

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1213/2005-1215/2005 - EX[DB] WITH
E/MISC/152-154/2010-EX

Date 21/10/2011

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

To :
M/S SEAGULL DRUGS (AYURVEDIC)
MIE, BHAHADURGARH, HARYANA
M/S SEAGULL DRUGS (AYURVEDIC)

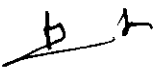
Appellant
Vs
Respondent

C.C.E. ROHTAK

MISC ORDER NO. 560-562/2011-EX

I am directed to transmit herewith a certified copy of Final order No.914-916/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

2011 EX[DB] dated 18-10-11


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

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

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 Publications 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)

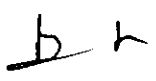
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file

14. SH S.C.SEHGAL MANAGING DIRECTOR

15. M/S OZONE PHARMACEUTICALS LTD,
1, LSC, BLOCK A-3, JANAKPURI, NEW DELHI


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.
Court No. 1

Date of hearing/decision: 11.10.2011

For approval and signature:

Hon'ble Ms. Jyoti Balasundaram, Vice President
Hon'ble Sh. Rakesh Kumar, 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.	No
2	Whether it should be released under Rule 27 of the 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

Excise Appeal Nos. 1213, 1214 & 1215 of 2005 with Excise Misc.
Application Nos. 152, 153 & 154 of 2010

(Arising out of order-in-original No. 18/Commr.KKG/2004 dated 07.01.2005 passed by the Commissioner of Central Excise, Rohtak)

M/s Seagull Drugs (Ayurvedic)
 Sh. S.C. Sehgal, M.D.
 M/s Ozone Pharmaceuticals Ltd.

Appellants

Vs.

CCE, Rohtak

Respondent

Appearance:

Rep. by Sh. K.K. Anand, Advocate for the appellants.

Rep. by Sh. Nagesh Pathak, DR for the respondent.

Coram: Hon'ble Ms. Jyoti Balasundaram, Vice President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

Per: Jyoti Balasundaram:

Common issues arise for determination in these three appeals filed by Seagull Drug Ayurvedic (SDA), Ozone Pharmaceuticals Ltd. (OPL) and its Managing Director Sh. S. C. Sehgal, which are hence heard together and disposed of by this common order.

2. Vide the impugned order the Commissioner has confirmed differential duty demand against SDA under proviso to Section 11A, imposed equal amount of penalty and separate penalties on OPL and its Managing Director Sh. S.C. Sehgal. The duty confirmation and imposition of penalties have arisen pursuant to a show cause notice issued on 30.05.2003 under extended period of limitation under proviso to section 11A of Central Excise Act for the period 1999 - 2000, 2000-01 and 2001-02.

3. The Commissioner has held that the 'Nomark' cream manufactured by SDA was classifiable under heading 3304.00 of Central Excise Act as a cosmetic product instead of Ayurvedic medicine classified by Seagull under heading 3003.39 as Ayurvedic medicine. He has held that OPL through whom SDA was selling bulk of their products was a related person of SDA in terms of Section 4 (4) (C) of Central Excise Act, 1944. he has also held that, in the facts of the case, extended period of limitation was rightly invoked.

4. We have heard the counsel for the appellants and the ld. DR for the Department and carefully perused the records.

5. We find that prior to starting of manufacture of Nomark cream, SDA was manufacturing Wanish cream for which they were granted Central Excise Registration w.e.f. 01.09.1997. Seagull had claimed the classification of Wanish cream as Ayurvedic medicine under heading 3003.39. The Department had issued a show cause notice to Seagull wherein it was alleged inter-alia that Wanish cream was classifiable as cosmetics under heading 3304 and was not an ayurvedic medicine as claimed by SDA. The Additional Commissioner vide Order-in-Original No. 16/CE/99 dt. 21.06.1999 had held as under:-

“Wanish Skin Cream

The skin cream is packed in 25 gm aluminium tube. On the tube and packing material following indication/ instructions are printed:

Indications: Scars, Burn marks, hyper pigmentation marks, dark circles under the eyes, obesity or post delivery stretch marks.

Instructions: Apply the affected area 2-3 times a day and massage gently till the cream is fully absorbed. The quantum of cream to be applied will depend on the extent of absorption in the skin and the area to be applied to.

- Store in cool and dry place.
- Protect from direct sun-light.
- An Ayurvedic Medicine.

From above description of the product and the related documents, it is seen that:

- i) Wanish skin cream is an Ayurvedic Medicine under Drugs and Cosmetics Act, 1940.
- ii) The product is marketed as a medicament for the cure of various types of marks.

