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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/542 /2010 - EX[DB] WITH E/S/553/2010-EX Date **20/04/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. JAMMU

OB-32, RAIL HEAD COMPLEX, JAMMU - 180012.

C.C.E. JAMMU Appellant

Vs

M/S MEDLEY PHARMACEUTICALS LTD. **STAY ORDER NO.459/2011-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No.346/ 2011 EX[DB]** dated 18-2-11

passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S MEDLEY PHARMACEUTICALS LTD.
LANE NO. 3, PHASE-I, SIDCO
INDUSTRIAL COMPLEX, BARI
BRAHMANA, JAMMU (J&K)

2. Adv. / Consult
MR.K.J.JHON &CO,ADV
SF 039,055,FORTUNE ARCADE, PLOT NO 69 K BLOCK,SECTOR-18, NOIDA
201301

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
9. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:18.2.2011

Stay Application No.553 of 2010 in
Central Excise Appeal No.542 of 2010

Arising out of the order in appeal No.620/CE/Chd-II(JK)/09 dated 30.11.2009 passed by the Commissioner (Appeals), Central Excise, Chandigarh.

Commissioner of Customs & Central Excise, J & K, Jammu ... Appellant

Vs.

M/s Medley Pharmaceuticals Ltd. .... Respondent

Appearance:

Shri R.K.Verma, Authorized Departmental Representative (DR) for the Revenue and Shri Dilip P. , Advocate for the respondents

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Technical Member

STAY Oral Order No. 459 /2011-EX

Per Shri. Justice R.M.S. Khandeparkar:

Heard the DR for the appellant and the Advocate for the respondents As we propose to dispose of the appeal itself, the application is disposed of while directing the registry to place the appeal for final disposal forthwith.

(Justice R.M.S. Khandeparkar)
President

Rakesh Kumar)
Technical Member

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:18.2.2011

Central Excise Appeal No.542 of 2010

Arising out of the order in appeal No.620/CE/Chd-II(JK)/09 dated 30.11.2009 passed by the Commissioner (Appeals), Central Excise, Chandigarh.

For Approval and Signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Commissioner of Customs & Central Excise, J & K, Jammu ... Appellant

Vs.

M/s Medley Pharmaceuticals Ltd. .... Respondent

Appearance:

Shri R.K.Verma, Authorized Departmental Representative (DR) for the Revenue and Shri Dilip P., Advocate for the respondents

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Technical Member

FINAL Oral Order No. 346/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard the appeal in terms of the order passed today in stay application No.553/2010.

2. Heard the DR for the appellant and the learned Advocate for the respondents.

3. This appeal arises from the order dated 30.11.2009 passed by the Commissioner (Appeals), Chandigarh. By the impugned order, the Commissioner (Appeals) has allowed the appeal filed by the respondents in relation to appropriation of the amount of Rs.13,13,990/- and has set aside the order in that regard which was passed by the adjudicating authority. The Assistant Commissioner, Jammu by his order dated 3.4.2009 had ordered appropriation of the said amount of Rs.13,13,990/- which was equal to the amount of cenvat credit availed in the month of April 2006 in terms of the provisions of Notification No.56/2002-CE dated14.11.2002 (as amended from time to time).

4. The respondents are engaged in the manufacture of Allopathic medicine Classifiable under heading 30042039, 30049069, 30049039, 30049067 and 30049099 of the first schedule to the Central Excise Tariff Act, 1985. The respondents having their factory situated in the State of Jammu and within the area specified under Notification No.56/2002-CE dated 14.11.2002 were availing the benefit of the said notification. They filed refund claims on 11.12.2006 for Rs.1,27,71,976/- on account of central excise duty paid through PLA for the month of November 2006. Pursuant to the report received by the Range officer in favour of the refund of the amount of Rs.1,27,71,976/-, the same was sanctioned by the said order dated 3.4.2009. However, while passing the said order and going through the records, the adjudicating authority found that the party working under exemption scheme provided under the said notification was required to avail cenvat credit on 18 invoices issued during the month of March 2006, however, the respondents had not availed any credit in respect of the said invoices and to that extent they had not complied with the provisions of the said notification. The provisions of the notification entitled the respondents to avail 50% of the credit so available in a relevant financial year. However,

they had failed to avail the same. The eligible credit during the said financial year amounted to Rs.13,13,990/-. It was also disclosed from the records that during the month of April 2006, the respondents had filed refund claims to the tune of Rs.76,61,162/- which was sanctioned under the order dated 30.6.06.

5. The Assistant Commissioner observed that the refund claim was erroneously sanctioned under the order dated 30.6.06 and therefore, was required to be recovered from the respondents. The Assistant Commissioner therefore, ordered appropriation of the said amount of Rs.13,13,990/- which was required to be refunded under order dated 3.4.2009.

