

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Excise Appeal Nos.42455 to 42465 of 2016

(Arising out of Order-in-Appeal No. 186 to 196/2016 (CXA-1) dated 22.9.2016 passed by the Commissioner of Central Excise (Appeals – I), Chennai)

Fourrts India Laboratories Pvt. Ltd.

Appellant

Vandalur – Kelambakkam road
Kelambakkam, Kanchipuram – 638 154.

Vs.

Commissioner of GST & Central Excise

Respondent

Chennai Outer Commissionerate
Newry Towers, 12th Main Road
Anna Nagar, Chennai – 600 040.

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant
Smt. O.M. Reena, Authorized Representative for the Respondent

CORAM

Hon'ble Shri M. Ajit Kumar, Member (Technical)
Hon'ble Shri Ajayan, T.V., Member (Judicial)

FINAL ORDER NOS. 40346 to 40356/2025

Date of Hearing : 04.03.2025
Date of Decision: 13.03.2025

Per M. Ajit Kumar,

These appeals are filed against Order-in-Appeal No. 186 to 196/2016 (CXA-1) dated 22.9.2016 passed by the Commissioner of Central Excise (Appeals – I), Chennai (impugned order).

2. Brief facts of the case are that the appellant is a manufacturer of pharmaceutical products falling under Chapter 30 of the CETA, 1985. They cleared P or P medicaments as physician samples on payment of duty by adopting value under Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The CBEC vide Circular No. 643/34/2002 CX dated 1.7.2002 clarified that in

respect of physician samples, which were distributed free, the assessable value would be 100% / 115% of the cost of production in terms of Rule 8 of the Valuation Rules, 2000. As the value adopted by the appellant for the samples cleared under Rule 4 of the Valuation Rules, 2000 was more than 100% / 115% of the cost of production, they filed 11 refund claims for the period from 01.09.2001 to March 2004. The Ld. Adjudicating Authority vide Order in Original dated 27.1.2006 rejected a part as time-barred and rejected the balance amount stating that valuation of physical samples were to be determined under Rule 4 of the Valuation Rules 2000 in view of subsequent clarification issued by CBEC vide Circular dated 25.4.2005. Commissioner (Appeals) allowed a part of the refund amount claimed by the appellant holding that the CBEC's Circular dated 25.4.2005 is only prospectively in nature. Subsequently, the refund sanctioning authority vide Order in Original dated 3.8.2007 sanctioned the refund. Aggrieved by the OIO dated 3.8.2007, department preferred appeals before Commissioner (Appeals) on various grounds and the claim was kept in call book as similar issue in the case of Apex Laboratories was pending before the Tribunal. Subsequently, the Ld. Commissioner (Appeals) vide the impugned order allowed the appeals of the department and hence the assessee-appellant is before this Tribunal.

3. Shri M.N. Bharathi, Ld. Advocate appeared for the appellant and Smt. O.M. Reena, Ld. Authorized Representative appeared for the respondent.

3.1 The Ld. Counsel for the appellant submitted the brief facts of the case in the form of a time-chart as is reproduced in the Table below;

S. No.	OIO / OIA Passed by AA	Issue involved/ decisions made	Order allowed / rejected	Period and amount involved
1.	OIO 10/2006 dated 27/1/2006 passed by AC-C. EX	Valuation of Physicians' Sample-Boards' Circular 813/10/2005-C. Ex dt 25/04/2005 is held to be clarificatory and retrospective, hence value to be arrived based on Rule 4 of C EX Valuation Rules 2000-valued on pro-rata basis	OIO rejected the refund claim	1/09/2001 to 03/2005 for Rs30,70,613 (11 refund claim application by party was issues with 3 SCN)
2.	OIA 8 to 11/2007 dated 25/01/2007 passed by Comm (A)	Party Appeal allowed on the grounds that Circulars are not retrospective and relied on case Law CCE Calicut Vs Trinity Pharmaceuticals Pvt Ltd 2005 (188) ELT 48 (Tri-Bangalore)	Appeal allowed partly / refund allowed	- do -
3.	OIO R-253/2007-R 263/2007dt 3/08/2007	Refund sanctioned based on Comm (A)order	Refund sanctioned	- do-
4.	SCN in file C. No. V/18/127/05-RF dated 31/07/2008	To show cause why refund claim of Rs 30,26,709 filed for the period Sep 2001 to March 2005 cannot be rejected.	SCN to reject refund	09/2001 to 03/2005 for Rs.30,70,613
5.	OIA 186 to 196/2016 dt 22/09/2016.	Department filed appeal against the OIO R-253 to R-263/2007 which was upheld by the Commissioner citing Medley Pharmaceuticals Ltd Vs C.Ex & Cus, Daman 2011 (263) E LT 641 (S.C) and Cadbury India Ltd 2006-TIOL-88-SC-CX which held Valuation under Rule 4 to be retrospective	Refund rejected. Department appeal allowed	- do -