- iii) The ingredients of the creams have medicinal value.
- iv) It has substantial therapeutic value as it claims to cure burn marks, hyper pigmentation marks, delivery stretch marks and obesity marks etc.
- v) The skin cream is to be applied at the affected area only and not anywhere else.
- vi) The skin cream has its own shelf life as in case of medicines.
- vii) The skin cream is to be applied for a specified condition/ ailment and for specified time only.
- viii) The marketing and advertising pattern of the product does not claim the cosmetic use of the product.

Therefore, in view of above characteristics of the products, Wanish Skin Cream is clearly classifiable as 'Ayurvedic Medicine' under chapter heading No. 3003.39 of Central Excise Tariff Act, 1985".

We have been informed that the Department had accepted the above order-in-original as no appeal was filed against the said order. While passing the above order the Additional Commissioner had examined the literature of the product as indicated on its packing material, its medicinal values and conditions in which the same was to be applied. He also took into account the fact that Wanish cream was used to cure scares, burn marks, hyper pigmentation marks, dark circles under the eyes, obesity or post delivery stretch marks.

6. The issue of classification of Wanish cream also came up before the Tribunal which in the case of CCE vs. Ozone Ayurvedic -2003 (157) ELT 196 also negated the contention of the revenue that Wanish cream/ lotion

was a cosmetic classifiable under chapter heading 3304.00 of CETA 1985.

The Tribunal in para 6 onwards held as under:-

“6. In the present case, the dispute is regarding classification of Wanish skin cream/ lotion manufactured by respondents. The respondents in this case produced evidence, which is relied upon by the Commissioner (Appeals) to show that Wanish skin cream/ lotion is sold at medical/ chemist shop on the prescription given by a doctor or a medical practitioner and it is used for treatment of pregnancy stretch marks and scars.

7. We find that this finding of Commissioner (Appeals), based on the evidence produced by the respondents, is not rebutted by the revenue before us. The contention of the revenue is that the product, in question, is not an ayurvedic medicine, but it is a cosmetic. The burden of proving that the product, in question, is a cosmetic, was on the revenue and the revenue has not discharged this burden as no such evidence is produced by revenue in support of their claim. On the contrary, we find that the product, in question, is manufactured out of ingredients mentioned in ayurvedic text book and is used for treatment of pregnancy stretch marks. The revenue has failed to produce any evidence that this product is known in the trade market as cosmetics.

8. Further, we find that the Hon'ble Delhi High Court in the case of Manish Pharma Plasto Pvt. Ltd. vs. Union of India (supra), while deciding the classification issue in respect of Nycil Prickly heat powder under Chapter 30 of the Central Excise Tariff, held that the product, in question, satisfies the common parlance test or popular meaning test. The powder, in question, is not used by a consumer as a daily use product and is a product normally used for the specific purpose for treating prickly heat. The ratio of this decision is fully applicable on the facts of the present case.

9. In view of above decision, we find no infirmity in the impugned order. The appeal is dismissed.”

Hence even this Tribunal also held in clear terms that Wanish cream/ lotion was used to remove the stretch marks on the skin which is a condition normally occurring in ladies after giving birth to a child. The Tribunal also held that Wanish cream was manufactured out of ingredients mentioned in ayurvedic text books. We have been informed that Department had accepted this order as no appeal was filed against the abovementioned judgement in any higher forum.

7. We find that Seagull decided to change the brand name of Wanish cream to Nomark cream with the same composition and intimated this fact to the Drug Licencing Authority vide their letter dt. 26.05.1999. Nomark cream and lotion were incorporated in the Drug Licence vide letters dt. 10.06.1999 and 30.3.2000 of the Licensing authority and Director of Ayurveda, Haryana and SDA was permitted to manufacture the same. In other words, the Licencing Authority and Director of Ayurveda accepted that Nomark cream was an ayurvedic medicine. We have gone through the ingredients/ composition of Nomark as declared to the Licencing Authority. We have also gone through the relevant pages of the diary seized on 18.01.2001 by the officers of the DGCEI during the search operation. It has been held by the Commissioner that the ingredients of Nomark cream and lotion declared to the Licencing Authority and Excise department were actually different than those actually used in the manufacture. We have gone through the ingredients declared by the SDA before the Licencing Authority and found in the diary. The said diary also contained composition

