IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. E/1227/08

(Arising out of Order-in-Appeal No. CEX/GOA/MP/35/2008 dt. 23.9.2008 passed by the Commissioner of Central Excise (Appeals), Goa.)

Cosme Pharma Ltd. : **Appellant**
VS
Commissioner of Central Excise, Goa. : **Respondent**

Appearance

None for Appellant

Shri H.M. Dixit, Asstt. Commr. (A.R) for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

Date of hearing : 16/11/2017
Date of pronouncement : 13/03/2018

ORDER NO. A/92271 / 2017

Per : Raju

This appeal has been filed by M/s. Cosme Pharma Ltd. against confirmation of demand of duty on physician samples which are distributed free as part of marketing strategy, or as a gift or donation to doctors. The dispute relates to the valuation of such physician samples. The arguments raised by both sides were similar to the arguments raised in the case of Blue Cross Laboratories.

2. None appeared for the appellant.

3. Ld. AR relies on the impugned order.

4. We find that the issue has been examined in the case of Blue Cross Laboratories vide order No. A/85360/2018 dt. 28/02/2018

wherein identical submissions were examined. In the said decision following has been observed:

"4. We have gone through the rival submissions. We find that it is not in dispute that the physician samples are cleared free of cost for distribution to the physicians as samples. Other than the packing of the goods, the goods are identical in nature in respect of quality. Even the packing is similar in many cases although the physician samples would contain and indication to that effect and would not contain the MRP.

4.1 In this regard, we find that the Hon'ble High Court of Bombay in the case of Indian Drugs Manufacturer's Association (supra) held as follows:

> ***21.*** *Physicians free samples are admittedly not sold and delivered at the time and place of removal or at any time thereafter and, therefore, the valuation of physicians free samples have to be determined under Section 4(1)(b) of the Act read with 2000 Rules.*
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> ***22.*** *Rule 4 of 2000 Rules is a general rule and it provides that the value of excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment. Rules 5, 6, 7, 9 & 10 of 2000 provide for the method of valuation in respect of goods sold and delivered at a place other than the place of removal or where the price is not the sole consideration for sale or where the excisable goods are sold after their clearance from the place of removal or where the goods are sold through a related person or sold through an inter-connected undertaking. Rule 8 provides for the method of valuation in respect of goods that are not sold but are cleared for use and consumption in the production or manufacture of other articles. Rule 11 provides that if the value of any excisable goods cannot be determined under the above rules, then the value shall be determined by using reasonable means consistent with the principles and general provisions of 2000 Rules and Section 4(1) of the Act.*
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> ***23.*** *In the present case, it is admitted by counsel on both sides that Rule 5, 6, 7, 9 & 10 of 2000 Rules are not applicable to the physicians free samples because Rule 5, 6, 7, 9 and 10 apply to*

cases where the goods are sold whereas physicians samples are not sold. Therefore, the question is, which of the remaining Rule 4, 8 and 11 of the 2000 Rules would be applicable for the valuation of physicians free samples.

24. *In our opinion, the physicians samples cannot be valued under Rule 8, because physicians samples are not cleared for use and consumption in the production or manufacture of other articles. Rule 8 applies to cases, where the goods are not sold but are cleared exclusively for use and consumption in the production or manufacture of other articles. Admittedly, the physicians samples are cleared for free distribution to the medical practitioners and are not cleared for use and consumption in the production or manufacture of other articles and, therefore, the method of valuation provided under Rule 8 cannot be applied for the valuation of physicians free samples.*

25. *Thus, the remaining rules, namely Rule 4 and Rule 11 are the only two rules that can be applied for the valuation of physicians free samples. As noted earlier, Rule 4 is a general rule and provides that the valuation of excisable goods that are not sold and delivered at the time and place of removal shall be based on the value of such goods sold and delivered at any other time nearest to the time of the removal of goods under assessment. The word "such goods" in Rule 4 clearly means that the goods in question must be similar or identical to and have same quality or character to the goods sold and delivered. In other words, what Rule 4 provides is that in all cases where the goods are not sold and delivered at the time and place of removal, its valuation is to be made by taking the value of such goods sold and delivered at the time nearest to the time and place of removal of the goods in question.*

26. *The above method of valuation contained in Rule 4 can be best understood by the following illustration. Suppose on 1st April, 2006 the goods manufactured by the assessee are sold and delivered to different parties from the factory gate/warehouse at 10.00 a.m., 12.00 noon and 4.00 p.m. respectively. If on the same day, similar goods are cleared otherwise than by sale at 1.00 p.m., then as per Rule 4, the value of goods cleared at 1.00 p.m. shall be determined by taking the value of the goods sold and delivered at 12.00 noon being the nearest to the time of the removal of the goods in question.*

