

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No. E/389/2009

[Arising out of Order-in-Original No.07/2009 dt. 30.03.2009 passed by
the Commissioner of Central Excise, Chennai-III]

Fourrts (India) Laboratories Pvt. Ltd.

Appellant

Versus

Commissioner of Central Excise,
Chennai-III

Respondent

Appearance:

Ms. Cyunduja, Advocate
For the Appellant

Shri K.P.Muralidharan, AC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 21.08.2017

FINAL ORDER No. 41774/2017

Per Bench

The facts of the case are that appellants are manufacturers of P or P medicines falling under Chapter heading 30 of CETA. During verification of the records pertaining to the period from 2002 to 2005, it appeared that appellant had adopted cost construction method as per Rule 11 read with Rule 8 of Central Excise Valuation

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(Determination of Price of Excisable Goods) Rules,2000, for arriving at the value of the goods cleared free as "Physician samples" and had accordingly discharged (lesser amount of) excise duty instead of correctly adopting the value as under Section 4 (1) (b) of Central Excise Act, 1944 read with Rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000, during the said period. Accordingly, proceedings were initiated proposing recovery of differential duty for the periods 2002-03 (from 01.02.2003 to 31.03.2003), 2003-04 and 2004-05 and 2005-06 (01.04.05 to 30.04.05) which worked out to Rs.85,91,184/- and Education Cess of Rs.75,645/- with interest thereon and imposition of penalty under various provisions of the law. In adjudication, Commissioner vide impugned order dt. 30.03.2009 dropped the demand to the tune of Rs.85,43,446/- towards Excise duty and Rs.74,690/- Education cess. However confirmed the demand of Rs.48,693/- (Excise duty + Education cess) for the period 25.04.2005 to 30.04.2005 along with interest liability thereon and imposed equal penalty under Section 11AC of the Central Excise Act, 1944. Aggrieved, appellants are before this forum

2. On 21.08.2017, when the matter came up for hearing, on behalf of appellant, Id. Advocate Ms. Cyunduja reiterated the grounds of appeal and also made oral and written submissions which can be summarized as under :





- (i) The Hon'ble Supreme Court in the case of *Commissioner vs. Sun Pharamaceutical Inds. Ltd* reported in 2017 (350) E.L.T. A61 (S.C.) held that 'physician samples' were to be assessed under Section 4 (1)(a) of the Central Excise Act.
- (ii) Proceedings for the very same period and the same assessee on the issue of valuation were before the department in the guise of a refund application. The matter was decided in favour of the appellants vide Order-in-Appeal dated 25.01.2007.
- (iii) A letter dated 05.08.2002 was sent to the superintendent stating that we are adopting the cost of production as per Rule 11 read with Rule 8 following the Board Circular. The deputy commissioner replied to the aforesaid letter stating that certain cost elements were not included in arriving at the cost.
- (iv) Three SCN's were issued rejecting the refund application filed by the appellants. Subsequently the department vide OIO R-010/2006 dated 27.01.2006 rejected the refund. The department was fully aware of the facts of the case as early as in 2006 and there was no whisper of any short payment made.
- (v) The Commissioner vide Para 22 had confirmed the demand for a period of 5 days from 25.04.2005 to 30.04.2005 on account of the Circular being in effect and the refund applications not covering that period which is bad in law.

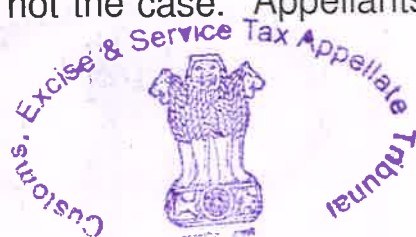


(vi) There is no clear finding to justify as to how the extended period of limitation has been invoked in the instant case in view of the fact that the department was fully aware of the fact as early as in 2006.

3. On behalf of the department, Id. A.R Shri K.P. Muralidharan supports the adjudication.

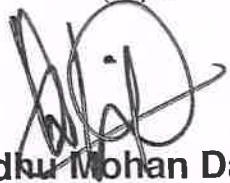
4. Heard both sides and have gone through the facts.

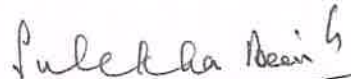
5. On going through the SCN dt. 28.2.2008, it emerges that while recovery of differential duty has been proposed to be demanded under proviso to Section 11A (1) of the Central Excise Act and read with Rule 4 and Rule 8 of the Central Excise Rules, 2002, however, there is no justification or reasoning given in the SCN for invoking the extended period of limitation. The SCN thus concedes that ER-1 returns had been filed by the appellant however, on the grounds that return has no indication of method of valuation followed for clearances of samples, there has been a conclusion that there was wilful, misstatement of facts and contravention of the provisions of Central Excise Rules, 2002 on the part of assessee with an intention to evade payment of duty. That by itself, we are afraid, will not justify invocation of extended period. Surely, there has to be wilful misstatement or suppression or fraud with evidence that same was deliberate and was designed only with intent to evade payment of duty. This is certainly not the case. Appellants have claimed that a



letter dt. 05.08.2002 had been sent to the jurisdictional Superintendent stating that they were adopting cost of production as per Rule 11 read with Rule 8 following the Board's circular. Moreover, the matter was already in litigation with the department concerning refund application filed for the same clearances. In any case, there definitely had been considerable confusion in the method and manner of clearance of physician samples. Board's earlier circular dt. 01.01.2002 which advised adoption of residual Rule 11 along with spirit of Rule 8 of Valuation Rules was superseded by another circular dt. 25.04.2005 which advocated that in case of free samples value had to be determined under Rule 4 of the Valuation Rules. Taking all these factors in mind, we are of the considered opinion that the impugned demand is hit by limitation. In the circumstances, the impugned demand is legally unsustainable. This being so, impugned order will require to be set aside in toto, which we hereby do. Appeal is allowed with consequential benefits, if any, as per law.

(Operative part of the order pronounced in court)


(Madhu Mohan Damodhar)
Member (Technical)


(Sulekha Beevi C.S.)
Member (Judicial)

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