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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

Date 12/05/2011

Appeal No. E/6140/2004 - EX[DB]

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

To :
C.C.E.INDORE M.P
MANIK BAGH PALACE P.O.NO-10,INDORE M.P
452001

Appellant

C.C.E.INDORE M.P

Vs
Respondent

M/S INVEN PHARMACEUTICAL PVT.LTD.

I am directed to transmit herewith a certified copy of **Final order No. 416/ 2011 EX[DB]** dated 09-9-2009 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 INVEN PHARMACEUTICAL PVT.LTD.
NEW HILL-KALSADA
KHURD,CHATABILLOD

2. Adv. / Consult
MR.K.K ANAND
A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24

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. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. HON'BLE PRESIDENT,

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 6140 of 2004

(Arising out of Order-in-Appeal No. IND-I/297/04 dated 16.07.2004 passed by the Commissioner of Central Excise (Appeals), Indore).

DATE OF HEARING : 26.08.2009
DATE OF DECISION : 09.09.2009

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE R.M.S. KHANDEPARKAR, PRESIDENT
HON'BLE MR. M. VEERAIYAN, MEMBER (TECHNICAL)

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982 ?	Yes
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ?	No
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

CCE, Indore .... **Appellant**
(Rep by Sh.K.P. Singh, DR)

VERSUS

M/s Inven Pharmaceutical Ltd. .... **Respondents**
(Rep. by Sh. Hemant Bajaj, Adv.)

CORAM : **HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT**
HON'BLE MR. M. VEERAIYAN, MEMBER (TECHNICAL)

FINAL **ORAL ORDER NO.** 416/2011-EX.

PER JUSTICE R.M.S. KHANDEPARKAR :

Heard the learned DR for the appellant and learned Advocate for the respondents. Perused the records.

2. This appeal arises from the order dated 16th July, 2004 passed by the Commissioner (Appeals), Indore. By the impugned order, the Commissioner (Appeals) has allowed the appeal filed by the respondents against the order of the adjudicating authority passed on 31st July, 2003. By the said order, the adjudicating authority had confirmed the demand of excise duty amounting to Rs. 93,093/- under Section 11-A of the Central Excise Act, 1944 and imposed penalty of the equal amount under Section 11-AC of the said Act and further penalty of Rs. 10,000/- under Section 173-Q. The respondents aggrieved by the said order had sought to challenge the order on the point of bar of limitation. The appeal is, therefore, confined only to the point of bar of limitation.

3. The learned DR, while placing reliance in the decision in the matter of **Commissioner of Central Excise, New Delhi vs Avis Electronics Pvt. Ltd.,** 2000 (117) ELT 571 (T-LB), submitted that, the materials on record do not justify the finding of the Commissioner (Appeals) about non-applicability of the extended period of limitation. He further submitted that, records disclose that the respondents had failed to disclose the relevant facts to the Department and neither had submitted declaration as required under Rule 173-C of the Central Excise Rules, 1944, nor at any point of time the Department was informed that the respondents were valuing the goods in

question by paying duty on the value lower than that of similar goods which were being removed by the respondents, and in view of the suppression of the said fact with intent to evade the duty, invocation of extended period of limitation was certainly justified. According to the learned DR, the same was totally ignored by the Commissioner (Appeals) while allowing the appeal. The learned DR further submitted that, when the statutory provision requires a condition to be fulfilled in order to avail certain benefits, it is obligatory for the assessee to comply with the said condition in order to claim the benefits thereunder and in the absence of non-compliance of the condition, the assessee is not entitled to claim such benefits.

4. On the other hand, the learned advocate for the respondents placing reliance in the decision of the Apex Court in the matter of **Gopal Zarda Udyog vs Commissioner of Central Excise, New Delhi,** 2005 (188) ELT 251 (SC); **Pushpam Pharmaceuticals Company vs Collector of Central Excise, Bombay,** 1995 (78) ELT 401 (SC); **Collector of Central Excise vs Chemphar Drugs & Liniments**, 1989 (40) ELT 276 (SC); and **Commissioner of Central Excise & Customs, Aurangabad vs Swastik Auto Products,** 2008 (222) ELT 200 (Bom.), submitted that, merely because there was failure to submit the information in the prescribed form, that would not amount to suppression of facts with intent to evade the duty. Being so, in the absence of cogent material about specific act(s) on the part of the respondents to which could reveal suppression of any relevant material and that too with intent to evade the duty, there was no justification for the adjudicating authority to allow the Department to invoke extended period of

limitation and the same having been correctly appreciated by the Commissioner (Appeals) under the impugned order, there is no case for interference therein.

