vessels, two storage tanks, four numbers of volumetric filling machines, a pouch filling machine, two shrink wrapping and packing lines, which are powered by one KPTCL electricity connection. During Mahazar proceedings on 23.06.2010, it was noticed that all manufacturing activities of both the appellants were carried out in the premises of M/s. Makam Pharmachem. M/s. Ivorychem and M/s. AG Vet did not have any separate infrastructure for manufacture of

medicaments. The required raw materials including packing materials purchased by the appellants were received in the factory premises of M/s. Makam Pharmachem and after manufacture of Veterinary Medicaments, they were cleared by the appellants against their invoices. No separate documents were maintained for movement of raw materials/ manufactured goods either from the factory of appellant to the factory of M/s. Makam Pharmachem or vice versa. The claim of the appellants was that only the activity of formulations were carried out in the factory of M/s. Makam Pharmachem and packing/labelling was undertaken by the appellants in their factory, is contrary to the clarification issued by the Drugs Controller Department; whereunder it is intimated that the loan licensee viz., the appellants were required to get their products manufactured/packed/labelled only in the premises of M/s. Makam Pharmachem and required with all the conditions of the license. He has submitted that as per Condition 2(vi) of the SSI exemption Notification No.8/2003-CE dated 01.03.2003 as amended, the exemption limit of Rs.1.50 crores (Rs.1.00 crores up to 31.03.2007) has to be computed considering the turnover of M/s. Makam Pharmachem as well as each of the appellant. The sales turnover of M/s. Makam Pharmachem for the year 2006-07 to 2010-11 had crossed the limit of Rs.1.50 crores; and for the year 2009-10, the turnover also exceeded to Rs.4.00 crores. Thus, the availment of SSI exemption limit of Rs.1.50 crores by each the appellant viz., M/s. AG Vet and M/s. Ivorychem is incorrect. Also, under the said Notification at para 4, the exemption contained in the Notification shall not apply to specified goods bearing brand name or trade name of others. As such, appellants are not eligible to SSI exemption under the said Notification.

5.1 He has submitted that the Veterinary Medicaments are chargeable to duty on MRP basis assessment under Section 4A of CEA, 1944. Further, he has submitted that M/s. AG Vet entered into an agreement with the following customers and manufactured and cleared products with their brand name.

(i) M/s. RFCL (Products – Dermeez and Ticmax)
(ii) M/s. Alembic Ltd. (Products – Tickout and Poron Flumethrin)]
(iii) M/s. Brilliant Bio Pharma Ltd. (Products – Krimlin)
(iv) M/s. TTK Healthcare – (Product – Lytik)
(v) M/s. Concern Health Care – (Products – Amitraz)

5.2 M/s. Ivorychem entered into agreement with the following customers:

(i) M/s. RFCL
(ii) M/s. Ventex Animal Health India Ltd.
(iii) M/s. Pfizer Health Products

5.3 From the agreements, it can be seen that the rights to use the brand names were extended to the appellants and as per the said agreements, brand names are owned by the customers. In the statement dated 15.09.2011/15.01.2012 of Shri M.S. Venkatachalapthy, it is made clear that these agreements gave them exclusive rights to manufacture and supply the goods back to the respective brand owners. From the agreement and the assignment deed, it is clear that though the brand name have been assigned to the appellants but it is mandatory in terms of the said agreement that the products manufactured with the said brand names are to be returned to the original brand name owners and to be cleared as per the conditions and directions/orders of brand name owners only. They have no freedom to sell the branded goods independently to other customers using the brand name. He has submitted that appellants are ineligible to avail SSI exemption when brand name / trade name of others are used even when brand name was assigned to the manufacturer. In support of his contention that SSI exemption is inadmissible, he places reliance on the following decisions:

(i) Vee Gee Faucets P. Ltd.: 2010 (259) ELT 273 (Tri.-Del.)
(ii) Vee Gee Faucets P. Ltd.: 2015 (316) ELT A72 (SC)
(iii) Dr. Smita's Herbal Laboratories: 2022 (381) ELT 784 (Tri.-Mum.)
(iv) Plaza Pipe Industries: 2017 (357) ELT 791 (Tri.-Del.)
(v) Double Cola Mfg. Co. (India): 2017 (349) ELT 779 (Tri.-Mum.)

5.4 Further, he placed reliance on the following decisions for clubbing the clearances:

(i) Parle Bisleri Pvt. Ltd.: 2011 (263) ELT 15 (SC)
(ii) Himanshu Traders: 2012 (278) ELT 223 (Tri.-Del.)
(iii) British Scaffolding India Pvt. Ltd.: 2014 (313) ELT 87 (Tri.-Del.)
(iv) Euro Scoff (India) Ltd.: 2015 (323) ELT A124 (SC)
(v) Box & Carton India Pvt. Ltd.: 2008 (228) ELT 85 (Tri.-Del.)
(vi) Box & Carton India Pvt. Ltd.: 2010 (255) ELT A13 (SC)
(vii) Navrang Art Printers: 2010 (251) ELT 267 (Tri.-Mum.)

