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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 12/07/2011

Appeal No. E/2706/2005 - EX[DB]

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

To :
C.C.E. ROHTAK
17-P, SECTOR 1, ROHTAK.

C.C.E. ROHTAK Appellant

Vs

M/S SEAGULL DRUGS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.591/ 2011 EX[DB]** dated 01-6-11 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 SEAGULL DRUGS LTD.
639,M.I.E.BAHADURGARH
HARYANA

2. Adv. / Consult SH. R.K. JAIN,
C10, PADMA TOWER 1,
RAJENDRA PLACE, N.DELHI

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 (Haryana)
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.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delli,
Court No.I

Ex. Appeal No.E-2706 of 2005

Arising out of O/A No.234/AKG/RTK/2005 dated 5.5.2005 passed by Commissioner of Central Excise (Appeals), Delhi III.

For approval and signature:

Hon'ble Shri Justice R. M. S. Khandeparkar, Presient
Hon'ble Shri 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? :
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether His Lordship wishes to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental Authorities? :

CCE, Rohtak

...APPELLANT(S)

VERSUS

M/s Seagul Drugs Ltd.

RESPONDENT (S)

APPEARANCE

Rep. by Shri V. Chaudhury, DR and Shri S. R. Meena, DR for the appellant-Revenue
Rep. by Shri R. K. Jain, Consultant for the Respondent (s)

CORAM:

Hon'ble Shri Justice R. M. S. Khandeparkar, Presient
Hon'ble Shri M. Veeraiyan, Member (Technical)

Date of hearing & decision : 01. 06. 2011

FINAL Oral Order No. 591/2011-EX

Per Shri Justice R. M. S. Khandeparkar :

Heard the Drs for the Appellant Revenue and the ld. Consultant for the respondents.

2. Perused the records. This appeal arises from the order dated 5th May, 2005 passed by the Commissioner (Appeals), Delhi. By the impugned order, the Commissioner (Appeals) has allowed the appeal filed by the respondents against the order of the adjudicating authority on the ground that the demand was barred by limitation and there was no case for invoking extended period of limitation. The Joint Commissioner vide his order dated 24th May, 2004 confirmed the demand of duty to the tune of Rs.7,99,937/- along with interest and equal amount of penalty on the respondent company and a penalty of Rs.1,50,000/- against the Director of the Company and the said order stands set aside by the Commissioner (Appeals).

3. The Department being aggrieved by the said order has approached this Tribunal by the present appeal. While assailing the impugned order, the Departmental Representative has submitted that the Commissioner (Appeals) held that there was no suppression of facts on the ground that the Department was aware of all the facts pursuant to the audit by the Departmental Officers

and the fact that the assessee had submitted necessary invoices in relation to the physicians samples. According to the Departmental Representative, the decisions relied upon by the authority below have no application to the facts of the present case. On the other hand, the Representative of the respondent has submitted that the impugned order has been passed based on materials on record and, therefore, there is no case for interference. He has submitted that departmental officers had been regularly visiting the respondents' factory and the audit was conducted in 1997 as well as in the year 2000. At no point of time prior to issuance of show-cause notice in question, the Department had raised objection to the method of valuation adopted by the respondents in relation to physicians samples. Being so, it was within the knowledge of the Department and hence, there was no case for invocation of extended period of limitation. On behalf of the Department, it has also been submitted that the invoices which were produced related to the period upto October, 1996 whereas the period in question was from April, 1997 to June, 2000. He also contented that merely on audit it cannot be presumed that all the relevant facts were revealed to the audit party. It was also contended that it was obligatory for the assessee to disclose that they had adopted different methods for valuation of the same product, one which was cleared for sale and other which was cleared as physicians samples and having not done so, there was a case of suppression. On behalf of the respondents, reliance is placed in the decision of the Apex Court in the case of Commissioner of Central Excise, Mumbai Vs. S. Narender Kumar & Company reported in 2011 (267) ELT 577 (S.C.) and the case reported in 2004 (167) ELT 491. In the course of argument, attention was also drawn to the official letter written by the Department on 10th October, 2001 and 25th January, 201 referring that in the course of audit, certain facts were revealed regarding discrepancies in the valuation method adopted in relation to the product cleared for sale in market and those cleared as physicians samples and asking for certain details in that regard.