He further submitted the details of refunds sanctioned, as stated at Sl.

No. 3 of the Table above:

S. No.	Appeal No.	Order in Original No. / Date	Period of dispute	Amount Involved
1.	32/07 (M III)(D) dated 13.12.07	R-253/2007 dated 3.8.2007	1.9.2001 to 31.10.2001	2,95,095
2.	33/07 (M III)(D) dated 13.12.07	R-254/2007 dated 3.8.2007	1.11.2001 to 31.12.2001	4,24,033
3.	34/07 (M III)(D) dated 13.12.07	R-255/2007 dated 3.8.2007	1.1.2002 to 28.2.2002	4,07,750
4.	35/07 (M III)(D) dated 13.12.07	R-256/2007 dated 3.8.2007	March 2002	2,64,224

5.	36/07 (M III)(D) dated 13.12.07	R-257/2007 dated 3.8.2007	April 2002	2,63,127
6.	37/07 (M III)(D) dated 13.12.07	R-258/2007 dated 3.8.2007	May 2002	3,88,810
7	38/07 (M III)(D) dated 13.12.07	R-259/2007 dated 3.8.2007	June 2002	3,18,121
8	39/07 (M III)(D) dated 13.12.07	R-260/2007 dated 3.8.2007	July 2002	4,06,395
9	40/07 (M III)(D) dated 13.12.07	R-261/2007 dated 3.8.2007	05/2004 to 09/2004	1,12,066
10	41/07 (M III)(D) dated 13.12.07	R-262/2007 dated 3.8.2007	10/2004 to 03/2005	1,03,903
11	42/07 (M III)(D) dated 13.12.07	R-263/2007 dated 3.8.2007	02/2004 to 03/2004	87,089

The Ld. Counsel stated that the said Orders-in-original were taken up for review by the department and a second round of litigation started, before the Commissioner Appeals, on the grounds that Board's circular issued on 01.07.2002 to value the samples under Rule 8 ie., cost of production basis was not applicable and was legally not correct in the light of Boards subsequent Circular dated 25.4.2005. The appeal was filed without having challenged the primary OIA dated 25.01.2007 before the Tribunal. Meanwhile a Show Cause Notice dated 31.07.2008 was also issued to the appellants asking as to why the refund sanctioned vide the 11 Order in Original listed above should not be recovered as 'erroneous refund' and also why interest should not be recovered. The Commissioner appeals Vide Order in Appeal dated 22.09.2016, has set aside the refund. The Ld. Counsel submitted that the issue had attained finality vide the Order of the Commissioner (Appeals) in Order in Appeal No 8 to 11 of 2007 dated 25.01.2007 wherein the Commissioner (Appeals) had allowed the refund to the extent of Rs 30,26,709/-. When the respondent has not challenged the aforesaid order, there is no merit in denying the refund by launching a second round of litigation. The Order in Appeal is thus bad in law and liable to be set aside on this ground alone. In this regard he placed

reliance on the following case laws and prayed that the appeals may be allowed:

- a. 2015(325) ELT 813 (S.C) - Commissioner of Customs, Mangalore vs. Kushalchand & Co
- b. 2022(381) ELT 588 (S.C) - Commissioner of customs vs, Shiwalya Spinning & Weaving Mills Pvt. Ltd
- c. 2006(202) ELT 389 (S.C) Boving Fouress Ltd vs. Commissioner of Central Excise, Chennai.
- d. 2011(264) ELT 366 (P&H) - Deekay Exports vs. Union of India
- e. 2017 (5) GSTL 85 (Tri. Bang) TVS Motor company Ltd vs. Commissioner of C.Ex. & ST., Mysore
- f. 2005 (191) ELT 847 (Tri. Bang) Commissioner of Customs, Bangalore vs. TTK Prestige Ltd