5.5 On the issue of invoking extended period of limitation, the learned AR for the Revenue has submitted that though the appellant had filed necessary Central Excise quarterly returns in the form of ER-3 returns for the year 2009-10 and 2010-11 indicating production and clearances during the said period with the department and it is argued by the appellants that no facts were suppressed from the knowledge of the department, it is his contention that mere taking out registration and declaring and availing SSI exemption is not sufficient, when they have suppressed the fact of aggregate value of specified goods manufactured in the factory of M/s. Makam Pharmachem exceeded the exemption limit, with an intention to avail SSI exemption, would not absolve them and the Commissioner had rightly confined the demand involving extended period.

6. Heard both sides and perused the records.

7. The issues involved in the present appeals for determination are whether: (i) The appellants viz., M/s. AG Vet and M/s. Ivorychem who are manufacturers of Veterinary Medicaments on loan licensee basis in the factory of M/s. Makam Pharmachem are eligible to the benefit of SSI Exemption Notification No.8/2003-CE dated 01.03.2003 during the relevant period from 2006-07 to 2010-11; (ii) Extended period of limitation applicable; and (iii) penalty is imposable on M/s. AG-Vet, M/s. Ivorychem and other Appellants.

8. Undisputed facts are that the appellants' premises were visited by the officers of the Department and Mahazar was drawn on 23.06.2010 regarding the activities carried in the factory

premises of M/s. Makam Pharmachem and M/s. AG Vet and M/s. Ivorychem. On the basis of Mahazar and subsequent statements of various persons and other evidences, the Revenue issued show-cause notices to the appellants alleging that since the specified goods were manufactured on loan licensee basis only at the factory premises of M/s. Makam Pharmachem, the SSI exemption under Notification No.8/2003-CE dated 01.03.2003 has been wrongly availed by M/s. AG Vet and M/s. Ivorychem when the exemption limit of Rs.1.00 crores / Rs.1.50 crores as applicable had already exhausted by M/s. Makam Pharmachem for each of the Financial Year. The crux of the allegation of the department is that both the appellants are loan licensee holders under the Drugs and Cosmetics Rules, 1945 to manufacture Veterinary Medicaments in the premises of M/s. Makam Pharmachem whose turnover had already exceeded the SSI exemption limit of Rs.1.00 crores for the year 2006-07 and Rs.1.50 crores during the period 2007-2011, hence, further exemption on clearances of specified goods would not be admissible under Notification No.8/2003-CE dated 01.03.2003. The arguments of the Revenue mainly centres around the clause 2(vi) of the said exemption Notification which reads as follows:

> 2(vi) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, does not exceed rupees three hundred lakhs in the preceding financial year.

9. On the basis of the Mahazar drawn in the premises of M/s. Makam Pharmachem, it has been alleged that all the activities of manufacture of medicaments were being carried out in the premises of the M/s. Makam Pharmachem on Loan License basis, hence, the manufacturers viz., M/s. AG Vet and M/s. Ivorychem would not be eligible in excess of the limit of Rs.1.50 crores, as M/s. Makam Pharmachem had already exceeded the aggregate value of clearance Rs.100 Lakhs/Rs.150 lakhs, hence their goods attract Central Excise duty at the

appropriate rate. Learned advocate for the appellant in their defense submitted that a part of the process was carried out by the appellant viz., M/s. Ivorychem and M/s. AG-Vet, viz., repacking the bulk formulations received from M/s. Makam Pharmachem into retail packs of 5 ml, 10 ml, 15 ml, 250 ml, 1 litre, etc., with the help of semi-automatic filling machine and after tampered proof seals and affixing labels, cleared the goods from their factory, which amounts to manufacture in view of Chapter Note 6 of CETA, 1985. Therefore, the Appellants are eligible to the benefit of the said Notification. Therefore, it cannot be said that the Veterinary Medicaments were manufactured only at the premises of M/s. Makam Pharmachem.