of Wanish cream being manufactured by SDA prior to 1999-2000. Major part of both the creams/ lotions consisted of water, preservatives, additives etc. such as Bees wax, Emulsifying wax, G.M.S., S.M.S., Liquid light Paraffin, Glycerine etc. Other ingredients were found to be Aloe vera extracts, Neem extracts, Turmeric extracts, Sandal essence, Vitamin E acetate etc. The only difference between ingredients of Wanish cream/ lotion and Nomark cream/ lotion appears to be that in Wanish cream, wheat germ oil and chandan oil were used whereas in Nomark cream / lotion, vitamin E acetate and sandal Essence were used. The process of the manufacture mentioned on the Drug Licence clearly permits SDA to use carriers such as MSM/ petroleum and extracts of materials in the manufacture of Nomark cream/ lotion. It was argued by the Id. SDR that vitamin E and sandal substitute were synthetic in nature, which was accepted by SDA in their letter dt. 09.07.2002 addressed to DGCEI by Mrs. Geeta Sehgal, Proprietor of SDA. He further argued that Commissioner has clearly held that these two ingredients were of synthetic nature and hence the product could not be held to be an ayurvedic medicine.

7.1 We have gone through the contents of the said letter. Nowhere in the said letter has Mrs. Geeta Sehgal accepted that vitamin E and sandal substitute were synthetic. She merely stated that the names indicated that they should be synthetic. Hence we do not agree with the finding of the Commissioner that the two ingredients of Normark cream/ lotion were admitted to be synthetic. Further it is clearly established from the discussion and finding portion of the order at internal page 43 that the Department had drawn samples of the product. But the test report has not been relied upon in

the show cause notice. We are of the view that if the department had any doubt on the composition of the product, the only acceptable method was to test the same in a laboratory and on the basis of the test report, come to a conclusion as to the nature of the various ingredients. In any event, the Commissioner did not dispute that the other ingredients such as Aloe vera extracts, Neem extracts, Turmeric extracts, Tulsi extracts etc. were not ayurvedic or did not have medicinal value. Even assuming for arguments sake, that vitamin E and sandal substitute were synthetic, the Hon'ble Apex Court in the case of *Amrutanjan Ltd. vs. CCE-1995 (77) ELT 500 (SC)* and *CCE vs. Ishaan Research Lab (P) Ltd. 2008 (230) ELT 7 (SC)* has clearly laid down that merely because a product contained the ingredients not known to ayurveda, would not by itself make it a non ayurvedic product. Consequently we hold that the ingredients and composition of both Wanish and Nomark was similar and SDA was manufacturing the product "Nomark" as per the composition declared to the Drug Controller.

8. It has been vehemently argued by the Id. DR that Wanish cream was being used as per the prescription of the Doctors whereas Nomark cream was being sold through General Stores, beauty parlors and chemists; that the same was being manufactured with a view to compete with cosmetics products such as Ponds and Lakme; that the product was meant for care of the skin and not for any cure; the same would not be covered under chapter 30 even if it had therapeutic or prophylactic propensities. He relied upon note 5 to chapter 33 to make the point that since Nomark was a beauty cream, the same would approximately be classifiable under heading No. 3304.00 of CETA 1985.

8.1 We find that SDA was manufacturing 'Nomark' under the proper Drug Licence issued by Drug Controller treating Nomark as Ayurvedic medicine. We have gone through the label of the product wherein it has been clearly mentioned that Nomark was meant for treatment of scars, pigmentation, pregnancy stretch marks. We have also gone through the contents of various statements recorded during investigation in the matter such as that of Mrs. Neeta Aggarwal, GM (Sales & Marketing) Ozone Ayurvedics, Shri Som Singh, Chemist SDA, Mrs. Geeta Sehgal, prop. SDA, Sh. S.C. Sehgal, MD OPL. It can be clearly discerned from these statements that formulation of both 'Wanish' and 'Nomark' were same; that 'Nomark' was meant for the patients with medical conditions like scars and marks, dark circles and pigmentation; promotion of the products was done at two levels, over the counter and through Doctors; 'Nomark' could not be compared with products like Lakme and Pond's as it (Nomark) had same medicaments like aloe vera, tulsi, neem & turmeric extracts. Hence we do not agree with the aforestated submissions of the Id. SDR and findings of the Commissioner on these aspects. The mere fact that the product in addition to being marketed through Doctors was also being marketed through beauty parlors to is not sufficient that it is a cosmetic. We find that the main issue which is to be decided is as to whether 'Nomark' was a medicament meant to cure certain medical conditions or is simply a cosmetic product. The evidence on record clearly proves that the same has medicinal and therapeutic value. We therefore hold that the primary function of Nomark is to cure a particular medical condition. Note 5 to chapter 33 is not applicable to the facts of the present case as the same is applicable only to

cosmetic products. Even the adjudicating Commissioner has accepted at internal page 37 of the impugned order that Nomark is used to prevent the stretch marks. But he erroneously has held that in such a case its usage can be termed as care of the skin. The Additional Commissioner as well as the Tribunal has already held that Wanish cream which was used for curing scars, burn marks, pigmentation, obesity or post delivery stretch marks was an Ayurvedic medicine classifiable under heading 3003.39 of CETA 1985 and not under 3304 of CETA 1985. The decision of the Tribunal in the case of Ozone Ayurvedic cited supra therefore fully covers the issue of classification in favour of the assesseees.