3.2 The Ld. AR in her oral and written submissions after the hearing stated that the monetary limit for filing the appeal before CESTAT was increased from Rs. 5 lakh to Rs.10 lakhs vide Instruction F. No. 390/Misc/163/2010-JC dated 17.12.2015. Individually each refund claim is below 10 Lakh as seen from the table, hence the department would not have filed appeal before CESTAT against the original Comm (A) order OIA 8 to 11/2007 dated 25/01/2007. Further the Commissioner (A) held that the Boards Circular dated 25/04/2005 was retrospective and valuation of Physicians' sample has to be on pro-rata basis, adopting Rule 4 of C.Ex valuation rules 2000. The Appellate Authority had also held that unjust enrichment needed to be examined. She hence prayed that the appeals may be rejected.

3.3 In their rejoinder to the written submission of the Ld. AR dated 05.03.2025, the appellant has stated that the Department/

Respondent has not raised the plea of monetary limit as a reason for not filing an appeal against the Order in Appeal, before this Hon'ble Tribunal during the hearing on 04.03.2024 or earlier. Moreover, the issue is no longer res integra in light of the decision in **M/s. Varun Beverages Limited Vs Commissioner of Customs, GST, and Central Excise, Jaipur** [2022 (2) TMI 731 - CESTAT New Delhi]. Further regarding unjust enrichment, the adjudicating authority while granting refund based on Order in Appeal No 08-11/2007 (M-II) dated 25.01.2007 had already examined this aspect and stated that the same would not apply as there was no sales. The said finding was not disturbed in the first appeal. The appellant relied on the following case laws in this regard:

- a. 2019 (370) ELT 485 (Tri. Ahmd) Tridoss Laboratories Ltd vs. Commissioner of C.Ex. & ST., Daman
- b. 2005 (186) ELT 328 (Tri. Del) German Remedies Ltd vs. Commissioner of Central Excise, Mumbai
- c. 2004 (168) ELT 70 (Tri Mumbai) Sarabhai Chemicals Pvt. Ltd vs. Commissioner of C.Ex. Vadodara.

4. We have gone through the appeal papers and have heard the parties to the dispute. We find that the issue involved in the dispute has been summarised by the Ld. Commissioner (Appeals) at para 2 of his Order dated 02.06.2009, while transferring the appeals to the call book. The same is reproduced below;

“Briefly stated facts of the case are that the appellants are engaged in the manufacture of Pharmaceutical Products falling under Chapter 30 of the Central Excise Tariff Act, 1985. The appellants have cleared P or P medicines as free samples to physicians on payment of duty by adopting value under Rule 4 of Valuation Rules, 2000. The CBEC, vide Circular No.643/34/2002 CX dated 01.07.2002 has clarified that in respect of samples which are distributed free, the assessable value would be 100%/115% of the cost of production. By applying

this ratio, the value adopted by them for clearing samples was more than the 115% of the cost of production. Subsequently, the assessee has filed refund claims on the ground that they had paid excess Excise duty in respect of the physician samples cleared by them. All the refund claims of the assessee were rejected by the lower adjudicating authority vide Order-in-Original No.R-10/2006 dt. 27.07.2006. Highly aggrieved by this Order, the assessee filed an appeal before the Commissioner (Appeals), Chennai. The Commissioner (Appeals) vide Orders-in-Appeal No.8 to 11/2007 (M-II) rejected partial refund claim of Rs.43907/- and allowed the balance of their claim amounting to Rs.30,26,709/-. Accordingly, the amount was sanctioned by the Jurisdictional adjudicating authority vide Orders-in-Original No.253-263/07 dt. 03.08.2007. The said Orders-in-Original were taken up for review by the Commissioner and the Department has filed the present set of appeals on the grounds that the samples are to be valued only on comparable price basis and not on cost of production basis and hence the Board's Circular issued on 01.07.2002 to value the samples under Rule 8 i.e. cost of production basis is not applicable and legally not correct among other grounds agitated in the grounds of appeal.”