5. The perusal of the order passed by the adjudicating authority in the matter in hand discloses that there was no dispute between the parties that the provisions of Rule 6 of the Central Excise (Valuation) Rules, 1975 were clearly attracted in the matter in hand and the authority had correctly determined the value of the product in question. In fact, there are clear findings to that effect. The order of the adjudicating authority further discloses a clear finding to the effect that, "since neither the declaration, as required under Rule 173-C, has been filed nor at any point of time it has been informed to the Department that they are under-valuing their goods i.e physician's samples by paying duty much below the value of similar goods which were being removed by the noticee, therefore, they have rendered themselves liable for penalty under Section 11-AC". This finding clearly discloses failure on the part of the respondents to submit the declaration as required under Rule 173-C of the said Rules.

6. The Rule 173-C relates to the procedure regarding valuation of goods assessable ad valorem. Rule (1) thereof provides that, every assessee who produces, manufacturers or warehouses goods which are chargeable with duty at a rate dependent on the value of the goods and removes or clears such goods as provided in rules 9, 49, 144, 152 and 157, shall declare the value under Section 4 of the Act of such goods in the documents such as sales invoice, invoice-cum-challan or like documents used by him for sale or

removal of goods. The first proviso thereto provides that, such documents shall indicate separately the value of goods under Section 4 of the Act and the duty paid as provided under Section 12A of the Act that such documents shall also contain a declaration of the price, that such documents shall also indicate, wherever applicable, individually the central excise duty, other taxes, all discounts and other consideration, if any, for the difference between the price and the value of the goods under Section 4 of the Act, and that such documents shall also indicate the date and time of removal of the goods. The second proviso provides that, where an assessee sells goods to or through related persons as defined in Section 4 of the Act or uses such goods for manufacture or production of other goods in his factory, or removes such goods for free distribution or removes such goods in any other manner which does not involve sale, or removes goods of the same kind and quality from his factories located in the jurisdiction of different Commissioners of Central Excise or Assistant Commissioners of Central Excise, he shall file, with the proper officer a declaration, in such form and in such manner and at such interval as the Central Board of Excise and Customs or Commissioner of Central Excise may require, declaring the value of the goods under Section 4 of the Act, the duty and other elements constituting the price of such goods along with such other particulars as the Central Board of Excise and Customs or the Commissioner of Central Excise may specify. Sub-section (2) provides that, the assessee shall certify in each such document that the amount indicated in such document represents the price actually charged by him and that there is no additional consideration flowing directly or indirectly from such sales over and above what has been declared. Sub-section (3) provides that, the proper officer, duty empowered by the Central Government under Section 14 of the Act, may, where he considers it necessary during the course of any enquiry in connection with the declaration made in the documents referred to in sub-rule (1) by an assessee require any person to produce or deliver any document or thing relevant to the enquiry and examine any person acquainted with the facts and circumstances of the particulars declared in such documents or other records, in the manner provided in Section 14 of the Act. Sub-section (3A) provides that, the assessee shall declare to the proper officer his marketing pattern, discount structure and such other particulars in such form and in such manner and at such intervals as the Central Board of Excise and Customs or Commissioner of Central Excise may require. Sub-section (4) provides that, the proper officer may after such further enquiry as he may consider, reassess following the provisions of Section 11A of the Act and the assessee shall pay the deficiency, if any.

7. Apparently, Rule 173-C though carries the title as "procedure regarding valuation of goods assessable ad valorem", it prescribes certain obligations upon the assessee essentially with the intention not to give any scope to evade the liability of excise duty. The provisions on the face of it disclose certain safeguards which have been proposed to enable the assessing authority to ensure proper assessment in a manner which would avoid the possibility of evasion of the excise duty. Such provisions of law, though may relate to the procedural aspect, cast certain mandatory obligations upon the assessee and the compliance thereof cannot be said to be discretionary to the assessee. The compliance of such provisions is absolutely mandatory and

failure thereof can result in prescribed penalty being imposed upon the defaulters. In this regard, the learned DR is certainly justified in contending that, when the particular thing is directed to be performed in a prescribed manner under the statutory rules, the person on whom lies the obligation is required to perform the same in the manner prescribed under the statutory rules and not in any other manner. The decision of the Tribunal in that regard in the matter of **Avis Electronics Pvt. Ltd.** (supra) is very clear and the same is in consonance with the decision of the Madras High Court in the matter of **Medopharma vs Superintendent of Central Excise,** 1994 (70) ELT 505, as also in the matter of **Nestle India Ltd.**, 1998 (99) ELT 443.

8. Though it was sought to be contended on behalf of the Respondents that there was no proforma prescribed for submitting the information in terms of Rule 173-C at the relevant time, the same does not appear to be correct. There was a clear proforma prescribed particularly in cases where the assessee removes the goods for free distribution and it was prescribed under Annexure '2-C' to the said Rules.