27. *In our opinion, Rule 4 squarely applies to the clearances of physicians free samples, because, physicians samples are not clearances by way of sale and delivery at the time and place of removal and such goods meaning thereby goods similar or identical to physicians samples are also sold and delivered at the time and place of removal. By the very nature, the physicians samples have to be strictly identical to the goods which are cleared on sale in the wholesale trade. In fact, by distributing* *physicians samples freely, the assessee represents to the physicians that the product have same physical and chemical properties, composition, potency, etc. Thus, the physicians samples cleared for free distribution are liable to be valued under Rule 4 on the basis of the value of such goods sold and delivered at any other time nearest to the time and place or removal of the physicians samples.*

28. *The argument that Rule 4 applies only to goods sold but not delivered to the buyer at the time and place of removal cannot be accepted because, Rule 4 is a general rule and does not contain any words which warrant such restricted meaning. The fact that Rule 4 permits adjustments in the value on account of the difference in the dates of delivery of such goods, if any, it cannot be inferred that Rule 4 is restricted to goods sold but not delivered at the time and place of removal. By use of the words "if necessary" in Rule 4, it is made clear that the adjustments shall be permitted wherever a necessary. In other words, Rule 4 would also cover cases where such adjustment is not necessary. To put it simply, there is nothing in Rule 4 to suggest that it applies only to goods sold but not delivered at the time and place of removal.*

29. *It was contended that the revenue, based on several judicial decisions of the Tribunal, has been valuing the physicians free samples for nearly three decades by applying the method applicable to captively consumed goods and, therefore, even under 2000 Rules the physicians samples are liable to be valued by applying the rule applicable to captively consumed goods. There is no merit in this contention, because, firstly, 1975 Rules and 2000 Rules are not identical. Under Rule 6(b) of 1975 Rules, two methods were provided for valuation of captively consumed goods, namely valuation based on the value of comparable goods [Rule 6(b)(i)] and valuation based on the cost of production [Rule 6(b)(ii)] whereas Rule 8 of 2000 Rules provides for only one method of valuation based on the cost of production. Secondly, even under the 1975 Rules, the decisions of the Tribunal were to the effect that the physicians samples are liable to be valued by applying the value applicable to comparable goods and not the method based on the cost of production. Thirdly, as held by the Tribunal in the case of Medley Pharmaceuticals Ltd. (supra), Rule 4 and Rule 6(b)(i) of 1975 Rules being similar, the result would be same if Rule 4 is substituted by Rule 6(b)(i). In other words, the fact that rule similar to Rule 6(b)(i) of 1975 Rules is not to be seen in 2000 Rules would not preclude the revenue from valuing the physicians samples under Rule 4 especially when Rule 4 of the 2000 Rules is similar to Rule 4 of 1975 Rules. Therefore, valuation of physicians samples under Rule 4 of 2000 Rules would be reasonable and in consonance with the principles consistently followed in the last three decades.*

30. *Various decisions relied upon by the Counsel for the petitioners do not support the case of the petitioners because in none of those cases, the scope of Rule 4 of 2000 Rules has been considered. Decisions rendered under the 1975 Rules as stated above, in fact, do not support the case of the petitioners. The contention that Rule 8 is the only rule which deals with the instances where the goods are not sold and, therefore. Rule 11 with the spirit of Rule 8 have to be applied to the physicians samples cannot be accepted because Rule 8 applies to cases where the goods are not sold but are consumed captively in the manufacture of other articles. In the cases of physicians samples, the clearances are not for captive consumption and moreover, goods similar or identical to physicians samples are sold in the market. Therefore, the question of applying the spirit of Rule 8 does not arise at all.*

31. *The fact that the Board had issued a Circular No. 643 dated 1st July, 2002 directing that the physicians samples be valued under Rule 8 does not mean that the revenue cannot withdraw that circular even if it is found to be was erroneous and issue a circular which is in consonance with the Act and the Rules made thereunder.*

32. *The argument of the petitioners that the physicians samples are distinct from the goods sold in the market is without any merit. As noted earlier, the physicians free samples must be similar or identical to the goods that are sold in the wholesale trade. If the physicians samples are not similar or identical to the goods that are sold in the wholesale trade, then the consequences will be disastrous, because, the physicians prescribe medicines based on the free samples supplied by the assessee. The fact that the physicians samples may be distributed in a different pack or in a different bottle would not make the physicians samples different from the goods sold in the open market. The difference in the size or quantity may entitle the assessee to some adjustment in the value, however, that would not make the physicians samples to be distinct from the goods sold in the open market. In other words, irrespective of the fact that the physicians samples are distributed in a pack different from the pack that is sold in the market, the valuation of the physicians free samples have to be determined under Rule 4 by applying the valuation of such goods sold in the open market.*