10. The learned Commissioner in the impugned Order-in-Original No.37/2011 dated 27.12.2011 in the respect of M/s. AG Vet, after analysing the statements and other evidences on record including the conditions of Drug License issued by the Drug Controller, has categorically held that the entire process of manufacture of Veterinary Medicaments were completed in the premises of the appellant. Also, the Commissioner analysing the gamut on evidences which we find more or less common in both the appeals, observed in Order-in-Original No.37/2011 dated 27.12.2011 relating to M/s. AG Vet has held as follows:

> "34.1 In this connection the admitted facts corroborated by evidence on record with regard to the utilisation of the factory of M/s. Makam are as follows:
>
> (i) The Mahazar drawn in the first instance on 23.6.2010 (Annexure A1) clearly records the fact that all the manufacturing activities of M/s. Ivorychem were carried out in the factory premises of M/s. Makam. The said Mahazar recorded as witnessed by the panchas indicated that M/s. Ivorychem did not have any separate premise or infrastructure (other than the factory and infrastructure of M/s. Makam) for the manufacture of medicaments. Further, it is also seen that only one power connection from M/s. KPTCL is available for the entire premise, which was registered in the name of M/s. Makam.

(ii) The ground plan submitted to the department (Annexure A7) indicates that the premises at A 281 included the factories of M/s. Makam, M/s. Ivorychem and M/s. AG-Vet. They have also indicated the premises of M/s. Makam as A 281, the premises of M/s. Ivorychem as A 281-1 and the premises of M/s. AG-Vet as A 281-2. Therefore, it is seen that as per the ground plan the premise No.A-281 is the only premises and the other premises are all situated in the said premises.

(iii) Shri M. S. Venkatachalapathy, Managing Partner of M/s. Makam has submitted in his statement recorded on 23.6.2010 [Annexure A2(1)] that all the manufacturing activity of M/s. Ivorychem is done in the factory premises of M/s. Makam. It was also submitted that all the raw materials procured by M/s. Ivorychem were directly received in the factory of M/s. Makam and that the finished goods were manufactured by M/s. Ivorychem in the factory premises of M/s. Makam using the employees of M/s. Ivorychem. It is seen that the goods manufactured in the factory of M/s. Makam were accounted by M/s. Ivorychem in their books and sold accordingly. In his further statement dated 26.07.2011 (Annexure A2(2) Shri M. S. Venkatachalapthy submitted that M/s. Ivorychem had asked M/s. Makam to provide the spare capacity for the manufacture of medicaments and accordingly M/s. Makam agreed to lend the services and expert staff, equipment and premises for the manufacture of the goods of M/s. Ivorychem.

(iv) Shri Chandraprakash, Partner of M/s. Makam was recorded as 28.6.2010 (Annexure A3(1) wherein he stated inter alia that the accounts of M/s. Makam, M/s, Ivorychem and M/s. AG-Vet were maintained in the common office premises at A 281, 6th Main Road, 2nd Stage, Peenya Industrial Estate, Bangalore – 560 058 as they were the persons involved in all the three firms/company. In his further statement dated 26.07.2011, [Annexure A3(2)] Shri M. S. Chandraprakash has agreed fully with the above statement dated 26.7.2011 of Shri M. S. Venkatachalapathy.

(v) The application submitted for renewal of manufacturing license by M/s. Makam vide their letter MPC: DRUG:09-10/0503 dated 8.5.2009 [Annexure A8(1) to the SCN] with the Drug Controller enclosing the blue print of manufacturing, testing and packing premises [Annexure A8(2) to the SCN], list of equipments [Annexure A8(4) to the SCN], indicate an admission that the entire premises at A 280 and A 281, Bangalore, is the factory / manufacturing unit of M/s. Makam. It is also seen from the enclosed lists that all the laboratory as well as manufacturing equipments including packing / sealing / weighing machineries belonged to M/s. Makam. The said fact is corroborated by Shri K. Hanumanthappa, Production Chemist of M/s. Makam, on 28.6.2010 (Annexure A4) that M/s. Makam were having the necessary infrastructure and a testing laboratory in the factory for the manufacture of medicaments. It is also seen that there was only one power connection obtained for the entire premises from KPTCL which was in the name of M/s. Makam and there were no separate power connections in the name of M/s. Ivorychem.

(vi) The above facts have been corroborated and fully endorsed by Shri M. S. Venkatachalapathy, (Managing Partner of M/s. Makam) in his statements, dated 23.6.2010 [Annexure A2(1) to the SCN] and statement dated 26.7.2011 [Annexure A2(2) to the SCN] and Shri M. S. Chandraprakash (Partner of M/s. Makam) in his statements dated 28.6.2010 [Annexure A3(1)], and further statement dated 26.7.2011, [Annexure A3(2)] recorded under summons proceedings. The said partners in the said statements also confirmed the fact that M/s. Makam at A-281, 6th Main Road, 2nd Stage, Peenya Industrial Estate was registered with the Central Excise Department for the manufacture of veterinary medicaments falling under Chapter 30 of the Central Excise Tariff Act, 1985, and that the said unit was paying full rate of duty without availing the benefit of SSI exemption manufactured by them in respect of the products other than those veterinary medicaments manufactured as loan licensee in terms of the loan lincense granted to M/s. Ivorychem.

