CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 2185 of 2008 [DB]

[Arising out of Order-in-Original No. 24/Commr./CEX/IND/08 dated 30.07.2008 passed by the Commissioner of Central Excise, Customs and Service Tax, Indore, Madhya Pradesh]

M/s. WWS Sky Shop (P) Ltd. **...Appellant**
5/8, Rafel Tower,
Saket Nagar,
Indore

VERSUS

Commissioner of Central Excise,
Indore **...Respondent**
Manik Bagh Palace, Post Box No. 10,
Indore – 452001 (M.P.)

APPEARANCE:
Shri V. Lakshmikumaran, Advocate for the Appellant
Shri M.K. Chawda, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 18.12.2023
DATE OF DECISION: **05.04.2024**

FINAL ORDER No. 55494/2024

DR. RACHNA GUPTA

The present appeal has been heard pursuant to the order of Hon'ble Supreme Court in SLP Civil No. 21000/2021 decided on 05.07.2023, vide which the matter has been remanded back while restoring the appeal before the Tribunal holding that the issue of illegality of duty liability under Section 4 of the Excise Act has not been addressed by the Tribunal and the Hon'ble High Court. It has been clarified in the said order that the final order of CESTAT, dated 23.01.2018 as was under consideration before Hon'ble Supreme

Court along with the order of Hon'ble High Court of Madhya Pradesh, dated 18.02.2020 in relation to the duty liability under Section 4A stands confirmed. Pursuant to the said directions of Hon'ble Supreme Court, the appeal is heard with respect to duty liability of appellant under Section 4 of the Central Excise Act. The facts of the case are as follows:

1.1 The department got an information that appellants are engaged in re-packing of various excisable goods (herbal and cosmetic products), affixing the brand names owned by them in their premises but they are removing the same without payment of central excise duty to their different shops and distributors. The department formed an opinion that processes adopted by the appellants render the product marketable to the consumer hence the activity done by them amounts to manufacture as per chapter note 6 to the chapter 30 and chapter note 5 to Chapter 33 of Central Excise Tariff Act, 1985. Accordingly, the Show Cause Notice No. 3841 dated 27.12.2006 was served upon the appellants proposing the recovery of central excise duty amounting to Rs.11,65,17,091/- along with the interest and the proportionate penalties. The penalty upon the Director of the appellant was also proposed. The said proposal was confirmed vide Order-in-Original No. 24/08 dated 30.07.2008. Being aggrieved, the appeal was preferred before this Tribunal. Vide Final Order No. 50353-50354/2018 with respect to the two Excise Appeals (M/s. WWS Sky Shop (P) Ltd. and Shri Manish Singhal, Director of M/s. WWS Sky Shop (P) Ltd.) was passed allowing the appeal by setting aside the said demand. The department went in appeal before Hon'ble

High Court of Madhya Pradesh. Vide order dated 18.02.2020, the final order of this Tribunal was accepted by the Hon'ble High Court and the departmental appeal was dismissed. Being aggrieved of the said decision, department was before Hon'ble Supreme Court and accordingly, the order dated 05.07.2023 as mentioned above has been passed.

2. Arguments of both the parties heard.

3. Learned counsel for the appellant has mentioned that the appellants are receiving goods (ayurvedic medicaments) from their manufacturers M/s. Davo Laboratories and M/s. Balchem Laboratories as a completely finished product which contains all essential details as required for retail sale of such goods under Drugs & Cosmetics Act and Weights & Measurement Act on which duty has already been demanded/confirmed and paid by the said manufacturers. It is further mentioned that putting wrappers/outer coverings by the appellant is only for safe transit and whole holograms have been put to avoid duplication. This activity cannot be called as manufacture, as has already been held by this Tribunal, Hon'ble High Court, Madhya Pradesh and those findings have also not been set aside even by Hon'ble Supreme Court.

4. It is submitted that the products called Roop Amrit, complete solution, diaba cure, complete women, bounce and no wrinkles are also the ayurvedic medicines. Those also are manufactured in accordance with the formula prescribed in the authorities books specified in First Scheduled to the Drugs & Cosmetics Act, 1940 and sold under the names as specified in such chargeable to nil rate of

duty. Otherwise also neither M/s. Davo Laboratories nor M/s. Balchem Laboratories are authorized to manufacture any cosmetic products. It is finally submitted that when the activity of the appellant which is same to all the products received from both the manufacturers is held to not to be the activity of manufacture, the question of raising any demand does not at arise. The demand under Section 4 of Excise Act has rightly been set aside by this Tribunal as well as by the Hon'ble High Court of Madhya Pradesh.

5. While rebutting these submissions, learned Departmental Representative has mentioned that the products in question have a special use of those being applied in any manner whatsoever on the human body for promoting attractiveness. The Departmental Representative has mentioned that as regards D-Care Plus, Ayuslim, Memory Booster, Cholesterol-X etc., there is no dispute regarding classification. The products are rightly classified under Chapter 30 as pharmaceutical products. However, the same is not true for the remaining other products as mentioned above. Those are the cosmetic preparations as different from ayurvedic medicaments/pharmaceuticals. As per Chapter Note 5 of Chapter 33, the activity done by appellant amounts to manufacture and as such the appellants are liable to pay the duty of excise. The demand has wrongly been set aside by this Tribunal and the Hon'ble High Court of Madhya Pradesh. It was rightly confirmed by the departmental adjudicating authority. The said order has been prayed to be upheld by confirming the duty demand against the appellant.