33. *Assuming that the petitioners are right in contending that the valuation of the physicians samples cannot be determined under any of the specific rules, even then, as per Rule 11 the value of physicians samples has to be determined by using reasonable means consistent with the principles and the general provisions of 2000 Rules and Section 4(1) of the Act. As stated earlier, Rule 4 is the only general rule and, therefore, it is just and proper to hold that the valuation of physicians samples be determined under Rule 11 read with Rule 4 and such a valuation would be*

> *reasonable and consistent with the principles and the general provisions of the Rules and the Act. The contention that the physicians samples must be valued under Rule 11 read with Rule 8 cannot be accepted because, Rule 8 applies to cases where the goods are not sold but are captively consumed whereas, goods similar to physicians samples are in fact sold in the open market and in fact physicians samples are not cleared for captive consumption. Hence, the valuation of physicians samples cannot be determined under Rule 11 read with Rule 8 of the 2000 Rules.*

4.2 It is seen that the Hon'ble High Court of Bombay has dealt with all the aspects which have been raised by the Ld. CA. The Hon'ble High Court clearly held that Rule 4 of the Valuation Rules can be applied to the instant situation. Ld. CA has sought to assert that Rule 4 cannot be applied by relying on the decision of the Hon'ble Apex Court in the case of Biochem Pharmaceuticals Industries Ltd. It is seen that the Hon'ble Apex Court in the case of Biochem Pharmaceuticals was dealing with the situation where the Rule 4 of the Valuation Rules was not under consideration. In fact the Hon'ble Apex Court was dealing with the Central Excise Valuation Rules, 1975 and the Rule 6 thereof. It was not the case of the department that Rule 4 is applicable, as the Rule 6 (1) of the said Rules prescribed a better alternative to Rule 4 of the Central Excise Valuation Rules, at the material time. In para 5, 6 & 7 of the Hon'ble Apex Court observed as follows:

> ***5.*** *Since provisions of Section 4(i)(a) are not applicable, as per clause (b) of sub-section (1) of Section 4, the valuation has to be determined as prescribed in the Rules, namely, Central Excise (Valuation) Rules, 1975. It is an admitted case that Rules 3 to 5 have no application in such a case Rule 6(a) & (b) reads as under :*
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> ***"RULE 6.*** *If the value of the excisable goods under assessment cannot be determined under Rule 4 or Rule 5, and -*

(a) where such goods are sold by the assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a person other than a related person :

Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other relevant factors;

(b) where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based -

(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee :

Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

(ii) if the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods."

6. *Even Rule 6 does not apply as that Rule is applicable only in those cases where such goods are either sold by the assessee in retail or are used or consumed by him or on his behalf in the production or manufacture of other articles. In this scenario Rule 7 becomes applicable. As per which proper officer is to determine the value of such goods according to the best of the judgment. This Rule further mentions that for arriving on the best of his judgment he may have regard 'among other things' to any one or more of the methods provided for in the earlier rules, namely, Rules 3 to 6. Rule 7 is as under :*

*"**RULE 7.** If the value of excisable goods cannot be determined under the foregoing rules, the proper officer shall determine the value of such goods according to the best of his judgment, and for this purpose he may have regard, among other things, to any one or more of the methods provided for in the foregoing rules."*

7. *Thus, to arrive at valuation under this Rule, the proper officer may adopt the principles contained in Rule 6(b). Rule 6(b) deals with two methods :*

(1) In case these are comparable goods, the value of comparable goods produced or manufactured by the assessee, can be the basis and thus pro rata method can be applied;

(2) In case aforesaid method can't be applied, then the second method can be resorted to viz. cost of production or manufacture including profits, if any, which the assessee would have normally earned on sale of goods.

It can be seen that when the Hon'ble Apex Court has held that Rule 4 is not applicable, the Hon'ble Apex Court has merely noticed that none of the party is pressing for the application of Rule 4. A perusal of Rule 6 (b) of the Central Excise Valuation Rules, 1975 clearly shows that the Rule 6 (b) (i) provided and better alternative to Rule 4. In these circumstances and therefore apparently revenue did not press for Rule 4 in the Central Excise Valuation Rule 2000 there is no rule similar to Rule 6 (b) (i) and thus Revenue has apparently relied on the Rule 4 of the Central Excise Valuation Rules. The Hon'ble High Court in the case of Indian Drugs Manufacturer's Association (supra) has clearly held that Rule 4 can read with Rule 11 can be applied to such a situation. It is seen that the Hon'ble Apex Court in the case of Biochem Pharmaceuticals Industries Ltd (supra) has merely endorsed the decision of the lower authorities where the assessing officer had an option to choose between Rule 6 (b) (1) Rule 6 (b) (2) after giving reasons. In the instant case the assessing officer has chosen to apply Rule 4 read with Rule 11 of the Central Excise Valuation Rules in preference to Rule 8 read with Rule 11 of Central Excise Valuation Rules, 2000. It is seen that the appellant had relied on the decision of the Hon'ble High Court of Gujarat in the case of Tuton Pharmaceuticals. However, the said decision has been passed without considering the decision of the Hon'ble High Court of Bombay in the case of Indian Drugs Manufacturers Association (supra). In the said case the Hon'ble High Court of Gujarat was concerned with virus of Section 4A of the Act. The Hon'ble High Court held that the assessment of physician samples can only be done on Section 4 of the Act and not under Section 4A. The issue in the present case is not the same. Here we are concerned with determination of value under Rule 11 of the Central Excise (Valuation) Rules. The said rule permits the tweaking necessary to arrive at a close estimate of the assessable value.

