IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.1

Excise Appeal No.668 of 2011
(Arising out of Order-in-Appeal No.138-139/Kol-III/2011 dated 01.04.2011 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

M/s. EMCEE Pharmaceuticals Private Limited
(Kalyani, Nadia.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-III

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

WITH

Excise Appeal No.670 of 2011
(Arising out of Order-in-Appeal No.138-139/Kol-III/2011 dated 01.04.2011 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

M/s. EMCEE Pharmaceuticals Private Limited
(Kalyani, Nadia.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-III

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

AND

Excise Appeal No.23 of 2012
(Arising out of Order-in-Appeal No.266/Kol-III/2011 dated 19.10.2011 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

M/s. EMCEE Pharmaceuticals Private Limited
(Kalyani, Nadia.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-III

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

APPEARANCE

Shri S.P. Majumdar, Advocate for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 77137-77139/2023

DATE OF HEARING : 18 September 2023
DATE OF DECISION : 18 September 2023

Per : ASHOK JINDAL :

All the appeals are having common issue, therefore, all are disposed of by a common order.

2. The appellant is manufacturer of medicaments and cleared physician samples to the brand owner on payment of duty on transaction value. As medicines are subject to duty in terms of section 4A of the Act, i.e. MRP less abatement, therefore, it was alleged that the appellants have under-valued the physician samples. Accordingly, the proceedings were initiated against the appellant for under-valuation and the matter was adjudicated, demand of duty was confirmed. Against the said order, the appellant is before us.

3. Heard the parties.

4. Considering the fact that the issue has already been settled by this Tribunal in the case of Themis Laboratories Pvt.Ltd. v. Commissioner of C.Ex., Mumbai [2012 (286) E.L.T. 244 (Tri.Mumbai)], wherein this Tribunal has observed as under:-

> ***"10.*** *On careful examination of the submissions made by both sides, we find that in this case the short issue is to be decided that the physician samples cleared by the appellants, on transaction value under contractual price what should be the assessable value? Whether as per Section 4(1)(a) of the Act or as per Section 4A read with Rules to determine the issue. The Section 4 is re-produced here as under :*
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> ***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 value, such value, shall, subject to the other provisions of this section, be deemed to be -*

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -
(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;
(ia) where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such place of removal;
(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the lime being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;
(iii) where the assessee so arranges that the goods are generally not sold by him in the

course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

11. *From a plain reading of Section 4(1)(a), it is clear that in 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 the assessable value shall be the transaction value and in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.*

12. *In this case, we find that the appellants have cleared their goods to the buyers, who are admitted not the related person, on a contractual price, the ingredients of Section 4(1)(a) are complied by the appellants to arrive at assessable value is the transaction value.*

13. *As contended by the DR that as the physician samples are made free of sale and the medicaments are governed by MRP based valuation and these physician samples are for free distribution, the valuation is to be arrived on value of the comparable goods as held by the Hon'ble High Court of Bombay in the case of IDMA (supra). We find in the case of IDMA (supra), the facts are somehow different from the facts in hand as in the case of IDMA, the physician samples were cleared by the manufacturers themselves, where there was no* *transaction value was available at the time of clearance of the physician sample, which is not in the cases here, these physician samples are cleared to the brand owner/buyers on a transaction value, which were further distributed/delivered by the buyer free of cost to the physicians/doctors.*

14. *The facts of the case of Mayer Health Care Pvt. Ltd. (supra) are similar to the facts of these cases where the appellants were the manufacturer of pharmaceutical goods on its own as well as on loan licencee basis. The buyers generally desire to give some of the products on "free samples" to the doctors and hospitals. Accordingly, they instruct the appellant to put the label as "free sample" on the products. In case of loan licencee, the appellant discharged the duty based on Rule 8 read with Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules. In case of manufacture of their own goods, which are ultimately given as "free sample" by the buyer, the duty has to be discharged on the transaction value. In that case, this Tribunal has observed as under :-*

"The point to be appreciated is if an item is sold by the manufacturer or cleared for a consideration, then duty is payable on the transaction value in terms of Section 4 of the Central Excise Act." and finally this Tribunal has observed that the samples are not distributed by the appellants free but cleared on receipt of consideration. Hence, the Central Excise duty is payable on transaction values."

15. *Reliance placed by the ld. DR in the case of C.C.E., Daman v. Sun Pharmaceuticals Ltd. (supra) is not applicable to the facts of this case, as in that case the facts are not similar to the case in hand. In fact in that case, the delivery and distribution of physician samples were under the control of the assessee himself and the medical representative (who are the employees of the representative) distributed free samples to the physicians even after the sale of samples to M/s. Aditya Medisales Ltd., Bhiwandi. The sale to M/s. Aditya Medisales Ltd., was deliberately created on paper and therefore, cannot be said to be a transaction on principal to principal basis, the* *price is not the sole consideration. Hence, the reliance placed by the DR is of no help.*

16. *As held by this Tribunal, in the case of Mayer Health Care Pvt. Ltd. (supra) that "the samples are not distributed by the appellants free but cleared on receipt of consideration. Hence, the excise duty is payable on transaction value" and it is admitted fact in the cases in hand that these physician samples were cleared by the appellant on principal to principal basis on a transaction value, which was admissible at the time of clearance of the physician samples, than the transaction value is to be determined as per Section 4(1)(a) of the Act. Accordingly, the impugned orders are set aside and it is held that the appellants have correctly valued the physician samples cleared by them on transaction value/as per CAS-4. Therefore, all the appeals are allowed with consequential relief (if any)."*

5. As held by this Tribunal in the case of Themis Laboratories Pvt.Ltd. (supra), the issue is no more res integra. Therefore, we hold that the appellant is liable to pay duty on transaction value on physician samples which have already been paid by the appellants i.e. CAS + 10%. Therefore, the appellants have correctly paid the duty. Accordingly, no demand is sustainable against the appellants, hence, we set aside the impugned orders, and allow the appeals with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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