9. The Apex Court in the case of **Eagle Flask Industries Ltd. vs Commissioner of Central Excise, Pune,** 2004 (171) ELT 296 (SC), referring to Rule 174 & 174-A and the Notification No. 11/88-CE issued thereunder, held that, "proviso makes it clear that where goods are chargeable to nil rate of duty or where the exemption from the whole of the duty of excise leviable is granted on any of the six categories enumerated, the manufacturer is required to make a declaration and give an undertaking, as specified in the Form annexed while claiming exemption for the first time under this Notification

and thereafter before the 15th day of April of each financial year. As found by the forums below, including CEGAT, factually, the declaration and the undertaking were not submitted by the appellants. This is not an empty formality. It is the foundation for availing the benefits under the Notification. It cannot be said that they are mere procedural requirements, with no consequences attached for non-observance. The consequences are denial of benefits under the Notification. For availing benefits under an exemption Notification, the conditions have to be strictly complied with."

10. Bearing in mind the provisions of Rule 173-C and the certain obligations cast upon the assessee in order to enable him avail certain benefits, the same are required to be strictly complied with and failure thereof can result in denial of those benefits.

11. Apart from denial of benefits, it could also result in non-disclosure of the relevant facts to the Department. As already seen above, the assessee while making declaration in terms of Rule 173-C is required to impart certain information to the Department. The information which is required to be imparted is not only relevant, but it is necessary in order to avail the benefits of certain exemptions etc. Being so, the information being of very relevant nature, non-disclosure thereof would amount to suppression with intent to evade the duty. Obviously, therefore, it would empower the authorities to invoke the powers regarding the extended period of limitation.

12. The Apex Court in the case of **Gopal Zarda Udyog** (supra) held that, "mere failure or negligence on the part of the manufacturer either not to

take out licence or not to pay duty in cases where there is scope for doubt, does not attract extended period of limitation". It is nobody's case in the matter in hand that there was any scope for doubt about the requirement of disclosure in terms of Rule 173-C by the assessee. Being so, the decision is of no help to the respondents in the matter in hand.

13. In the case of **Pushpam Pharmaceuticals Company** (supra), it was held by the Apex Court that, "where facts are known to both the parties, the omission by one to do what he might have done and not that he must have done, does not render it suppression of fact". Obviously, the pre-condition for non-application of the provision regarding the extended period of limitation is that, the facts must be known to both the parties. When the statute clearly requires certain information to be imparted to the Department and that information is suppressed and the assessee does not come forward with necessary material which could reveal an occasion for the Department to know those facts which were otherwise required to be disclosed by the assessee, there can hardly be any scope to contend that both the parties were in know-how of the detailed information which were required to be disclosed by the assessee.

14. In the case of **Chemphar Drugs & Liniments** (supra), it was held by the Apex Court that, "Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case." The ruling rather than rendering any assistance to the respondents, clearly helps the

appellant. As already observed above, in the facts and circumstances of the case, the relevant facts having not been disclosed by the respondents to the Department, the latter was clearly required to invoke the provisions of law relating to the extended period of limitation.

15. The Bombay High Court's decision in the case of **Swastik Auto Products** (supra) was based on the decision of the Supreme Court in the case of **Pushpam Pharmaceuticals Company** (supra). As already held above, the decision in **Pushpam Pharmaceuticals Company's** case (supra) is of no help to the respondents and for the same reason, the decision of the Bombay High Court is also of no help to the respondents.

16. It was also sought to be contended that, prior to 1996 the respondents were clearing the physician's samples for the purpose of free distribution and it was known to the Department. When we speak of knowledge, it is not merely knowledge in abstract. It has to be in relation to the facts of the case. The period in question, in the matter in hand, relates to from October, 1997 to May, 2000. Merely because some Officers of the Department who were incharge of the matter prior to 1996 might have had knowledge of certain activities of the assessee. From that, it would be difficult to draw an inference about the knowledge to the Department of all the activities of the assessee even in relation to the subsequent period. It is not the case of the respondents that during the relevant period there was occasion for the Department to verify the facts in question. Had there been such occasion, perhaps the knowledge could have been inferred. In the absence of such information, it cannot be presumed that the Department was fully aware of the

fact that the respondents had been under-valuing their goods i.e physician's samples by paying duty much below the value of the similar goods which were being removed by the respondents. Obviously, therefore, the provisions of extended period of limitation as well as provisions relating to penalty were clearly attracted.

17. In the facts and circumstances of the case, therefore, the impugned order cannot be sustained and is liable to be set aside and the order passed by the lower authority is to be restored, with consequential relief.

18. The appeal is accordingly disposed of in the above terms.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(M. VEERAIYAN)
MEMBER (TECHNICAL)

Golay