(vii) The said partners in the said statements also confirmed the fact that M/s. Makam at A-281, 6th Main Road, 2nd Stage, Peenya Industrial Estate was registered with the Central Excise Department for the manufacture of veterinary medicament falling under Chapter 30 of the Central Excise Tariff Act, 1985, and that the said unit was paying full rate of duty without availing the benefit off SSI exemption manufactured by them other than those veterinary medicaments manufactured as loan licensee in terms of the loan license granted to M/s. Ivorychem.

(viii) It is confirmed by the statements of the above mentioned partners confirming the fact that M/s. Ivorychem Pvt. Ltd., where both Shri M. S. Venkatachalapathy, (Managing Partner of M/s. Makam) and Shri M. S. Chandraprakash (Partners of M/s. Makam) are seen to be the Directors, and major shareholders subsequently obtained Central Excise registration for manufacture of veterinary medicaments in the premises of M/s. Makam by mentioning the addresses as A281/1, 6th Main Road, 2nd Stage, Peenya Industrial Estate, Bangalore – 560 058 and A 281/2, 6th Main Road, 2nd Stage, Peenya Industrial Estate, Bangalore – 560 058 respectively. Further, it is seen that the subsequent registration for the said two units was obtained independently for the purpose of payment of Central Excise duty soon after M/s. Makam had crossed the exemption limit for availing the benefit of SSI exemption units in terms of the Notification No.8/2003 has also been confirmed in the said statements. The statements also confirmed the fact that the accounts of M/s. Makam, M/s. Ivorychem and M/s. Ivorychem were maintained in the common office premises of M/s. Makam situated at A 281, 6th Main road, 2nd Stage, Peenya Industrial Estate, Bangalore – 560 058 as they were the persons involved in all the affairs of M/s. Makam, M/s. Ivorychem and M/s. Ivorychem Pvt. Ltd.

(ix) It is again seen that the Drugs Control Department Bangalore vide letter No.DCD/CR-32/Spl. Cl.-2/10-11 dated 28.8.2010 (Annexure A9 to SCN) had clarified the fact that the manufacdture of veterinary medicaments was to take place in terms of the loan licensee issued under the Drugs and Cosmetics Rules, 1945 in the premises of M/s. Makam. The relevant portion of the clarification is reproduced below as follows:-

