CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Excise Appeal No. 1540 of 2011

(Arising out of Order-in-Appeal No. M-V/RKS/62-63/2011 dated 21.07.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Bio Care Laboratory **…..Appellant**
72, Shreeji Darshan,
100, S.V. Road,
Above Bata Showroom,
Kandivali (West)
Mumbai

Vs.

Commissioner of Central Excise, **…..Respondent**
5th Floor, Utpad Shluk Bhavan,
Plot no. C-24, Block 'E'
Bandra Kurla Complex,
Bandra (East), Mumbai

APPEARANCE:

Shri D.H. Nadkarni, Advocate for the appellant
Shri S. Hasija, Supdt. (AR) for the respondent

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Excise Appeal No. 1581 of 2011

(Arising out of Order-in-Appeal No. M-V/RKS/62-63/2011 dated 21.07.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. TVC SKY SHOP LTD. **…..Appellant**
Plot no. 20, Mira Indl. Estate,
Mira Road (East),
Dist. Thane

Vs.

Commissioner of Central Excise, **…..Respondent**
5th Floor, Utpad Shluk Bhavan,

Plot no. E-24, Sector 'E'
Bandra Kurla Complex,
Bandra (East), Mumbai

APPEARANCE:

Shri D.H. Nadkarni, Advocate for the appellant
Shri S. Hasija, Supdt. (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

FINAL ORDER No: A/86343-86344/2019

DATE OF HEARING : 08.04.2019
DATE OF DECISION : 05.08.2019

PER: C J MATHEW

These appeals of M/s Bio Care Laboratory and M/s TVC Sky Shop Ltd pertain to the duty liability fastened on the former consequent upon denial of benefit of notification no. 8/2003-CE dated 1st March 2003 on clearances of 'hair removal cream' as the brand name and the logo 'TVC Sky Shop' on the product alleged to belong to an entity that was not entitled to such exemption. The goods were also held to be liable to duty at the 'retail selling price' netted for the abatement prescribed in notification issued under section 4A of Central Excise Act, 1944. Accordingly, the original authority confirmed the differential duty of ₹5,23,674/- on the clearances effected between July 2004 and January 2005 as well as on the goods seized at the premises of M/s TVC Sky Shop Ltd. The seized goods were confiscated but permitted to be released on discharge of redemption fine of ₹51,000/-. In addition, penalties were imposed on the manufacturer, as well as the owner of the brand name, under rule 25 and rule 26 of Central Excise Rules, 2002. The first appellate authority while upholding the demand and interest as well as the penalty under section 11AC set aside the penalties under rule 25 and rule 26 without modifying the fine determined for redemption of the seized goods. While M/s Bio Care Laboratory challenged the upholding of duties, interest and penalty, M/s TVC Sky Shop Ltd is in appeal against imposition of redemption fine.

2. According to Learned Counsel for the manufacturer appellant, it is claimed that the goods were transferred from M/s Bio Care Laboratory to M/s TVC Sky Shop Ltd on principal-to-principal basis and, hence, valuation under section 4A of Central Excise Act, 1944 would not arise. While admitting that value of clearance by the manufacturer is ₹110 per piece and that the purchaser markets the same at ₹990 per piece, he placed reliance on the decision of Tribunal in *Omni Protect Drugs Pvt Ltd v. Commissioner of Central Excise, Pune I [2011 (274) ELT 377 (Tri-Mumbai)* to defend the transaction value. He also contends that the decision of Larger Bench of Tribunal in *Prakash Industries [2000 (119) ELT 30 (Tribunal-LB)]* led them to believe that the affixing the brand name of purchaser does not amount to contravention of the restrictions imposed by the conditions in notification no. 8/2003-CE dated 1st March 2003 and contended the decision of the Hon'ble High Court of Calcutta in *Commissioner of*

Central Excise, Kolkata II v. Diamond Scaffolding Co. [2011 (274) ELT 10 (Cal.)], with particular reliance on paragraph 6 and 7, was relevant to the bar of limitation.