9. The Id. Counsel for the appellants has relied upon several judgements of the Apex Court and this Tribunal in support of his submission that 'Nomark' is a medicament and not cosmetic product. The details of these judgements are as under:-

- i) CCE vs. Ishaan Research Lab (P) Ltd. -2008 (230) ELT 7 (SC)
- ii) CCE vs. Pandit D.P. Sharma -2003 (154) ELT 324 (SC)
- iii) Naturalle Health Products (P) Ltd. vs. CCE-2003 (158) ELT 257 (SC)
- iv) Puma Ayurvedic Herbal (P) Ltd vs. CCE-2006 (196) ELT 3 (SC)
- v) CCE vs. Sharma Chemical Works -2003 (154) ELT 328 (SC)
- vi) Meghdoot Gramodyog Seva Sansthan vs. CCE 2004 (174) ELT 14 (SC)
- vii) Ponds India Ltd. vs. CTT -2008 (227) ELT 497 (SC)
- ix) Manisha Pharma Plasto (P) Ltd. vs. UOI-1999 (112) ELT 22 (Del)
- x) CCE vs. Dollar Co. (P) Ltd. -2009 (234) ELT 549 (T)
- xi) CCE vs. Elder Health Care Ltd. -2007 (210) ELT 89 (T)

9.1 The crux of these judgements as far as SDA is concerned can be formulated as under:-

- (a) The product should be useful for treatment of a disease.
- (b) The product should be manufactured under a drug licence.
- (c) It fulfills the requirement of a drug as understood in the common parlance
- (d) Its label or literature should refer to it as a drug.
- (e) The fact that medicinal element in the product was minimal does not detract it from being classified as a medicament.
- (f) It was not necessary that the item be sold under a doctor's prescription.
- (g) Availability of the product across the counter in shops was not relevant as it makes no difference.
- (h) The product would remain Ayurvedic medicine even if herbs are in form of extracts and purified to pharmaceutical grade.
- (i) Cosmetic products are meant to improve appearance of a person that they enhance beauty whereas medicinal product or medicament is meant to treat some medical condition.
- (j) Formula to manufacture ayurvedic medicament may not be as per the text books but a medicament can also be under a patented or proprietary formula –main criteria for determining the classification is normally the use it is put to by the customers who use it.
- (k) If the Central Excise authorities have any doubt as to whether a product is an ayurvedic medicine or not they should refer the matter to the office of Drug Controller, DGHS, New Delhi.
- (l) When the composition and curative proprieties of a product are admitted, it was still not open to the department to hold the product to be cosmetics.
- (m) Burden to prove correct classification lies on revenue.

9.2 The law laid down by the Hon'ble Apex Court is a series of judgements is squarely applicable to the product at hand i.e. 'Nomark'. The afore-stated guidelines laid down by the Hon'ble Apex Court would clearly establish that the product in question i.e. Nomark is a medicament classifiable under heading 3003.39 and is not a cosmetic product classifiable under heading 3304. The revenue has not discharged its burden to prove that the product was known in the market as cosmetics. Further the results of test report in respect of sample drawn of the product has not been disclosed. We also agree with the submission of the counsel of SDA that even in those cases where the dispute was with respect to a entry which read as 'Medicaments including those used in Ayurvedic, Unani, Sidha, Homeopathic or Bio-chronic systems' the Hon'ble Apex Court has treated the same as Ayurvedic despite the fact these contained non-ayurvedic elements. As far as SDA is concerned, they claimed classification of the product under heading 3003.39 which is for 'others'. Hence in their case the only requirement which is to be fulfilled is that the product should be a medicament i.e. it should cure or treat some medical condition. In the result, we order classification of Nomark under heading 3003.39.

10. We find that the duty demand on 'Nomark' has arisen because the Department, by classifying the product under heading 3304, took the product out of the provisions Section 4 of CEA 1944 and applied the provisions of Section 4A of CEA 1944 i.e. calculated the differential duty on maximum retail price and allowed admissible abatement as per law. But since we have already held that the product 'Nomark' is classifiable under heading 3003.39 and not under heading 3304, we hold that SDA has correctly discharged

~~their~~ central excise duty under the provisions of Section 4 of the CEA 1944.