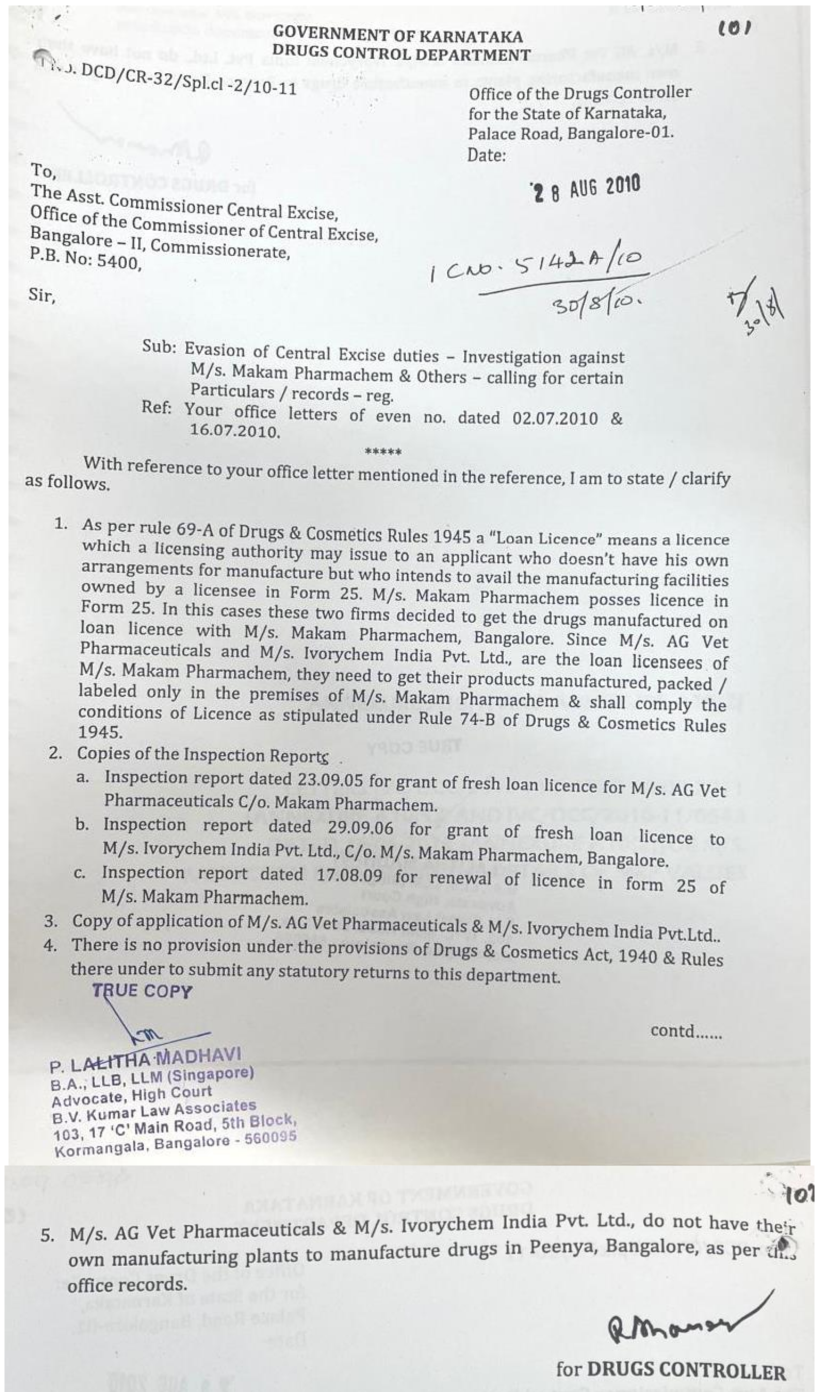
(a) As per rule 69A of Drugs and Cosmetics Rules, 1945 a loan license means a license which a licensing authority may issue to an applicant who doesn't have his own arrangements for manufacture but who intends to avail the manufacturing facilities owned by a licensee in Form 25. M/s. Makam possesses license in Form 25. In this case, two firms decided to get the drugs manufactured on loan license with M/s. Makam. Since M/s. Ivorychem and M/s. Ivorychem are the loan licensees of M/s. Makam, they need to get their products manufactured, packed/labelled only in the premises of M/s. Makam and shall comply the conditions of License as stipulated under Rule 74-B of Drugs & Cosmetics Rules, 1945;

(b) M/s. Ivorychem do not have their own manufacturing plants to manufacture drugs.

It is therefore clear from the above facts corroborated by documentary evidence and statements detailed and discussed above (relied upon in the SCN) that in the first instance the factory of M/s. Makam where veterinary medicaments are being manufactured by them consisted of an all inclusive premises at A 280 and A 281, 6th Main Road, 2nd Stage, Peenya Industrial Estate, Bangalore – 560 058, consisting of sheds. The very same factory premises of M/s. Makam at A 281 located at 6th Main Road, 2nd Stage, Peenya Industrial Estate, Bangalore – 560 058 is the premises where the said products are manufactured and A-281 in the same precinct is rented to M/s. Ivorychem. Therefore, it is seen that the factory of M/s. Makam at A 281 is the premises/factory where the manufacture of veterinary medicaments of M/s. Ivorychem is taking place in terms of the loan license as evidenced by the facts and documentary evidence detailed above. Therefore, even if it is agreed but not accepted that M/s. Ivorychem possessed the infrastructure for the packing of the bulk formations into smaller packs the admitted facts that corroborate the said facts as discussed above indicate that M/s. Ivorychem is the manufacturer of the said goods in the factory of M/s. Makam in terms of the loan license issued to them by the Drugs control Department."

11. The above analysis and findings of the learned Commissioner on the basis of evidences on record reveals that the Veterinary Medicaments were manufactured on behalf of the appellants, the loan licensors, in the premises of M/s. Makam Pharmachem. This fact is corroborated further with the condition of license given to the appellant under Section 69A of Drugs and Cosmetics Rules, 1945 and also the clarification issued by the Drugs Controller vide letter dated 28.08.2010 in response to a query raised by the department, which is reproduced below:

"A loan licence means a licence which a licensing authority may issue to an applicant who does not have his own arrangements for manufacture but who intends to avail the manufacturing facilities owned by a licensee in Form 25."



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GOVERNMENT OF KARNATAKA
DRUGS CONTROL DEPARTMENT

No. DCD/CR-32/Spl.cl -2/10-11

Office of the Drugs Controller
for the State of Karnataka,
Palace Road, Bangalore-01.
Date:

28 AUG 2010

To,
The Asst. Commissioner Central Excise,
Office of the Commissioner of Central Excise,
Bangalore – II, Commissionerate,
P.B. No: 5400,

I CNo. 5142A/10
30/8/10.

