

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.1

Excise Appeal No.666 of 2008

[Arising out of Order-in-Original No.9/CEX/2008, dt.13.03.2008, passed by the CCE Nasik]

M/s Sigma Laboratories Limited

.....Appellant

M/s Sigma Laboratories House,
43, South Wadala, R.A. Kidwai Road,
Mumbai 400 031

VERSUS

CCE Nashik

.....Respondent

Kendriya Rajaswa Bhavan,
Gadkari Chowk,
Nasik 422 002

AND

Excise Appeal No.667 of 2008

[Arising out of Order-in-Original No.9/CEX/2008, dt.13.03.2008, passed by the CCE Nasik]

Shri Dilip Coulagi

.....Appellant

C/o M/s Sigma Laboratories Laboratories,
M/s Sigma Laboratories House,
43, South Wadala, R.A. Kidwai Road,
Mumbai 400 031

VERSUS

CCE Nashik

.....Respondent

Kendriya Rajaswa Bhavan,
Gadkari Chowk,
Nasik 422 002

AND

Excise Appeal No.668 of 2008

[Arising out of Order-in-Original No.9/CEX/2008, dt.13.03.2008, passed by the CCE Nasik]

Mrs. Nayana Dilip Coulagi

.....Appellant

C/o M/s Sigma Laboratories Laboratories,
M/s Sigma Laboratories House,
43, South Wadala, R.A. Kidwai Road,
Mumbai 400 031

VERSUS

CCE Nashik

.....Respondent

Kendriya Rajaswa Bhavan,
Gadkari Chowk,
Nasik 422 002

Appearance:

For Appellant : Shri R.B. Pardeshi, Advocate
For Respondent : Shri Ajay Kumar, ADC (AR)

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.A/87334-87336/2019

Date of Hearing: 19.06.2019
Date of Decision: 13.12.2019

PER: DR.D.M. MISRA

These appeals are filed against Order-in-Original No.9/CEX/2008, dt.13.03.2008, passed by the Commissioner of Central Excise, Nasik.

2. Briefly stated the facts of the case are that the Appellants are engaged in the manufacture of P&P Medicines falling under Chapter 38 of Central Excise Tariff Act, 1985 on their own account and on loan license basis for other parties viz. M/s Adelphi Pharmaceuticals and M/s Heilen Lab on job work basis. The entire quantity of goods manufactured on job work basis was sold to the Appellant, being the sole selling agent of M/s Adelphi Pharmaceuticals and M/s Heilen Lab at a discount of 30% of the sale price at which the said goods are ultimately sold to the sub-distributors/in the market. Alleging that M/s Adelphi Pharmaceuticals and M/s Heilen Lab are related to the Appellant M/s Sigma Laboratories in terms of Section 4(3)(b)(iv) of Central Excise Act, 1944 as they were having mutual interest in the business of each other show Cause Notice was issued to the Appellant demanding differential duty of Rs.25,73,350/- along with

interest and penalty, taking into consideration the price at which the goods are sold by the Appellant to the sub-distributors as the transaction value. On adjudication, the demand was confirmed with interest and penalty; personal penalty was also imposed on Appellants Shri Dilip Coulagi and Mrs. Nayana Dilip Coulagi under Rule 26 of Central Excise Rules, 2002. Hence, the present Appeals.

3. The learned Advocate for the Appellant has submitted that the parties viz. M/s Adelphi Pharmaceuticals and M/s Heilen Lab are independent Loan Licensors and not 'related' to the Appellant within the meaning of 'related person' prescribed under Sec.4(3)(b) of CEA,1944 as wrongly held by the learned Commissioner. It is his contention that the purchases and sale of the goods are on principal to principal basis and at arm's length and there is no free flow of funds between the Appellant and the said parties. The 30% discount passed by M/s Adelphi Pharmaceuticals and M/s Heilen Lab to the Appellant are perfectly within the commercial parlance. It is his contention that on the issue of admissibility of discount, it is settled by the CESTAT in their own case vide Order No.C/II/919/20/WZB/2000, dt.23.04.2000. It is his further contention that merely because the entire productions were sold to the Appellant being the sole distributor M/s Adelphi Pharmaceuticals and M/s Heilen Lab, objections raised by the Commissioner on this count is unsustainable. Further, he has referred to the judgment of Hon'ble Supreme Court in the case of CCE Vs Xerographic – 2010 (257) ELT 11 (SC), Bolster Pharmaceuticals Ltd Vs State of Maharashtra – 2017 (351) ELT 193 (Bom), CCE Delhi-I Vs Sheth Brothers – 2016 (344) ELT 647 and UOI Vs. Atic Industries Ltd. He

has submitted that M/s Adelphi Pharmaceuticals and M/s Heilen Lab were in existence since 1970 and therefore, the allegation that these two firms are created to suppress the correct value of the product is unsustainable in law.

