

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH – COURT NO. 3

EXCISE APPEAL NO: 1405 of 2011

[Arising out of Order-in-Appeal No: M-I/AV/253 & 254/2011 dated 6th May 2011
passed by the Commissioner of Central Excise (Appeals-II), Mumbai Zone – I.]

Commissioner of Central Excise

... Appellant

Thane – II,
4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai – 400 028

versus

Korten Pharmaceuticals Pvt Ltd

...Respondent

Post Shirgaon, Tal: Palghar, Dist: Thane – 401 404

APPEARANCE:

Ms AS Parab, Assistant Commissioner (AR) for the appellant

Shri Prakash Shah, Advocate for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86475 / 2019

DATE OF HEARING:

14/05/2019

DATE OF DECISION:

26/08/2019

PER: C J MATHEW

The issue in dispute in this appeal of Revenue, against order-in-
appeal no. M-I/AV/253 & 254/2011 dated 6th May 2011 of
Commissioner of Central Excise (Appeals -II), Mumbai Zone – I,

is the clearance of 'physician samples' to the 'principal manufacturer', M/s Novartis India Ltd, between January 2005 and November 2006 by the respondent. The first appellate authority had set aside the order of the original authority confirming duty liability of ₹ 32,24,985/- under section 11A of Central Excise Act, 1944, with appropriate interest under section 11AB of Central Excise Act, 1944, besides imposing penalty on the respondent as well as the Managing Director, under rule 25 and 26 of Central Excise Rules, 2002.

2. The clearances were effected on assessment by resort to cost construction basis to which the jurisdictional central excise officers objected as, according to them, 'patent and proprietary medicines', covered under Drugs (Price Control) Order, 1995, was liable to duty on the 'retail selling price' as prescribed under section 4A of Central Excise Act, 1944. Hence the plea for restoration of the order of the original authority. Learned Authorised Representative contends that, consequent upon amendment upon the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, circular no. 643/34/2002-CX dated 1st July 2002 had directed that computation of 'samples' for free distribution be assessed at 115% of cost of manufacture. Following that, the Central Excise Board of Excise & Customs, in circular no. 813/10/2005-CX dated 25th April 2005, directed that 'free samples' should be valued under rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules,

2000. Consequently, he contends that, under rule 4 of the said Rules, the nearest ascertainable price of like goods should be adopted and that as there was no difference between ‘supplies for medication’ and ‘physician samples’ except for the size of the package, the ‘retail selling price’ should be adopted. The impugned order has been contested for failure to comply with the said instruction. Learned Authorised Representative further contends that the relationship between the respondent and M/s Novartis India Ltd implies that samples are dictated by the principal manufacturer and hence require the recourse to the Rules, which, according to the instruction of Central Board of Excise and Customs, requires application of rule 4 of the Central Excise Valuation (Determination of Price Excisable Goods) Rules, 2000. Reliance has been placed in the decision of the Tribunal in *Goa Antibiotics & Pharmaceuticals Ltd v. Commissioner of Central Excise, Goa* [2014 (314) ELT 546 (Tri.-Mumbai)] and of the Hon’ble High Court of Bombay in *Indian Drugs Manufacturer’s Association v. Union of India* [2008 (222) ELT 22 (Bom.)].

3. Learned Counsel for respondent claims that the ‘physician samples’ are, themselves, not subject to the Drugs (Price Control) Order and, can, thereby, be valued under section 4 of Central Excise Act, 1944 that the transaction between independent parties is sought to be portrayed as ‘dictated price’ without any evidence and that such a circuitous route for deployment of section 4A of Central Excise Act,

1944 is clearly not tenable in law should suffice for the purpose of adoption of transaction value. He relies upon the decision of the Tribunal in *Themis Laboratories Pvt Ltd v. Commissioner of Central Excise, Mumbai* [2012 (286) ELT 244 (Tri.-Mumbai)].

4. The issue of valuation of ‘physician samples’ is one that has been dogging the industry for long. There is no doubt that, *prima facie*, ‘physician samples’ are not covered by the prescription in section 4A of Central Excise Act, 1944 and, therefore, subject to the default scheme envisaged under section 4 of Central Excise Act, 1944. The appellant has been discharging duty liability on the transaction value at which goods are cleared to M/s Novartis India Ltd on ‘principal-to-principal’ basis. Such transaction value may be market determined or on ‘cost plus’ basis and adoption of either does not detract from being transaction value. In *Commissioner of Central Excise & Customs, Surat v. Sun Pharmaceuticals Industries Ltd* [2015 (326) ELT3 (SC)], the Hon’ble Supreme Court approved the decision of the Tribunal that as long as physician samples are sold and the characteristics for the transaction conform to the enumeration in section 4(1)(a) of Central Excise Act, 1944, acceptance of the invoice price is not flawed. As contended by the respondent, there is no evidence on record that the goods are not sold by them to their principal. The decision in *re Goa Antibiotics & Pharmaceuticals Ltd* holding that

