IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. E/216/2011

(Arising out of Order-in-Appeal No. PKS/446/BEL/2010 dated 26.11.2010 passed by Commissioner of Central Excise (Appeals), Mumbai Zone-III, Belapur)

Biochem Pharmaceutical Industries **Appellant**

Vs.

Commissioner of Central Excise, Mumbai-III **Respondent**

Appearance:

Shri N.S. Patel, Advocate, for appellant
Shri Sanjay Hasija, Superintendent (AR), for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 11.12.2018
Date of Decision: 11.12.2018

ORDER No. **A/88312/2018**

Per: Sanjiv Srivastava

This appeal is directed against the order in appeal No PKS/446/BEL/2010 dated 26.11.2010 of Commissioner Central Excise (Appeal) Mumbai-II. By the said order Commissioner (Appeal) has upheld the order in original No 172/Adj/KDN/PDP/09-10 dated 30.11.2009 of Deputy Commissioner Central Excise

Kanjur Division Mumbai-III. By the said order learned adjudicating authority held as follows:

"29(i) I confirm the demand of Rs 3,05,724/- (Rupees Three Lakh five thousand seven hundred and twenty for only) (for 2003-04- Rs 1,95,036.00 and for 2004-05 Rs 1,08,518.00 (BED) + Rs 2170 (Ed Cess for the year 2004-05) as shown in Annexure B to the show cause Notice, being Central Excise 9CENVAT) duty on clearances of free replacement good without payment of duty during the period 2003-04 & 2004-05 and direct it to be recovered from them under proviso to section 11A(1) of the Central Excise Act, 1944.

29(ii) I impose a penalty of Rs 3,05,724/- under the proviso of section 11AC of the Central Excise Act, 1944.

29(iii) I order recovery of interest on duty of Rs 3,05,724/- at the appropriate rate under the provision of Section 11AB of the Central Excise Act, 1944."

2.1 Appellant manufacture P & P Medicines classifiable under Chapter 30 of the First Schedule to Central Excise Tariff Act, 1944.

2.2 They were allowing quantity discounts which varied from product to product. They were clearing the goods as quantity discount proportionate to the declared scheme along with the excisable goods. All the goods were routed through Bhandup depot to various distributors all over the country. The appellants paid Central Excise duty on the saleable goods and not on the discounted quantity.

2.3 From the depot invoices it was evident that declared scheme of discount was not followed to the extent that-

i) Proportionate discount quantity was not passed on to distributors.

ii) In normal course, the ratio is much lesser than that declared at the time of clearance at the factory gate; and

iii) The extra quantity left out due to non passing of proportionate discount is used for the replacement of goods received back from the distributors on account of damage/ expiry of date/ non moving goods.

2.4 Appellant had also not declared to the department that the free discounted quantity would be used for replacement purposes.

2.5 A show cause notice dated 11.08.2008 was accordingly issued to the appellants demanding duty on clearance of free replacement goods without payment of duty during the period 2003-04 and 2004-05, by invoking extended period as per proviso to Section 11A(1). Interest was also demanded under Section 11AB and penalty proposed under Section 11AC of Central Excise Act, 1944.

2.6 Show Cause Notice was adjudicated by the Deputy Commissioner as per order referred in para 1, supra. Commissioner (Appeal) upheld the order of adjudicating authority.

2.7 Aggrieved appellants have preferred this appeal before us.

3.1 Appellants have in their appeal assailed the order of Commissioner (Appeal) stating that-

i. They were regularly intimating the department of the discount schemes and hence there was no suppression. Accordingly demand by invoking extended period as per proviso to Section 11A (1) is barred by limitation.

ii. Wherever there was variation in allowing the quantity discount at depot which resulted in short payment of duty, they paid the differential duty suo motto.

iii. Since the goods were cleared from their factory premises to depot and were cleared from the depot to distributors, the assessments made by them at the time of clearance of goods from the factory were provisional even if the procedure of Rule 9B was not followed. Hence the finding of Commissioner 9Appeal) on this issue is not correct.

iv. The issue with regards to suppression of facts and mis-statement is well settled by the decisions of Apex Court. The extended period is not available in the facts and circumstances of this case. The jurisdictional officers were visiting and randomly verifying the duty paid on the goods at the factory gate on stock transfer basis and that paid on sale from the duty the duty paid depot. The audit has also taken place from time to time. The system of clearance adopted by them was same since 2001 and department was well aware of the same

4.1 We have heard Shri N S Patel Advocate for the Appellants and Shri Sanjay Hasija, Superintendent Authorized Representative for the Revenue.

4.2 Arguing for the appellants learned counsel supported the averments made in the appeal filed. He submitted-

i. relying on the decision of Government of India in Kalapi Stores, Bombay [1981 (8) ELT 807 (GOI)], that they had followed the same practice of clearing goods on quantity discount basis.
ii. In case of Bombay Latex & Dispersion Pvt Ltd [1985 (19) ELT 527 (T)] it has been held that article given as bonus not separately liable to duty as its price stands included in the price of other articles.

iii. He also submitted that extended period cannot be invoked in this case as department was fully aware of the discount scheme and the unit was regularly visited by the departmental officers and unit was also regularly audited.