6. Being aggrieved by the order of the Assistant Commissioner, the respondents filed the appeal. While allowing the appeal, the lower appellate authority held that the said amount was erroneously refunded and the recovery thereof could be made only by taking recourse to Section 11A. As the said notification which lays a special mechanism for refund and provides a specific method for recovery of such amount, the adjudicating authority could not have adopted the short-cut method in that regard in violation of the provisions of law and therefore, set aside the order of the appropriation of the amount of Rs.13,13,990/-. Aggrieved by the said order, the department has filed the present appeal.

7. While challenging the said order, the DR submitted that since the respondents were availing the benefit of the exemption Notification No.56/2002-CE dated 14.11.2002 (as amended from time to time) it was mandatory for them to avail and to utilize the cenvat credit for payment of duty in the relevant month. The respondents were required to avail and utilize 50% of cenvat credit of duty in respect of capital goods received in the factory premises during the month of April 2006. However, the respondent failed to avail the same. Drawing our attention to clause 1A , 2(a), 2(b) and 2(c), the DR submitted that the notification has two provisions for appropriation of the amount because in case the party is on the part of the

the beneficiary thereof to either of the provisions or conditions of the said notification, the same empower the authority to make necessary adjustment in relation to the refundable amount as well as shortfall in the refund during subsequent months. Considering the same as the default in the case in hand related to the month of April, the necessary adjustment having been done in relation to the month of November, the Commissioner (Appeals) was not justified in observing that the adjudicating authority had not complied with the provisions of law while ordering appropriation of the said amount. Attention was also drawn to the Circular No.682/73/2002-CX, dated 19.12.2002 and in particular to clause 4 of the said notification while contending that the adjudicating authority had not committed any irregularity in exercise of its power while ordering appropriation of the said amount.

8. On the other hand, the Advocate appearing for the respondents drawing our attention to clause 2(c) of the notification submitted that the adjustments thereunder are permissible only in case of provisional refund and not of the refund finally ordered. The records, according to the learned Advocate, nowhere disclose that the refund sanctioned under order dated 30.6.06 was a provisional refund order. In the absence of any provision in law in that regard, it was not permissible for the adjudicating authority to review its earlier order. As such, no review power was fulfilled in the notification or under the statutory authority of the provisions of law. If the Department is aggrieved by the order of dated 30.6.06, it was necessary for the department to take appropriate step including filing of the appeal. It was not permissible for the adjudicating authority to recall its earlier order. He further submitted that the order of appropriation was passed without issuing any show cause notice in that regard and without affording any proper opportunity to the respondents to contest their claim in that regard.

9. It is undisputed that the proceedings before the adjudicating authority were in pursuance of the benefit sought to be availed under the notification No.56/02-CE, dated 14.11.2002. The DR is justified in contending that the

manufacturer availing the benefit under the said notification has to comply with the condition of the said notification. In case there is failure in that regard, certainly the department is entitled to take appropriate steps in accordance with the provisions of law.

10. The adjudicating authority while dealing with the refund claim in terms of the provisions of said notification ordered appropriation of the amount ordered to be refunded under the earlier order of the adjudication in relation to the earlier months. In this regard, as rightly pointed out by the DR and not disputed by the learned Advocate, the provision under the clause 2 of the notification is of vital importance. The same reads as under:

> ***"2. The exemption contained in this notification shall be given effect to in the following manner, namely :-***
>
> ***(a) The manufacturer shall submit a statement of the duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 7th day of the next month in which the duty has been paid.***
>
> ***(b) The Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall refund the amount of duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002, during the month under consideration to the manufacturer by the 15th day of the next month.***
>
> ***(c) If there is likely to be any delay in the verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th day of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer."***

11. According to the above quoted provisions of the notification, the manufacturer seeking to avail the benefit of the scheme under the said notification is required to submit a statement of duty paid, other than by way of utilization of cenvat credit, by 7th of the month following the month in respect of which the duty has been paid. On receipt of such report from the manufacturer, the competent authority had to verify the same and thereupon make the necessary order of refund of the amount of duty paid other than

the amount of duty paid by utilization of cenvat credit, during the month under consideration. However, such refund shall be made by 15th day of the month following the month in respect of which refund is to be ordered. However, the said provisions of law which provides that in case where the exemption contained in this notification is not applicable to some of the goods produced by a manufacturer, such refund shall not exceed the amount of duty paid minus the amount of cenvat credit availed of, in respect of the duty paid on the inputs used in or relation to the manufacture of goods cleared under this notification. The provisions of law relevant for decision in the matter in hand is comprised under sub-clause (c) of Clause 2 of the said notification. Plain reading of the said clause would disclose that in case the competent authority finds it difficult to complete the verification to decide about the refund within 15 days of the month following the such month, the authority is empowered to take provisional decision in that regard and pass appropriate order subject to adjustment to be made during the finalization of the decision, while deciding the claim of the subsequent month.