5 We find that this is a case where the department in the second round of litigation has sought to deny the refund to the appellant by appealing against the refunds sanctioned to the appellant on the ground that;

(i) Physicians' samples were to be valued only on comparable price basis and not on cost of production basis and hence Circular 2002, issued to value the samples under Rule 8 of Valuation Rules, 2000 i.e. cost of production basis is not applicable and thus the Adjudicating Authority's decision to process the refunds claims based on Circular, 2002 was legally not correct;

(ii) Hon'ble Supreme Court in the case of **Cadbury India Limited** [2006-TIOL-88-SC-CX] held that Board's Circular No.692/8/2003-CX dated 13.02.2003, on valuation method of captively consumed goods had retrospective effect and hence Circular 2005 relating to valuation under Rule 4 of the Valuation Rules, 2000 also has retrospective effect;

(iii) Adjudicating Authority presumed that duty burden had not been passed on to buyer of such goods and hence the sanctioned refund amount claimed was against the legal provisions;

(iv) Hon'ble Apex Court in the case of **Solar Pesticides** (2000 (116) ELT 401 (SC)] held that even when the duty on the goods concerned was passed on either directly or indirectly to consumers, 'doctrine of unjust enrichment' shall apply and that this aspect was not considered by the adjudicating authority;

(v) Adjudicating Authority should have rejected the claims as time barred

6. This is a case where the appellant initiated a refund claim based on Boards Circular. It was for the department to examine the claim from all angles, on fact and law, and issue a SCN if they choose to reject the claim. In doing so they were obliged to bring out all the objections that they had in sanctioning the claim, so that the noticee could effectively respond to the allegations being made at one go. Piecemeal issue of SCN or adjudication cannot be done. It is not the departments case that the second round of appeal was caused by the Lower Authority going beyond the remit of the First Appellate Authority's order. The Hon'ble Supreme Court in **Gangai Vinayagar Temple Vs Meenakashi Ammal**, (2009) 9 SCC 757, held that res judicata is an ancient doctrine of universal application and permeates every civilised system of jurisprudence. This doctrine encapsulates the basic principles in all judicial systems which provide that an earlier adjudication is conclusive on the same subject-matter between the same parties. Instead of challenging the first order of the Commissioner Appeals revenue has chosen to file an appeal against

the sanction of refund claim made on the basis of the Commissioner Appeals order and also issue SCN's in all the cases, presumably as protective SCNs, which is legally incorrect. The first appellate order had become final and binding on the parties, and the respondent could not question it in any way.

7. In fact, we find that the first 'ground', pleaded during the second round of appeal, had already been examined and decided in the appellants favour during the first appeal. The issue could not have been reopened again in an appeal by the same Authority, nor could fresh issues which were omitted to be alleged in the first round of appeal be added in the second round, multiplying the litigation. A decision or order made by an Authority of competent jurisdiction is final, unless it is modified or reversed in appeal. The well settled principles of res judicata debars an Authority from exercising its jurisdiction to determine the lis if it has attained finality between the parties. This is based on public policy in order to put an end to litigation. Further no man should be vexed twice for the same cause.

8. Revenue should not have reviewed and taken up the refund orders in appeal when they did not challenge the order of the First Appellate Authority which partly allowed the appeal leading to the sanction of the refund. We are not concerned here with the correctness or otherwise of the conclusion arrived at by the Commissioner Appeals in the second round of appeals, but with the fact that a settled position of law was allowed to be reopened without following established legal principles. The binding nature of the first appellate order on the parties to the litigation would endure, as it had not been appealed against, even in circumstances where the basis of which it was made is

subsequently held to be an incorrect application of the relevant tax law. To do otherwise is in breach of judicial discipline and is destructive of the basic principles of the administration of justice.

9. The stand taken by revenue that it may be due to the monetary limit for filing the appeal before CESTAT that the department would not have filed appeal before CESTAT against the original Comm (A) order dated 25/01/2007, is a mere assumption. No such claim was made or document produced to evidence the same, either in the second round of appeal or through a cross objection before us.

10. Having regard to the discussions above we set aside the impugned order and allow the appeals. The appellant is eligible for consequential relief as per law, if any. The appeals are disposed of accordingly.

(Order pronounced in open court on 13/03/2025)

Sd/-
(AJAYAN T.V.)
Member (Judicial)

Sd/-
(M. AJIT KUMAR)
Member (Technical)

Rex