4. Per contra, the learned A.R. for the Revenue has submitted that M/s Sigma Laboratories is related to M/s Adelphi Pharmaceuticals and M/s Heilen Lab who manufactured P&P Medicines on job work basis under a loan licence agreement. M/s Adelphi Pharmaceuticals and M/s Heilen Lab were supplying the inputs and packing material to M/s Sigma Laboratories, who availed CENVAT Credit on the same and utilised it towards payment of duty on finished goods. Further, M/s Sigma Laboratories was also appointed as the sole selling agent of M/s Adelphi Pharmaceuticals and M/s Heilen Lab and assigned the job of marketing of the manufactured P&P Medicines. Under the agreement the Appellant M/s Sigma Laboratories was assigned with the responsibility to decide the MRP of the product manufactured on job-work basis in respect of which the brand name is owned by M/s Adelphi Pharmaceuticals and M/s Heilen Lab. Thus, M/s Sigma Laboratories has interest in the business of M/s Adelphi Pharmaceuticals and M/s Heilen Lab; also the proprietor of M/s Adelphi Pharmaceuticals and proprietor of M/s Heilen Lab are managing director and director of M/s Sigma Laboratories, respectively. It is his contention that with other family members, they had complete equity share holding in M/s Sigma Laboratories except 8% which is held by IDBI Bank. The learned A.R. for the Revenue has further submitted that from the statements recorded during the course of hearing and discussion by

the Adjudicating authority in the impugned order, it is established that the value at which M/s Sigma Laboratories sold the goods in the market/distributor be considered as transaction value. Referring to the statements recorded and accepted by the Commissioner in the Order, he has submitted that Shri Chandramauli in his statement dt.05.08.2004 stated that the transaction value adopted by the Assessee-Appellant is mis-leading. In his statements Shri Sunder Nair, AGM (Excise) recorded on 16.10.2004, 19.12.2004, 18.05.2007 and 01.06.2007 admitted the fact that the value declared by the Appellant is 30% less than the transaction value due to huge advertising expenses borne by the Assessee. Shri Chanderkant M. Rode, Officer (Excise) also admitted that the value at which the goods sold by M/s Sigma Laboratories is 30% less than the trading price. Further, he has submitted that the Managing Director Shri Dilip S. Coulagi in his statement dt.10.05.2007 accepted that the transaction value of the goods should be as applicable to the transaction of related parties.

5. The learned A.R. has further submitted that Shri Dilip S. Coulagi & family is in control of business of the Appellants M/s Adelphi Pharmaceuticals and M/s Heilen Laboratories, therefore, there is mutuality of interest in the business of the Appellant and other two companies, for whom they are manufacturing the goods on job work basis and later the entire quantity of goods were sold for further distribution. In support, he refers to the judgment of Hon'ble Supreme Court in the case of Collr. of C.E. Ahmedabad Vs I.T.E.C. (P) Ltd - 2002 (145) ELT 280 (SC), Flash Laboratories Ltd Vs CCE New Delhi - 2003 (151) ELT 241 (SC). Further, referring to

the judgment of Hon'ble Supreme Court in the case of CCE Indore Vs S. Kumars Ltd – 2005 (190) ELT 145 (SC), he submitted that since the Loan Licensor M/s Adelphi Pharmaceuticals and M/s Heilen Labs are related to the Appellant, hence, the principle of law laid down in Ujagar Prints case cannot be made applicable.

6. Heard both sides and perused the records.

7. The short issue involved in the present appeal for determination is whether the Appellant is related to M/s Adelphi Pharmaceuticals and M/s Heilen Lab in terms of Section 4(3)(b)(iv) of Central Excise Act, 1944 and the price at which the P&P medicines sold by them to sub-distributor be considered as the transaction value for the purpose of determination of duty under Section 4(1)(b) of Central Excise Act, 1944 read with Rule 9 of Central Excise Valuation Rules, 2000.