4. The limited issue which is involved in the matter relates to invocation of extended period of limitation by the Department. While it is the contention of the Department, there was suppression of relevant fact to justify the invocation of extended period of limitation, it is the contention of the assessee that all the relevant facts were always within knowledge of the Department.

5. The relevant period is from April, 1997 to June, 2000. The show-cause notice was issued on 31st May, 2002. The show-cause notice issued to the assessee discloses that pursuant to the scrutiny of the record by the audit and by the range officers, the discrepancy in the method of variation in relation to the valuation of the product cleared for the market sale and of those cleared as the physician samples,

was revealed and that there was no logical basis for adopting such different methods in relation to the valuation of the products, besides that the same was suppressed from the department and therefore the show-cause notice was issued. The show cause notice also discloses that the fact about such discrepancy come to the knowledge of the department in the course of investigation during which the statement of the Director of the Company, Shri A. C. Sehgal, was recorded on 22nd May, 2002. The respondents contested the show-cause notice by filing their reply dated 1st August, 2002, wherein while referring to Circular dated 30th June, 2000, it was sought to be contended that they had cleared the samples based on transaction value and the duty was paid as per valuation worked out at the ascertainable value cleared at the factory gate and there was no short payment of duty. It was also the defence of the respondent that since the samples were distributed free, the normal price thereof could not be made the basis for assessment and for levy of excise duty. The contention regarding the bar of limitation was also raised in the reply.

6. The adjudicating authority rejected all the contentions which were sought to be raised by the assessee and confirmed the demand as stated above while holding that un-retracted statement of the Director of the Company clearly establishes the facts alleged by the Department and further that there was

suppression of facts about under-valuation of the physician samples by the respondents. The Commissioner (Appeals), as observed above, set aside the order only on the ground of bar of limitation.

7. As far as the liability to pay the excise duty on the physician samples, the issue is no more *res-integra* and it is settled by the decision of the Apex Court in the case reported in 2011 (263) ELT 641. Even otherwise that is not the subject matter of this appeal.

8. As regards the contention regarding suppression of the relevant facts, it is the case of the Department that it was only pursuant to the scrutiny of the records in the course of audit and by the range officers, the under-valuation of the physician samples came to light. It is not in dispute that audit was conducted in the year 2000. It is also sought to be contended on behalf of the respondent that similar audit was conducted in the year 1997. We are however concerned with the period from April, 1997 to June, 2000 and in respect of this period, it is not in dispute that audit was conducted in the year 2000 and in the course of scrutiny of the said period, relevant facts were revealed. In fact, there is specific assertion in that regard in the show-cause notice. We have no chance to see the reply filed by the appellant to such show-cause notice as no copy thereof is available on record before us. However, the scrutiny of the said reply as summarized in the order passed by the adjudicating authority, it is not disclosed that the assessee had ever challenged or disputed the facts stated in the show-cause notice, though it was sought to be contended that the clearances of samples were shown in RT-12 Return and therefore,

there was no case for invocation of extended period of limitation. Mere disclosure of clearance of samples in RT-12 Return by itself cannot lead to the conclusion that the Department had knowledge about the relevant facts. It merely says when there was specific statement in the show-cause notice and which does not appear to have been disputed that the scrutiny of the documents revealed the fact of under-valuation of the physician samples. The main issue being related to the question of under-valuation of the physician samples and the same being basis for issuance of show-cause notice and that fact itself having not been disputed, the mere contention that the clearance of samples were shown in RT-12 Return, can hardly be accepted as valid defence against invoking extended period of limitation in the show-cause notice.