The differential duty calculated in charts appended to the SCN is therefore set aside.

11. The next question is as to whether SDA and OPL are related persons in terms of Section 4(4)(c) of CEA, 1944. The sole ground on which both are sought to be treated as related persons are that Mrs. Geeta Sehgal was holding 10% shares of OPL and family of Mrs. Geeta Sehgal is holding 90% of the total share capital of OPL. We find that the department has not been able to establish any mutuality of interest between SDA and OPL. OPL was a limited company whereas SDA was a proprietary firm of Mrs. Geeta Sehgal. The mere fact that Mrs. Geeta Sehgal was holding 10% share capital of OPL is not sufficient to treat both as related persons. The department has failed to prove any mutuality of interest or money flow back in two units. Further we have perused the chart appended to the show cause notice and find that SDA was selling the same product to different buyers including OPL, at the same price. The department has not proved that SDA was selling these various products to OPL at depressed price. Hence findings of the Commissioner that SDA and OPL are related persons fail and are set aside. It is held that the price at which SDA was selling their products to OPL was the normal price as enshrined under Section 4 of the Central Excise Act.

12. It was contended by the Id. Counsel for SDA that they were paying central excise duty under Section 4A of CEA 1944 on product 'Semop' under heading 3304 but still some differential duty was demanded in the

Annexures appended to the SCN. It was his further contention that there was no allegation in the show cause notice about any duty demand on Semop. We have perused the show cause notice. We find there is no allegation in the show cause notice about any differential duty being payable on the product 'Semop'. Once no allegation has been leveled in the show cause notice about this product, no differential duty could be demanded in the Annexures appended with the said show cause notice. The Id. SDR also admitted discrepancy of duty demand on this product. Hence duty demand on the product 'Semop' is set aside.

13. We further find that the duty demand in the present case has been confirmed under the extended period of limitation. The Commissioner has justified the applicability of the extended period solely on the ground that SDA and OPL were related persons and that this fact was intentionally concealed by SDA only to evade central excise duty. Though in the show cause notice, the allegations of suppression, mis-statement etc under proviso to Section 11A were not leveled both with regard to classification and valuation while dealing with the issue of demand being hit by bar of limitation, his findings are confined only to the issue of related persons as can be seen from internal page 46 of his order. Therefore we hold that once he has not held that there was any suppression, mis-statement etc. on the part of SDA in respect of classification of the product Nomark he could not have confirmed the duty demand on Nomark under extended period of limitation. Further differential duty demand on the product Nomark was demanded only by taking the product out of the purview of Section 4 of CEA, 1944 and placing it under Section 4A of CEA, 1944. Hence the issue

of related person had no applicability to the classification of the product 'Nomark'. In the present case, almost entire duty liability is on account of 'Nomark' only. As regards the evasion of central excise duty on the part of SDA on account of related person, we note that it is a very meager amount of Rs. 3171.52 as is evident by perusing Sr. No. 156 of duty calculation chart for the financial year 1999 -2000 appended with the show cause notice. We have already held that SDA and OPL are not related persons and hence the question of intentionally concealing the same from the department does not arise. Further there could not be any intention to evade duty on the part of SDA as they were selling the same product to OPL and other buyers at the same rate. We therefore hold that extended period of limitation is not applicable in the present case.

14. The Commissioner has imposed equal amount of penalty on SDA under Section 11AC of Central Excise Act read with Rule 173Q of erstwhile Central Excise Rules read with Rule 25 of Central Excise Rules, 2002. He has also imposed separate penalties on OPL and its Managing Director Sh. S.C. Sehgal under erstwhile Rule 209A of Central Excise Rules, 1944 read with the Rule 26 of Central Excise Rule, 2002. Since we have already set aside the entire duty demand confirmed against SDA, there is no justification to sustain any penalty against them. Penalties on OPL and its Managing Director have been imposed on the ground that OPL and its Managing Director had connived with SDA in purchasing the goods at enormously low price. We have already held that the price at which SDA was selling the goods to OPL was normal price and was not influenced by any extra commercial considerations. We have also held that SDA and OPL

are not related persons. Consequently there is no justification to sustain penalties on OPL and its Managing Director.

15. In the result, the impugned order is set aside and all the three appeals are allowed with consequential relief, if any, due in accordance with law.

(Jyoti Balasundarām)
Vice President

(Rakesh Kumar)
Member (Technical)

Pant