'4. We have considered the submissions of both sides. As per various case laws cited by the Id. Advocate for the appellant this Tribunal has been consistently taking the view that in respect of physician's sample being manufactured by job worker and sold to the principal manufacturer, valuation is to be done as per Ujagar Print's judgment of Apex Court. However, we find in this case appellant's themselves are not assessing duty as envisaged in Ujagar Print's case, which requires specifying cost of all the raw materials, packing material supplied by the principal manufacturer, job charges and profit element. In fact, principal manufacturer on his own dictating the assessable value to be declared. This has come out clearly in the statement mentioned by the Id. AR Id. Advocate for the appellant has not rebutted the same. Even Id. Advocate is claiming that they are declaring value as per CAS-4. CAS-4 valuation scheme is applicable for goods meant for captive consumption, which is not the case here. Thus the transaction between appellant and principal manufacturer cannot be considered as on principal to principal basis. Under the peculiar circumstances, the only way left is to assess the value based upon M.R.P. of similar goods after giving abatement as prescribed and on proportionate basis. This is what has been ordered by Commissioner (Appeals),

arose from the statement of the authorised signatory of the appellant therein to the effect that the assessable value had been forced upon them by the principal manufacturer and, therefore, not a computation based on 'cost construction'. In *re Indian Drugs Manufacturer's Association*, the Hon'ble High Court was considering a challenge from the association of manufacturers and the issue was limited to

those who were in the business of supplying the samples free manufactured by them. Such is not the case herein.

5. It would also appear that the clarification issued by Central Board of Excise & Customs has been misconstrued by the central excise authorities inasmuch as it pertains to the clearance of 'physician samples' by the manufacturers themselves. We also take into consideration that the decision of the Tribunal, in *re Themis Laboratories Pvt Ltd*, has distinguished the decision of the Hon'ble High Court of Bombay in *re Indian Drugs Manufacturer's Association* and the earlier decision of the Tribunal in *Commissioner of Central Excise v. Sun Pharmaceuticals Industries Ltd* *Commissioner [2009 (245) ELT 749 (Tri.)]*, to hold that

'16. The facts of the case reveal that the appellants are selling physician samples of their products to one M/s. Aditya Medisales Ltd. at an agreed price between the two, who in turn is distributing the same to Doctors and Physicians through medical representatives appointed by the appellants themselves. The appellants have their warehouse at Bhiwandi from where the samples are sold to M/s. Aditya Medisales Ltd. who is also located at Bhiwandi. For part of the period, the samples despatched were accompanied by delivery challans in the name of individual medical representatives and on receipt were distributed by M/s. Aditya Medisales Ltd. to those medical representatives in quantity referred to in the delivery challans. Later on this practice was changed and the samples were sent in consignments which were accompanied by delivery challan for a consignment. The appellant's

advocate was specifically asked about the existence of any written agreement between them and M/s. Aditya Medisales Ltd. to which he replied in negative. It is difficult for me to understand how the physician samples in such a large quantity can be supplied to M/s. Aditya Medisales Ltd. with an obligation of distributing the same by the appellants medical representatives without a written agreement and without a binding condition that the samples are to be distributed to the medical representatives appointed by the appellants. In the absence of written agreement I am inclined to take a view that the whole arrangement is on paper only with a view to avoid duty and in fact there is no sale. I am not in agreement with the view expressed by Member (Judicial) that the price at which the samples are sold to M/s. Aditya Medisales Ltd. is a genuine price on the stated grounds, that the two are not related and there is no flow back from M/s. Aditya Medisales Ltd. to the appellants and further there is no loss to M/s. Aditya Medisales Ltd. in free distribution of samples as the loss is compensated by profit in the marketing and distribution of the trade packs. On the contrary these very facts establish that agreed price is not the sole consideration and is influenced by the factor that free distribution is to be done by the appellants themselves through its medical representatives and whole planning thereof is to be done by the appellants. Thus, M/s. Aditya Medisales Ltd. had been absolved of all the expenses incurred on the marketing and distribution of physician samples and the expenses to this effect have been incurred by the appellants themselves and therefore the agreed price is influenced by the factor that the distribution expenses have been taken over by the appellants themselves. Therefore even if there is no flow back of any money, the fact that the price is not sole consideration is sufficient for rejecting the transaction value. I further notice that Drugs and Cosmetics

Act prohibits the sale of physician samples and this factor also put a question mark on the sale by the appellants to its distributors.'

6. In the light of these judgments and decisions, we find that the issue is no longer *res integra* and accordingly we find no reason to interfere with the order of the first appellate authority.

7. Appeal of Revenue is dismissed.

(Order pronounced in the open court on 26/08/2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)