12. While it is the contention of the DR that the decision on provisional basis would mean that the order need not necessarily state that it is provisionally passed but if within the reasonable period the adjustment is made, it would disclose that the earlier refund was provisional one. And that is what has been done in the case in hand. On the other hand, it is the contention of the Advocate for the respondents that the notification specifically provides that the step to be taken by the authority in case he finds it difficult to take final decision about the refund claim by the manufacturer, the authority is empowered to take provisionally. It is only provisional decision to adjust the subsequent claim. Otherwise, according to the Advocate, it would mean review of order passed in the earlier month, without having such power being available to the authority.

13. As already pointed out above, clause 2 (c) of the notification clearly provides that the circumstances under which the provisional decision regarding refund can be taken. It specifically provides that in case where the authority delays the verification of the claim for whatever reason it could be he is empowered to refund the amount on provisional basis by 15^{th} day of the month following the month in respect of which the refund is to be ordered and thereafter to adjust the refund as may be necessary in the subsequent refund admissible to the manufacturer. The DR is justified in contending that the adjustment is permissible within reasonable period and even if the adjustment in relation to the month of April is made in relation to the month of November, it cannot be said that there is no such power to the authority. However, there is one restriction imposed upon the authority in this regard. And that is, such earlier refund should be on provisional basis. Once the refund is finally granted, by no stretch of imagination it can be said that it is on provisional basis. Where the refund is granted on provisional basis, the order of the decision should necessarily disclose the same. It could be apparent ~~from~~ on the face of the order itself or could be revealed from the other contemporaneous records. In other words, it is not a matter of discretion of the authority to grant refund provisionally or finally. The Notification specifically provides that it is only in case of likelihood of delay in verification, the authority is empowered to refund on provisional basis. Obviously, therefore, the order granting refund on provisional basis or the contemporaneous records should apparently disclose the ground on which the refund was ordered provisionally. In the absence of any such disclosure, it cannot be accepted that the refund was on provisional basis. Undisputedly, in the case in hand the order dated 30.6.06 nowhere discloses that the refund was on provisional basis. We have not been pointed out any material which could reveal that the authority had difficulty in completing the verification proceeding for the month of April till the end of June, 2006. Being

so, the contention that the order of refund dated 30.6.06 was on provisional basis cannot be accepted.

14. As rightly pointed out by the Advocate for the respondents, the authorities below are not empowered to review their order. It is not the matter of correction or amendment of the order. The adjudicating authority while holding that the refund was erroneously granted sought to recall the order dated 30.6.06 and further ordered appropriation of the amount which was ordered to be refunded. It was a clear case of review its earlier order. There is no such review power, available to the said authority. Besides, the clause 2(c) as already pointed out above, specifically empowers adjustment only in case of the provisional order of refund and not otherwise.

15. It should not be forgotten that the notification in question provides specific scheme incorporating the conditions to be complied with by the beneficiary and at the same time, requires the authority to act in accordance with the procedure prescribed under the Notification. Being so, while taking resort to the exercise of the power under the notification, the authority would be obliged to be within the parameters of its power prescribed under the said notification. Since clause 2(c) specifically provides for refund on provisional basis and only in those cases empowers adjustment of such refund during the subsequent month. In the absence of provisional order on 30.6.06 and in the absence of power to review its earlier order, the lower authority had clearly erred in passing the order of appropriation of the amount and it had clearly exceeded its jurisdiction. Being so, we do not find any case for interference in the impugned order passed by the Commissioner (Appeals) setting aside the order passed by the adjudicating authority.

16. As regards the para 4 of the of the said circular, the same reads thus:

> ***"4. The notifications provide for expeditious refund of duty paid in cash. It is for this reason that a provision has been made for allowing refund even on provisionsal basis by the 15th of the next month, in case there is likely to be a delay in verification of the refund claims. Any excess or shortfall in case of refund allowed on provisional basis may be adjusted in the subsequent refund claims. Considering the fact that verification of refund claims basically involves checking of duty paid in cash, in most cases, it should be***

possible to allow refund by the 15th of the subsequent month. The Board is of the view that pre-audit of refund claims of more than Rs. 5 lakhs should not lead to delays. If it is possible to pre-audit, and the finalization of claim could be completed before the 15th of the next month, it may be resorted to. Otherwise, the initial provisional refund may be allowed without pre-audit and while deciding upon its finalization, pre-audit may be done."

17. The above quoted portion of the circular indeed provides that any excess or shortfall in case of refund allowed on provisional basis may be adjusted in the subsequent refund claims. Apparently, the circular nowhere speaks of final refund order on final basis. It specifically speaks of refund allowed on provisional basis. Being so, the view that we are taking in the matter in the case in hand is in consonance with the understanding of the provision of law by the Board.

18. For the reasons stated above, we find no interference is called for in the order passed by the Commissioner (Appeals). Hence the appeal fails and is rejected.

(Justice R.M.S. Khandeparkar)
President

Rakesh Kumar)
Technical Member

scd/