Sir,

Sub: Evasion of Central Excise duties – Investigation against M/s. Makam Pharmachem & Others – calling for certain Particulars / records – reg.

Ref: Your office letters of even no. dated 02.07.2010 & 16.07.2010.

*****

With reference to your office letter mentioned in the reference, I am to state / clarify as follows.

1. As per rule 69-A of Drugs & Cosmetics Rules 1945 a "Loan Licence" means a licence which a licensing authority may issue to an applicant who doesn't have his own arrangements for manufacture but who intends to avail the manufacturing facilities owned by a licensee in Form 25. M/s. Makam Pharmachem posses licence in Form 25. In this cases these two firms decided to get the drugs manufactured on loan licence with M/s. Makam Pharmachem, Bangalore. Since M/s. AG Vet Pharmaceuticals and M/s. Ivorychem India Pvt. Ltd., are the loan licensees of M/s. Makam Pharmachem, they need to get their products manufactured, packed / labeled only in the premises of M/s. Makam Pharmachem & shall comply the conditions of Licence as stipulated under Rule 74-B of Drugs & Cosmetics Rules 1945.
2. Copies of the Inspection Reports
   a. Inspection report dated 23.09.05 for grant of fresh loan licence for M/s. AG Vet Pharmaceuticals C/o. Makam Pharmachem.
   b. Inspection report dated 29.09.06 for grant of fresh loan licence to M/s. Ivorychem India Pvt. Ltd., C/o. M/s. Makam Pharmachem, Bangalore.
   c. Inspection report dated 17.08.09 for renewal of licence in form 25 of M/s. Makam Pharmachem.
3. Copy of application of M/s. AG Vet Pharmaceuticals & M/s. Ivorychem India Pvt.Ltd..
4. There is no provision under the provisions of Drugs & Cosmetics Act, 1940 & Rules there under to submit any statutory returns to this department.

TRUE COPY

P. LALITHA MADHAVI
B.A., LLB, LLM (Singapore)
Advocate, High Court
B.V. Kumar Law Associates
103, 17 'C' Main Road, 5th Block,
Kormangala, Bangalore - 560095

contd......

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5. M/s. AG Vet Pharmaceuticals & M/s. Ivorychem India Pvt. Ltd., do not have their own manufacturing plants to manufacture drugs in Peenya, Bangalore, as per this office records.

for DRUGS CONTROLLER

Therefore, the Veterinary Medicaments have been manufactured only in the factory of M/s. Makam Pharmachem during the disputed period utilising their plant and machinery and no contrary evidence to the said letter has been placed by the Appellant; nor any evidence adduced rebutting the facts mentioned in the Mahazar dated 23.6.2010 and the condition of license issued to manufacture the said Medicaments on Loan Licensee basis. The learned advocate referred to the individual Lease Agreements for availing the premises on rental basis and ground plan of each of the appellant to show that they are separate units, but however, that cannot in any manner rebut the allegation that the goods were manufactured only at the premises of M/s. Makam Pharmachem using the machinery installed in the said premises.

12. The next arguments advanced on behalf of the appellant is that each of the manufacturer i.e., M/s. Makam Pharmachem, M/s. AG Vet and M/s. Ivorychem as Loan Licensee is entitled to the prescribed SSI exemption limit of Rs.1.00 crore for the period 2006-07 and Rs.1.50 crores for the period 2007 to 2011. We find that the issue has been considered by the Hon'ble Gujarat High Court, in the case of **Indica Laboratories Pvt. Ltd. vs. UOI: 1990 (50) ELT 210 (Guj.),** in the context of SSI Exemption Notification No.175/1986-CE dated 01.03.1986, *para materia* with the Notification No.8/2003-CE dated 01.03.2003.

12.1 Briefly stated the facts of the said case [**M/s. Indica Laboratories** (supra)] are that the petitioners in their factories were engaged in the manufacture of PP Medicaments and also manufactured the same goods for loan licensees who were given the licenses under the provision of Drugs and Cosmetics Act, 1944 read with Drugs and Cosmetics Rules, 1945. The inserted paragraphs (2) and (3) of the said exemption Notification No. 175/1986-CE dated 01.03.1986 which is *pari materia* with the condition in Notification No.08/2003-CE dated 01.03.2003 had been challenged before the Hon'ble Gujarat High Court being *ultra vires*. Analysing the conditions of the Notification stipulated under paragraphs (2) and (3) relating to determination of aggregate value of specified goods by any one or more manufacturers in any financial year. The Hon'ble High Court has observed as follows:

> "Now follow paras 2 and 3 which are impugned by the learned counsel for the petitioners. They provide that the aggregate value of clearances of the specified goods from any factory by one manufacturers in any financial year under clause (a) and (b) of para 1, shall not exceed Rs.