4.4 In the instant case it is seen that the physician samples are not sold by the appellants but are cleared free cost. It is not the appellant's case that any of the Rule 4 to 10 of the Central Excise Valuation (determination of price of excisable goods) Rules 2000 are directly applicable. Since no transaction value available, the assessment cannot be done under Section 4 (1) (a) and the assessment has to be done under Section 4 (1) (b). The assessment cannot be done under Section 4A as the said goods are not marked with MRP. The appellants are seeking to apply Rule 11 read with Rule 8 whereas Revenue is seeking to apply Rule 11 read with Rule 4 of the Central Excise Rules. It is apparent that neither Rule 4 nor Rule 8 of the Central Excise Valuation (determination of price of excisable goods) Rules, 2000 are directly applicable to the situation and both the rules have to be applied as reasonable alternatives with suitable adjustments in terms of Rule 11 of the Central Excise Valuation (determination of price of excisable goods) Rules, 2000. In the instant case, it is seen that identical goods different only in respect of size of packing and marking of MRP, are being assessed under Section 4A of the Central Excise Act and such comparable value after suitable adjustments can be adopted for the purpose of assessment of physician samples in terms of Rule 4 of Central Excise Valuation (determination of price of excisable goods) Rules, 2000. This does not amount to application of Section 4A of the Central Excise Act to physician samples. This is only a measure of taking an alternate value of similar goods for the purpose of Central Excise (Valuation) Rules, 2000 in terms of Rule 11 thereof.

4.5 It is seen that in appellant's own case, the Larger Bench has observed as follows:

> ***10.*** *Where the medicines put in the retail packs and free physician's samples are identical in the material characteristics as well in quantity, then there would be no scope for any doubt in working out the value of the excisable goods not sold, namely, free physician's samples on the basis of value of such medicines which are sold by the assessee, as provided by Rule 4. The only adjustment contemplated in that rule would be on account of the difference in the dates of delivery which can be made in cases where there is such difference in the delivery dates. However, when the physician's sample differs in quantity though identical in essential characteristics of' the medicine, keeping in view Chapter Note 5 of Chapter 30, which includes labelling, repacking etc. in the manufacturing process, these nonetheless would be "comparable goods" within the meaning of Rule 6(b)(i) of the said rules and there would be no scope for adopting the costing method contemplated by sub-clause (ii) of sub-clause (b) of Rule 6 in respect of such physician's samples. The material characteristics of the goods are virtually identical because the identical medicine which is packed in the retail packs is packed in the physician's sample. Though manufacturing process gets an extended meaning by virtue of Chapter Note 5 of Chapter 30, it cannot be said that the medicine was not manufactured before it was packed. The material characteristics of the medicine whether in physician's sample or in retail pack do not at all change by virtue of the provisions of Note 5 of Chapter 30. Moreover, the medicine, having been already manufactured even before the packaging, could be consumed as such medicine even before its removal. Once taken out of the packages it was difficult to relate medicine from one package to the medicine from the other type of package, as was amusingly demonstrated in the court. The only adjustments in such cases would therefore be in the context of the proviso to sub-clause (i) of Rule 6(b), as discussed above.*

4.6 The facts in the case of ZYG Pharma Pvt. Ltd. (supra) cited by the Ld. CA are different in so far as in the said case the appellants were not supplying the physician samples free of cost themselves. Ld. CA has relied on the decision of the Tribunal in the case of Centaur Pharmaceuticals Pvt. Ltd. – 2016-TIOL-299-CESTAT-Mum. It is seen that the Tribunal in the said case failed to notice that the decision of the Hon'ble Apex Court in the case of Centaur Pharmaceuticals Pvt. Ltd. (supra) was given with reference to the old Valuation Rules. Whereas the Central Excise Valuation Rules, 2000 are significantly different from the Central Excise Valuation Rules, 1975".

5. In view of the above, the appeal is dismissed.

(Pronounced in court on 13/03/2018)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

SM.