9. It is true that it was sought to be contended that there was audit conducted in the year, 2000. The Department enquired all the relevant facts in 2000 and therefore, there was no justification for the Department to wait till 31st May, 2002 to issue show-cause notice. Undoubtedly, immediate action in that regard would have been certainly appreciable. However, the Department is not concerned only with the case of the assessee, it is concerned with different cases. The Department would take some time~~s~~ in dealing with each of the cases.

10. Besides based on the records disclosed in the course of investigation, the Department has recorded the statement of the Director of the respondent company on 22nd May, 2002 wherein he

had clearly stated that the facts of clearance of medicinal samples meant for physicians at value lower than the sale value of the similar product and also the assessable value of the samples was lower on the ground that the manufacturing cost of the samples was less on the ground that the samples were manufactured separately utilizing less fuel consumption, less labour costs and different packing. It was nowhere disclosed in the said statement that all these facts were brought to the notice of the Department prior to recording of his statement or that those facts were brought to notice of the Department prior to scrutiny by the Department and other materials by the audit in the year 2000. Apparently, it came to the knowledge of the Department in the year 2000. Certainly the notice issued in May, 2002 cannot be said to be barred by limitation. Once it is established that pursuant to the investigation and disclosure made by the Director of the Company, various facts were revealed to the Department during the period in the year 2000, the notice issued in May, 2002 was within a period of limitation which the Department could have issued. Once the fact of suppression has been established, obviously, the period available for issuance of notice is five years.

11. The decision of the Apex Court in the case reported in 2011 (263) ELT 641 (cited supra) was to the effect that there was enough material on record for justification that the Department had not only given the opportunity to know the relevant facts, but also it came to know of the relevant facts. All these aspects having been brought on

record and the Department having not been able to dispute the same, the Hon'ble Apex Court held that there was no case for invocation of extended period of limitation. That is not the case in the matter in hand.

12. In S. Narender Kumar & Company case, the Apex Court has clearly observed from 1994 to 1999, which was the relevant period for consideration, the assesses had been regularly filing the classification lists with the Department and the same were approved by the Department over the years. This clearly disclosed that the Department had complete knowledge of all the relevant facts. In those circumstances, there was no justification for the Department to invoke extended period of limitation. Again, that is not the case in the matter in hand.

13. The finding arrived at by the Commissioner (Appeals) is that "I find from the record submitted by the appellants that they have been filing invoices of physician's samples with the Department till October, 1996. The submission of invoices alongwith RT-12 Returns was discontinued by them from November, 1996 onwards probably in view of Board's Circular No.249/83/96-CX dated 11.10.1996. The appellant has also produced the evidence of submission of invoices along with RT-12 Returns for the month of October, 1996 to the Range Office on 5.11.1996. I further find that as per the impugned order itself, the appellant has been clearing the samples from the factory only on

payment of duty, though at a value lower than that considered by the Department. Thus, this is not a case of suppression of production of clearances."

The above finding itself discloses a total non-application of mind by the Commissioner (Appeals) to the matter in dispute. The matter in dispute was not regarding suppression of production or suppression of clearances. The issue is related to suppression of different methods adopted for valuation of physician's samples from the one adopted in relation to production cleared for sale in market. This itself justifies interference by the Tribunal in the impugned order. It also discloses total wrong approach to the matter while deciding the same by the Commissioner (Appeals).

14. It is also to be noted that the period involved is from April, 1997 to June, 2000. The Commissioner (Appeals) refers to all the Acts prior to October, 1996. The Commissioner (Appeals) has not indicated how those facts can be relevant to ascertain what happened during that relevant period and whether the relevant fact has been informed to the Department or not.

15. For the reasons stated above, we find that the impugned order cannot be sustained and liable to be set aside while restoring order passed by the adjudicating authority. Hence, the appeal succeeds and the impugned order is therefore set aside and the order of the

adjudicating authority is restored with all the consequential relief. Appeal is allowed accordingly.

(Dictated and pronounced in the open Court)

(Justice R.M.S.Khandeparkar)
President

(M.Veeraiyan)
Member (Technical)

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