30 lakhs and Rs. 60 lakhs respectively. There is a proviso to para 2 which lays down that the aggregate value of lakhs respect the specified goods from any factory by any one or more manufacturers in any financial year, in terms of clause (a) and (b) of para 1, taken together, shall not exceed Rs.75 lakhs. Para 3 provides that nothing contained in this notification shall apply if the aggregate value of clearances of all excisable goods for home consumption, (a) by a manufacturer, from one or more factories, or (b) from any factory, by one or more manufacturers, had exceeded Rs. 150 lakhs in the preceding year. Thus, paras 2 and 3 bring about the concept of clubbing of manufactured goods for the purpose of earning exemption qua their clearances from a given factory. To illustrate working of these two paras read with para 1, we may take example of a manufacturer. A owning factory whose first clearance from that factory amounts to Rs. 30 lakhs. Then as per para 1 (a) (ii) he will get total exemption of excise duty qua these specified goods cleared upto limit of Rs. 30 lakhs. But if in the very same factory, some other manufacturer B on hiring factory shiftwise or otherwise manufactures his own goods under his supervision and control and out of his own raw material and first clearance value of E's manufactured goods exceeds Rs. 30 lakhs, then, but for para 2, both A and B would be entitled, as per para 1, to claim individual exemption on their respective first clearances of goods manufactured by them in the factory to the extent of Rs. 30 lakhs each but because of concept of clubbing brought in by para 2, the goods manufactured from the very same factory, by A and B will be clubbed and their first clearances of the respective goods would amount to Rs. 60 lakhs i.e. Rs. 30 lakhs each. Consequently, exemption from excise duty will be available upto total value of Rs. 30 lakhs only and the rest will attract duty Similarly clubbing of further clearances of these manufacturers from the same factory would attract ceiling of Rs. 60 lakhs and would not entitle them to have concessional duty on their respective additional clearances upto Rs. 40 lakhs each. Even for the last year, eligibility criterion for the same factory being aggregate value of clearance of the excisable goods for home consumption as the rate of 150 lakhs of rupees would apply conjointly if more than one manufacturers like A and B manufacture from the same factory.

12.2 Upholding the vires of the Notification, their Lordships held as follows:

"..............If one manufacturer manufactures specified goods in one financial year alone from that factory and gets the are goods cleared, he gets full exemption and concession to the extent provided by para 1. But if more than one manufacturer utilise the said factory and infrastructures during the fin year and get their goods cleared through the factory gate in the same year, then, their goods will be clubbed for the purpose of deciding the question of total exemption upto the limit prescribed and concessional exemption upto further limit prescribed. The common thread which runs through all the paras of the notification is the scheme of exemption and concessional duty in connection with total quantity of first clearances and subsequently clearance of specified goods, ex-factory gate during the financial year. Once this common thread is kept in view, then paras 2 and 3 will fall in line with para 1. If paras 2 and 3 are not countenanced, unexpected and unwarranted result would follow. From the same factory gate, goods manufactured by manufacturer. A in a financial year will get total exemption upto Rs. 30 lakhs as per para 1 and manufacturer B who also utilised the same infrastructure some other time during the same financial year will get total benefit for Rs. 30 lakhs by way of first clearance of his own goods. Thus, total exemption limit would stand inflated to Rs 60 lakhs instead of Rs. 30 lakhs, which is the total limit of full exemption envisaged by the exemption notification, so far as first clearances of concerned goods from the given factory for the financial year go. With a view to avoiding this unexpected and uncontemplated result, the aforesaid system of clubbing envisaged by paras 2 and 3 has been brought in. It works as a safety valve for avoiding such unexpected result and ensures that from the same factory permissible extent of total goods by way of first clearances as contemplated by notification are allowed to be cleared without payment of duty and, thereafter subsequent total clearances of specified goods from the same factory in the same year would earn concessional rate of duty. Thus, paras 2 and 3 instead of being arbitrary and irrational, are in full consonance with the scheme of exemption envisaged by the notification in question and but for them, the nature of exemption would be rendered arbitrary and top-sided. Under these circumstances, it is not possible to agree with the submission of the learned counsel for the petitioners that impugned paras 2 and 3 of the notification are ultra vires Art. 14 or that they hostilely discriminate against the plurality of manufacturers manufacturing from the same factory. The second point, therefore, fails and stands rejected."