8. It is not in dispute that the Appellants are manufacturing P&P medicaments on job work basis for M/s Adelphi Pharmaceuticals and M/s Heilen Lab under loan licence agreement. It is also not in dispute that the entire quantity of the goods manufactured on job work basis are sold to the Appellant being appointed as sole selling Agent of M/s Adelphi Pharmaceuticals and M/s Heilen Lab at a price 30% less than the price at which the Appellant M/s Sigma Laboratories sold to the sub-distributors. It is the responsibility of the Appellant M/s Sigma Laboratories, to arrive at and fix the MRP of the P&P medicines bearing the brand name of M/s Adelphi Pharmaceuticals and M/s Heilen Lab. It is also not in dispute that Shri Dilip S. Coulagi is the Managing Director of M/s Sigma

Laboratories and also the proprietor of M/s Adelphi; Mrs. Nayana C. Coulagi, wife of Shri Dilip S. Coulagi was the proprietor of M/s Heilen Labs and Director of the Appellant till 2004. Also, it is not in dispute that majority share holding in the Appellant's company is held by Shri Dilip S. Coulagi in association with his family members and only minor portion is held by the Financial Institution i.e.IDBI.

9. Analysing the evidences on record, the learned Adjudicating authority observed that the Appellants not only manufactured the goods under loan licence agreement on job work basis for M/s Adelphi Pharmaceuticals and M/s Heilen Lab, but also purchased the entire production for further sale in the market as sole selling agent/wholesale distributor of the Loan Licensors. The agreement between the Appellant and loan licensor reveals that the Appellant was given absolute right to fix the MRP of the medicines bearing brand name of M/s Adelphi Pharmaceuticals and M/s Heilen Lab. The learned Adjudicating authority analysing the evidences recorded in the Order as follows:-

"124. The arrangement between M/s Sigma and M/s Adelphi and between M/s Sigma and M/s Heilen has been very well elaborated in the body of the Show Cause Notice. The facts on record disclose that Shri D.S. Coulagi, proprietor of M/s Adelphi and Managing Director M/s Sigma; and Mrs. Nayana D. Coulagi, Proprietor of M/s Heilen and Director in M/s Sigma are husband and wife. M/s Adelphi and M/s Heilen did not have independent marketing network. The entire production manufactured under loan license agreement at M/s Sigma was shown as sold to M/s Sigma, who is the sole selling agent/distributor of M/s Adelphi and M/s Heilen. The goods were directly transported to the godown of M/s Sigma situated at Bhiwandi. Thus, it is evident that M/s Heilen and M/s Adelphi were not carrying out any activity related with manufacturing and selling of the goods but were shown only on paper; they have been shown as if they carry out all the activities.

131. The inter connected undertaking covers within the ambit of related person category undertakings which are associate concerns, companies under the same management, holding and subsidiary

companies, companies or concerns with interlocking management, interlocking directorates, etc. From the facts, I notice that Mr. Coulagi, the Managing Director of M/s Sigma, is the proprietor of M/s Adelphi, having direct control over each other. The fact remains that M/s Heilen is a proprietary concern of his wife. Also, the share holding of M/s Sigma within the family members, being relative as defined in Section 2(41) of the Companies Act, 1956 establishes the related party transaction. M/s Heilen and M/s Adelphi have appointed M/s Sigma as sole selling agent/sole distributor, and the transaction between them are again that of related party transaction. I, therefore, notice that M/s Sigma, M/s Heilen and M/s Adelphi are not only related party but also having mutual interest in the business of each other. The transactions are so arranged that though the units appear to be different but ultimately the actual beneficiaries are the members of the same family.

135. The Apex Court's decision is squarely applicable to the present case. The Order clarifies that the wholesale price is required to be taken for valuation subject to certain exceptions one of them being that the sale is not to or through a related person. In the present case, M/s Sigma is manufacturer on loan license basis for M/s Heilen and M/s Adelphi, and is subsequently purchasing the same goods by discharging duty on the price less 30% of the MRP; and in turn selling the goods to the independent dealers/retailers as sole distributor of M/s Adelphi and M/s Heilen. Hence, in the present case, the role of M/s Sigma is not restricted to job work alone but extends further to determine the MRP/Price, and advertise for the products manufactured and carry on whole sale distribution/marketing of the said products. In the present case, as the loan license holder, manufacturer as well as sole selling agent are the related persons, the value at which M/s Sigma sells the goods to their independent dealer is the price to be considered for the payment of duty. Alternatively, even if the goods were manufactured by M/s Sigma not on loan license basis, the value would have been the price at which the goods were sold to independent wholesale dealers. I, therefore, hold that the differential duty is rightly demanded and is required to be recovered under the proviso of Section 11A of the Central Excise Act, 1944 along with interest under Section 11 AB of Central Excise Act, 1944.