6. After hearing the rival contentions and perusing the record of the appeal memo, we observe that this Tribunal vide the Final Order No. 50353-50354/2018, while relying upon Board's Circular No. 354/285/2011-TRU dated 08.12.2011 has already held that since there is no value addition made by the appellant after receiving the goods from the respective manufacturers till the time these are sold to the consumers that the activity done by the appellant does no amount to manufacture. The Hon'ble High Court, Madhya Pradesh has also observed as follows:

> *"Facts of the case makes it very clear that the assessee / respondent before this Court were engaged in trading and telemarketing of various goods and also in selling medicines manufactured by M/s. Davo Laboratories and Balchem Laboratories through VPP. They were also giving advertisement on television and other media. The most important aspect of the case is that the assessee/ respondent before this Court received the medicines duly duty paid from the manufacturers in a packed form mentioning therein the retail price. The undisputed facts also reveal that after receiving bottles of medicines in the packets, the assessee has just fixed the hologram and the barcode to avoid duplicity and an outercover was placed to ensure safe transportation. It certainly does not amount to the process of manufacture. It is the process which is being carried out by the Companies like Flipkart, Amazon, etc,. They are also receiving the goods and they are just putting a cover over the goods received from various companies which have paid the duty and are being delivered to the consumers and therefore, the circular issued by the Board which has been referred by the Appellate Tribunal dated 08/12/2011 is very much applicable in the present case."*

Accordingly, the order of this Tribunal setting aside the demand confirmed by original adjudicating authority was confirmed by Hon'ble High Court of Madhya Pradesh.

7. We further observe that even the Hon'ble Supreme Court has opted to not to interfere with the findings as far as the "activity not being an activity of manufacture" is concerned. It has only been observed that issue of illegality of duty liability under Section 4 of

Excise Act has not been addressed by the Tribunal and the Hon'ble High Court that the matter is sent back to this Tribunal to adjudicate to the said extent of duty liability under Section 4 of the Act. However, the orders in relation to duty liability under Section 4A are ordered to be confirmed. Thus the narrow scope of the present adjudication is the applicability of Section 4 of Central Excise Act to the present set of facts and circumstances. Section 4 reads as follows:-

> ***4. Valuation of excisable goods for purposes of charging of duty of excise***
>
> *(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall-*
>
> *(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;*
>
> *(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.*
>
> *[Explanation: For the removal of doubts, it is hereby declared that the price-cum duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, following directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]*

8. The bare perusal makes it clear that as per Section 4, the duty of excise on excisable goods has to be assessed including the price actually paid to the manufacturer for the goods sold and the money value of additional consideration, if any, following directly or indirectly from the buyer to the assessee in connection with the sale of such goods. Thus, this section is applicable only qua the person who is the manufacturer of the goods and charges something extra for some additional activity done prior the sale of the goods

manufactured by him. It is already confirmed on record that the activity done by the appellant does not amount to manufacture. It has also been held and confirmed that appellant is not the manufacturer of the goods sold by him. He is merely a trading and the advertising agency who is not otherwise altering any of details of the product like the name of the product, ingredient, batch number, name of manufacturer, date of manufacture and even MRP. The labels on the products were containing information as per statutory requirements under the Drugs & Cosmetics Act. Hence, irrespective the method of how those products are manufactured by the manufacturer, the activity done by the appellant before putting those products to the actual consumers are not held to be the activity of manufacture. The question of the activity of the appellant to be excisable does not at all arise. Nothing additional is brought on record to have the different opinion. Hence we affirm these findings. Hence, even for sake of Section 4, the value for the appellant's activity cannot be included in the value of the excisable goods.

9. Otherwise also, the duty liability on excisable goods is that of the manufacturer. It is an admitted fact on record that the manufacturer i.e. M/s. Davo Laboratories nor M/s. Balchem Laboratories are authorized have discharged their respective eligible liability. No question for sustaining the demand even under Section 4 at all arises. Though the department has relied upon the decision in M/s. Davo Laboratories own case in a departmental appeal titled as **Commissioner of Central Excise, Bhopal Vs. Davo Laboratories reported as 2017 (358) ELT 271 (Tri.-Del),**

wherein the Ayurvedic Preparations Roop amrit and Complete Solutions are denied to be considered as Ayurvedic medicines on the ground that both the products are most commonly used for enhancing personal appearance and beauty i.e. cosmetic. We observe that the said decision is not applicable as far as duty liability on these products qua the appellant under Section 4 of Central Excise Act is concerned. We observe that this decision rather holds that since the cosmetic products are classifiable under Chapter 33 of Central Excise Tariff Act, the valuation has to be as per Section 4A of the Act. Section 4A is applicable in accordance of Notification No. 13/2002. With these observations, we hereby set aside the demand confirmed even under Section 4 of Central excise Act, 1944. Consequent thereto, the appeal stands allowed.

[Order pronounced in the open court on **05.04.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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