12.3 From the above observations of the Hon'ble High Court, it is clear that in computing the aggregate value of manufactured goods by more than one manufacturer by utilisation of same infrastructure in a factory in the manufacture of specified goods would be admissible up to the limit of Rs.1.00 crore or Rs.1.50 crore as the case may be in a financial year. In the present case, it is an admitted fact that M/s. Makam Pharmachem had already exceeded the clearance value of Rs.1.50 crores in each financial year during the disputed period, therefore the appellant M/s. AG Vet and M/s. Ivorychem would not be eligible for SSI exemption in excess of clearances of Rs.1.00 crore and Rs.1.50 crore as the case may be in the respective Financial Years.

13. Also, the arguments advanced by the learned advocate for the appellants that the department had wrongly clubbed the clearances of the units taking into consideration the composition and commonality of the Partners/Directors, hence not sustainable, in our opinion, is immaterial in examining the admissibility of Notification No.8/2003-CE dated 01.03.2003 to each of the appellant. As mentioned earlier, the crux of the allegation is breach of clause 2(vi) of the said exemption Notification in as much as the allegation is that same infrastructure has been used by three manufacturers viz., M/s. Makam Pharmachem, M/s. AG Vet and M/s. Ivorcychem, accepting each of the said manufacturers is considered as an independent and a separate legal entity. Evidences led by the Revenue that the manufacturing of the specified goods from the said factory for the all manufacturers were carried out during the relevant period exceeding the exemption limit available to one factory.

14. Also, the issue of affixing of brand name to the manufacture of specified goods by the manufacturers M/s. AG Vet and M/s. Ivorychem which assigned to them is otherwise also not essential as the appellants failed to establish that the

condition prescribed under clause (4) has not been complied with. Therefore, it is immaterial whether they cleared the branded or unbranded goods so as to examine Condition (4) of the said Notification.

15. With regard to valuation on the basis of MRP, we find that in the show-cause notice, it was alleged that during the relevant period the gross aggregate value of clearances of Veterinary Medicaments were notified under Section 4A, MRP based assessment. The appellants had wrongly applied the value arrived under Section 4 of the CEA, 1944 in computing the aggregate value of the clearances under the said Notification No.8/2003-CE dated 01.03.2003. We find that the definition of value prescribed under the said Notification reads as follows:

"5. ……..

(C) "value" means, -

(i) in respect of specified goods which have been notified under section 4A of the Central Excise Act, the value as determined in accordance with the provisions of that section, and

(ii) in respect of specified goods other than those referred to in sub-clause (i), the value as determined in accordance with the provisions of section 4 of the Central Excise Act, or the tariff value fixed under section 3 of the said Act;"

It is not disputed that Veterinary Medicaments manufactured by the appellants are notified under Section 4A of CEA, 1944, accordingly, the value should be determined taking into consideration the MRP of the product.

16. On the issue of suppression of facts, we find that the appellant had not disclosed the fact to the department that they have wrongly availed SSI benefit when M/s. Makam Pharmachem had already exceeded the aggregate turnover limit prescribed under the Notification No.8/2003-CE dated 01.03.2003; even though periodically they had filed the 'Nil' returns with the department, therefore, invoking of extended period is justified.

17. In the case of M/s. Makam Pharmachem, we find that they were fully aware of the fact that the aggregate value of clearances of manufactured specified goods had already exceeded Rs.1.50 crore and still they continue to manufacture and clear the goods without payment of duty to loan licensees without proper documents, hence, they are liable to be penalised under Rule 26 of the Central Excise Rules, 2002. Consequently, taking into consideration the overall circumstances of the case, to meet the ends of justice, the penalty imposed in both the appeals on M/s. Makam Pharmachem is reduced to Rs.1,00,000/-.

18. Even though the learned Commissioner imposed penalty on the employees who are Partners/Directors of the appellants, we do not find any specific role of the said employees that has been brought on record except a general allegation of being in-charge and involved in the day-to-day activities of the company and also involved in the design and execution of the scheme of evasion of Central Excise duty. No specific evidence has been brought on record against each of the said individuals while imposing penalty under Rule 26 of Central Excise Rules, 2002. Consequently, imposition of penalty on Partner/Directors of the appellant-company under Rule 26 of Central Excise Rules, 2002, cannot be sustained.

19. In the result, the impugned orders are modified to the extent of upholding the demand with interest and penalty against M/s.AG Vet and M/s. Ivorychem and accordingly, Appeals No.E/815/2012 and E/1271/2012 are dismissed. However, the penalty imposed on M/s.Makam Pharmachem is reduced to Rs.1,00,000/- (One Lakh Only) in both the appeals

and accordingly, Appeal Nos.E/812/2012 and E/1288/2012 are partly allowed. Appeal Nos. E/813, 814, 1289, 1290/2012 are allowed.

20. Appeals are disposed of as above.

(Order pronounced in Open Court on ………………………..….)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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