3. Learned Authorised Representative contends that appellant had no *locus standi* to raise a challenge to valuation as these have been conceded before the lower authorities and that such a challenge could not be brought up for the first time before the Tribunal. He placed reliance on the decision of *Jayanti Food Processing (P) Ltd v. Commissioner Of Central Excise, Rajasthan [2007 (215) E.L.T. 327 (SC)]*. He also contends that the decision in *re Omni Protect Drugs Pvt Ltd* would not apply to the present case as the issue in dispute therein was the valuation system to be adopted on clearance of 'physician's samples.' Here the manufacturer cannot claim that the activity was being carried out as 'job work' even if it was, undoubtedly, contract manufacturing. According to him, the bar of limitation will not sustain as erroneous dependence on an inapplicable judgment is no reason entertain such notions. The decision in *re Prakash Industries*, according to him, pertains to packing material and that the appellant-manufacturer, as producer other brand goods, could not have been ignorant of the provisions pertaining to printing of brands in the claim for benefit of exemption under notification no. 8/2003-CE dated 1st March 2003. He, on the other hand, submits that the decision, in *Continental Drugs Company Pvt Ltd v. Commissioner of Service tax, Mumbai [2015 (39) STR 154 (Tri-Mumbai)]*, discarded

the claim of *bona fide* belief as a barrier to invoking of the extended period.

4. Having heard both sides, we find that the narrow issue for consideration here is the claim that the demand is barred by limitation. The appellant-manufacturer, admittedly, produces goods which are sold to M/s TVC Sky Shop Ltd who, in turn, markets the products to their customers. It is also not in dispute that the brand name does not belong to the appellant-manufacturer and that it is the appellant-manufacturer who affixed the 'maximum retail price' on the package. The claim that such manufacture contracted with a single client is excluded from the purview of assessment under section 4A of Central Excise Act, 1944 does not stand the test of reason. It is in the nature of scheme of alternative assessment under section 4A of Central Excise Act, 1944 that the manufacturer, literally wears his intent on his sleeve and the marking of the maximum retail price on the product is the surest indicator of the goods being intended for the retail customer. This clear manifestation of intent on the part of the appellant must inevitably lead to duty liability in accordance with section 4B of Central Excise Act, 1944.

5. Naturally such a resort is contingent upon non-eligibility for the exemption available to small scale unit under notification no. 8/2003-CE dated 1st March 2003. The appellant is a manufacturer and the brand/logo is not theirs. There is no evidence on record that contract

purchaser, the ‘supplier’ of brand name/logo, is entitled to the same exemption. In the absence of such a claim, the eligibility to exemption becomes questionable. It would appear that the appellant has misplaced applicability of the decision of the Larger Bench in *re Prakash Industries* which is limited to packaging material on which the brand of contract manufacturer is affixed. In the present dispute it is not packing material that is so printed but the product itself that bears the brand. In these circumstances, the lack of eligibility for clearance under said notification is clearly evident.

6. The claim of appellant that demand is barred does not convince us as the decision in *re Prakash Industries* was on an entirely different matter. There is no ground for the appellant to entertain the belief that there was an exclusion from restriction of brand name or of assessment under section 4A of Central Excise Act, 1944. We are, therefore, not inclined to accede to the request that the demand be set aside on the bar of limitation.

7. We find that the impugned order has dropped the penalties against the contract purchaser but has upheld the redemption fine on the confiscated goods. The goods were seized and held liable to confiscation. Inevitably, such liability to confiscation, when crystallised, should lead to quantification of fine should the owner of the goods desire them to have redeemed. We do not find any illogicality in the imposition of redemption fine or penalty.

8. Learned Counsel made a plea that the lower penalty under section 11AC was not option offered by the original authority or extended by the first appellate authority. We find the Hon'ble Supreme Court in *Commissioner of Central Excise & Customs v. RA Shaikh Paper Mills P Ltd [2016 (335) ELT 203 (SC)]* has held that it was mandatory for adjudicating authority to include such option within the order the option to reduce penalty. Such an option was not given at the two lower stages. This must be corrected.

9. For the reasons highlighted above, we uphold the confirmation of duty liability, the confiscation of goods along with imposition of penalty, fine thereon for redemption as well as penalty under section 11AC of Central Excise Act, 1944. However, we also extend the privilege of reduced payment of penalty subject to fulfilment of condition. Appeals are accordingly allowed with enumerated modifications.

(Order pronounced in open court on 05.08.2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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