4.3 Arguing for the revenue learned Authorized Representative submitted that-

i. The manner in which the appellants have operated the quantity discount scheme is nothing but a scheme of damage discount. Hon'ble Supreme Court has in case of IPF Vikram [2002 (144) ELT 4 (SC)] held relying on its past decisions in case of Hindustan Lever Limited {130 ELT 721 (SC)], Vikram Detergent Limited [127 ELT 641] and Surya Roshni Limited [122 ELT 3] held that damage discount is not an admissible deduction.

ii. He also relied upon the decision of Tribunal in case of VIP Industries [2008 (226) ELT 491 (T-Mumbai)], Commander Water Tech Pvt Ltd [2017 (348) ELT 464 (T-Mum)] to buttress his arguments in respect of denial of quantity discounts and also on limitation.

5.1 We have considered the submissions made by the appellant in appeal and those made during the course of arguments.

5.2 Issues for our consideration in the present case can be listed as follows:

i. Whether in case of clearance of goods from the depot, the assessment have to be treated as provisional even if the procedure as prescribe by Rules is not followed?

ii. Whether the scheme of quantity discount as followed by the appellants is admissible deduction?

iii. Whether duty free replacements in respect of damaged/ expired goods permissible under the Scheme of Central Excise Act, 1944?

iv. Whether the demand is barred by limitation in the present case?

5.3 In the present case assessments were made by the appellants in the scheme of self assessment without following the procedure laid down for making provisional assessments. The fact that clearance were being done from the depot would not make the assessments provisional in absence of the procedure as prescribed under of Central Excise Rules, 2002. Commissioner (Appeals) has in his order held as follows:

"4. Since the appellants during the course of personal hearing had contended that the assessment was provisional, enquiries were caused with the jurisdictional Central Excise authorities. The Deputy Commissioner, Central Excise, Kanjur Divisions, Mumbai-III vide his letter No. V/T-III/KDN/Recovery/4-19/09-10 dt. 24.11.2010 has clarified that the assessment was not provisional and this issue was never raised before the adjudicating authority. The appellants

have also not produced any evidence indicating therein that the assessment was provisional. Therefore, I find that the issue of provisional assessment raised by the appellant during personal hearing is not sustainable. The issues to be decided are that a) whether there is suppression of facts so as to invoke extended period under the proviso to Section 11A(1) of CEA 1944, and, b) whether the discount quantity claimed was totally passed on by the appellant to their various distributors as per agreement, if not, then whether the extra quantity left out due to non passing of proportionate discount was used for the replacement of goods received back from the distributors on account of damage/expiry of date/non moving goods?"

5.4 In the present case the goods are cleared by the appellants to their depot after claiming quantity discount as per their scheme of discount the goods are from depot cleared to various distributors across the country. The quantity discount as claimed at the time of clearance of goods from the factory to depot is not passed on to the distributors. In similar circumstances in case of Commander Water Tech Pvt Ltd [2017 (348) ELT 464 (T-Mum)], it has been held that-

"***4.*** *We have gone through the rival submissions. We find that the appellant, as a matter of policy, has given quantity discount to various buyers. Quantity discount is an admissible discount provided the same is known prior to clearance or removal and if it is passed on to the buyers in terms of Section 4 of the Central Excise Act, 1944. Therefore, the same is an admissible discount. However, the issue at hand is if the said quantity discount can be claimed in respect of clearance made to own depots. In such case, there is no sale involved and the discount though known at the time of clearance is not passed* *on to the buyers. The sales are actually made in retail from the depot at the retail sale price. The buyers do not get the same quantity discount as claimed by the appellant while clearing the goods to their depot. Thus, while it is seen that the first condition to avail the quantity discount that it is known prior to the clearance is fulfilled, the second condition that the same is passed on to the buyers is not fulfilled in the instant case. In these circumstances, quantity discount cannot be claimed by the appellant in respect of clearance made to their own depot. In the instant case, there cannot be any case of incentive to self."*

Since the scheme for clearance of goods after availing the quantity discount in respect of clearances made to depot is identical to that considered in case referred above we are of the view that quantity discount as claimed by the appellants in the present case for clearance made to the depot is not an admissible deduction.

5.5 Issue in respect of Damage Discounts is not res-integra. In case of MRF {1995 (77) ELT 0433 (SC)] three Member Bench of Hon'ble Supreme Court has held as follows:

"53.*The question is whether the claim, put forward as TAC/Warranty discount is a trade discount within the meaning of Section 4(4)(d)(ii)? We think not. It is only a claim for refund by the buyer for the manufacturing defect in the tyre sold by the assessee, which is being honoured by the assessee in a manner acceptable to both the parties. In a given case, a buyer may well insist that he must be reimbursed in cash and not in kind. In such a case, the assessee cannot certainly refuse such a claim; it would have to pay cash. The nature and character of the amount so being* *refunded is certainly not a trade discount contemplated by Section 4(4)(d)(ii), whether the claim is honoured by paying cash or by deducting it from the price of the new tyre. As rightly pointed out by Bhagwati, C.J. in the Order dated December 20, 1986, "what is really relevant is the nature of the transaction". The learned Chief Justice pointed out further that "the warranty is not a discount on the tyre already sold, but relate to the goods which are being subsequently sold to the same customers. It cannot be strictly called as discount on the tyre being sold. It is in the nature of a benefit given to the customers by way of compensation for the loss suffered by them in the previous sale". He characterised it as "a compensation in the nature of warranty allowance on a defective tyre". We express our respectful concurrence with the said observations."*

The principle laid down by the Apex Court in the said decision has been subsequently followed in various decisions i.e IPF Vikram India Ltd [2002 (144) ELT 4 (SC)} Hindustan Lever Limited [2001 (130) ELT 721 (SC)], Vikram Detergent Limited [2001 (127) ELT 641 (SC)] and Surya Roshni Limited [2000 (122) ELT 3 (SC)]. Hence we are of the view that supply of goods as free replacement in respect of the damaged or expired goods has to be on payment of duty.

5.6 On issue of limitation Commissioner (Appeals) has observed as follows:

"5. On the issue of time limitation, the appellants have taken the stand that the Show Cause Notice has been issued on 11.8.2008, on the issues which were raised by Audit in 2006. From the perusal of records filed by the appellants, it is found that the issue was in fact cropped up during audit and a series of correspondence have taken place between

department and appellants. However, the department maintained its position, and vide letter F.No. CE/R-01/Biochem/audit/2006 dated 19.10.2007 informed the appellants regarding non-acceptance of reply of appellants and also directed the appellants to provide details of free replacements provided for the period from April 2001. The letter dated 11.6.2008 of the appellants to the Supdt., Central Excise, Range-01, Kalyan Division demonstrate that investigation in the matter was continuing, and the same was not completed. Since the facts of free replacement was detected by Audit during 2006, and, the investigation was continuing till 2008, as evident from these facts, the extended period available under Section 11A(1) is invokable. The Apex Court in the case of Mathaina Fabrics reported in 2008 (221) ELT 481 has held that five years period to be reckoned backward from the date of show cause notice. As such, the case law relied upon by the appellants would not be applicable. Further, the contention of the appellants that the assessment was provisional has also been found to be untrue. The appellant had not given any specific evidence on the contrary in the notice alleging that the factory invoices as well as depot invoices did not indicate the quantity of free replacement with the intention to avoid detection of irregularity of clubbing free replacement with regular quantity discount offered. The appellant had not refuted this allegation neither in their appeal memorandum nor at the time of personal hearing, hence invocation of extended period justifiable. As such, the extended period is invokable in the facts and circumstances of the case."

The scheme of quantity discount was disclosed to the department what was not disclosed was whether the quantity discounts as claimed were actually being passed on to the buyers of goods was never disclosed to the department. Also the manner in which the replacement goods out of those which were received without payment of duty under the scheme of quantity discount was never disclosed by the appellants to the revenue. In fact the scheme of clearance of goods by claiming quantity discount in respect of clearances made to depot was nothing but an instrument to claim the inadmissible damage discounts. Such scheme was adopted by the appellants with intention to evade payment of duty in respect of goods supplied as replacement for the damaged/ expired goods. None of the decisions relied upon by the appellants lay down the law that in such case were appellants willfully misdeclared the scheme as that of quantity discount, without passing on the benefit of said quantity discount to distributors, but to benefit itself in respect of free replacements made for damaged/ expired goods. Such colorable devices and instruments used for evasion of Central Excise duty would definitely bring the case within the proviso to Section 11A(1) of Central Excise Act, 1944.

5.7 Issue in respect of penalty under Section 11AC has been settled by the Apex Court in series of decisions. In case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 03 (SC)], Hon'ble Apex Court held as follows:

"15. *Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of* *duty before the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub section 2B will have no application.*

16. *The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :*

11AC. Penalty for short-levy or non-levy of duty in certain cases*.- where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder* *with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."*

Since we have held that extended period of limitation is applicable in present case, so is Section 1AC.

5.8 Interest is payable as statutory liability in case of short payment of service tax by the due date. Thus Demand for interest under Section 11AB of Central Excise Act, 1944 is also upheld in view of the Apex

Court decision in case of Kerala State Electricity Board [2008 (9) STR 3 (SC)] holding-

"16. *Submissions of Mr. Iyer that the payment of interest was the statutory liability of the service provider must be considered in the aforementioned context. If Appellant itself was liable for payment of tax, it was also liable for payment of statutory interest thereupon, if the same had not been deposited within the time stipulated by the statute. The liability to pay tax was not on the foreign company. Only on default on the part of the appellant the interest was leviable. Appellant was clearly liable therefor. In other words, the liability being that of the appellant, it must accept the liability of payment of interest leviable thereupon in terms of statute occasioned by the breach on its part to deposit the amount of tax within the prescribed time."*

6.1 Appeal filed by the appellants is dismissed.

(Pronounced in court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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