10. The Hon'ble Apex Court in similar circumstances in the case of M/s I.T.E.C. (P) Ltd.'s case, where the entire business is being controlled by one family through majority share holding, reversing the orders of the Tribunal, observed as follows:-

"9. We may now turn to the findings recorded by Customs, Excise and Gold (Control) Appellate Tribunal. It was found that the respondent and M/s. International were having common Directors and that they were relatives of one another; a further finding was also noted that both the companies were family concerns and were beneficiaries of their ventures and that the benefit of both the concerns are shared by members of one and the same family. From these findings, it is difficult to resist the conclusion that the respondent and M/s. International have a

direct interest, in the business of each other and that the mutuality of interest between the two is apparent. We may point out here that the Tribunal's observation, quoted above, that no evidence regarding mutuality of interest has been brought on record, is inconsistent with the acceptance of the finding of the adjudicating authority, referred to above. Once those findings are accepted, the conclusion that there is mutuality of interest between the two concerns is inevitable. In this view of the matter, we set aside the finding of the Tribunal that the respondent and M/s. International are not related persons."

11. In the present case, the mutuality of interest between the Appellant M/s Sigma Laboratories and other two proprietary-ship concerns viz. Adelphi Pharmaceuticals and M/s Heilen Laboratories is apparent inasmuch as the proprietors of these two companies are also the Managing Director and Director of the Appellant company, the family as a whole control the shareholding of the Appellant Company. Besides, the important factor to note is that the P&P medicine manufactured on job work basis using the brand names of loan licensors viz. M/s Adelphi Pharmaceuticals and M/s Heilen Laboratories are sold to the Appellant at a price which is fixed by the Appellant after extending 30% discount from the said price. The said discounted price is considered in arriving at the transaction value between the Appellant and the loan licensors viz. M/s Adelphi Pharmaceuticals and M/s Heilen Laboratories. This itself shows that the quantum of profit and benefit had been mutually shared by the two companies viz. M/s Adelphi Pharmaceuticals and M/s Heilen Laboratories with that of the Appellant. Therefore, the price at which the Appellant sold the manufactured goods to the sub-distributor be considered as a transaction value as per Sec.4(1)(b) of CEA,1944 read with Rule 9 of The Central Excise Valuation Rules,2000. Therefore, the learned Commissioner has rightly confirmed the differential duty short paid by the Appellant.

12. The plea of the Appellant that the issue was decided in their favour in the judgment of this Tribunal in the case of M/s Heilenlab Vs.CCE,Mumbai-II Order No. C-II/919-20/WZB/2000 dt. 23.4.2000 is mis-placed. The periodical notices were issued to M/s Helien lab who was a manufacturer of the P&P Medicines on job work basis, to add the excess discount of 22% claimed from the price as an additional consideration in determining the value of the goods sold. There has been no detailed investigation of their relation with the buyer, share holding pattern, etc. in the said case. However, in the present case the Appellant M/s Sigma Laboratories is the job-work manufacturer and M/s Adelphi Pharmaceuticals and M/s Heilen Laboratories were licensor & seller of the goods and the statements recorded in the instant case revealed the interse relation among the Appellants. Thus the said judgment is not applicable.

13. Further, The Appellant could not show that the agreement between them and M/s Adelphi Pharmaceuticals and M/s Heilen Laboratories had been disclosed to the Department indicating that the fixation of price for the sellers M/s Adelphi Pharmaceuticals and M/s Heilen Laboratories was within the domain of the Appellant. Thus, invoking of extended period in confirming duty is justified. Consequently, imposition of penalty on the company and also on the Managing Director who is involved in fixation of price and discharging appropriate duty is also justified. However, considering the overall circumstances, the penalty imposed on the Managing Director is reduced to Rs.25,000/- (Rupees Twenty Five Thousands only). But, we do not find justification in imposing penalty on Mrs. Nayana D. Culogi.

In the result, the impugned order is modified. The Appeal filed by the Director Shri Dilip S Culogi, Managing Director is partly allowed and the appeal filed by Mrs. Nayana D. Culogi is allowed. Appeal filed by the Appellant Company is hereby rejected.

(Order pronounced in the open court on 13.12.2009)

(Dr. D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Bahalkar