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

**WEST ZONAL BENCH**

**Excise Appeal No: 87002 of 2017**

[Arising out of Order-in-Appeal No: PK/193/RGD/2017 dated 1st June 2017 passed by the Commissioner of Central Excise (Appeals), Mumbai – III.]

Alkem Laboratories Ltd … ***Appellant***
Alkem House, 'Devashish', Senapati Bapat Marg
Lower Parel, Mumbai 400 013

*versus*

Commissioner of Central Excise …***Respondent***
Raigad
Plot No. 1, Sector 17, Khandeshwar
Navi Mumbai – 410 206

*APPEARANCE:*

Shri Bharat Raichandani, Advocate for the appellant

Shri AB Kulgod, Assistant Commissioner (AR) for the respondent

**CORAM:**

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**
**HON'BLE MR P DINESHA, MEMBER (JUDICIAL)**

**FINAL ORDER NO: A/88585 / 2018**

DATE OF HEARING: 07/05/2018
DATE OF DECISION: 07/05/2018

*PER: C J MATHEW*

This appeal lies against order-in-appeal no. PK/193/RGD/2017 dated 1st June 2017 of Commissioner of Central Excise (Appeals), Mumbai – III which has upheld the order of the original authority by dismissal of the appeals of M/s Alkem Laboratories Ltd.

2. This matter is before us for the second time and, upon remand, the adjudicating authority ordered recovery of demand of ₹ 30,10,21, ₹20,99,260 and ₹26,89,521 respectively for the period from June 2003 to December 2003, January 2004 to June 2004 and July 2004 to January 2005, along with interest thereon, and imposed penalties of like amount on the assessee as well as ₹ 7,50,000/- and ₹ 8,00,000/- respectively in the other two noticees.

3. Briefly, M/s Alkem Laboratories Ltd, as ‘loan licencee’, dispatched raw materials and packing materials to M/s Alcon Industry Limited who manufactured ‘patent and proprietary medicaments’ in their capacity as ‘job-worker’. Prior to June 2003, M/s Alcon Industries Limited had been discharging duties of central excise on the price by which M/s Alkem Laboratories Ltd sold the finished goods to their customers. However, after June 2003, they adopted ‘cost construction method’ which, being disputed by the department, led to the proceedings that culminate in the present appeal.

4. We have heard Learned Counsel for the appellant at length as well as the response of the Learned Authorised Representative.

5. Learned Counsel placed reliance on circular no. 619/10/2002-

CX dated 19th February 2002 and the decision of the Hon'ble Supreme Court in *Ujagar Prints v. Union of India [1988 (38) ELT 535 (SC)], Commissioner of Central Excise, Goa v. Cosme Farma Laboratories Ltd [2015 (318) ELT 545 (SC)], Collector of Central Excise, Baroda v. MM Khambhatwala [196 (84) ELT 161 (SC)], Pawan Biscuits Co (Pvt) Ltd v. Collector of Central Excise, Patna [2002-TIOL-04-SC-CX]* and those of the Tribunal in *Intas Pharmaceuticals Ltd v. Commissioner of Central Excise & Service Tax, Ahmedabad – II [2016 (338) ELT 422 (Tri.-Ahmd)], Kare Labs Pvt Ltd v. Commissioner of Central Excise, Goa [2017 (350) ELT 437 (Tri.-Mumbai)]* and *Cosme Remedies Ltd v. Commissioner of Central Excise, Goa [2006 (203) ELT 567 (Tri.-Mumbai)].*

6. It is seen that the orders of the lower authorities have relied upon the licence held the principal manufacturer M/s Alkem Laboratories Limited, to determine the duty liability on the selling price of the goods instead of considering M/s Alcon Industries Ltd as 'job-worker' and liable to duty at the value determined by 'cost construction method'. In *re Cosme Farma Laboratories Ltd,* it has been held by the Hon'ble Supreme Court that

> *'18. At the outset, we would like to clarify that the term 'manufacturer' or the loan licensee used under the provisions of the Drugs and Cosmetics Act, 1940 has nothing to do with the manufacturing activity or term 'manufacture' under the provisions of the Central Excise Act, 1944. Both the Acts*

*referred to hereinabove have been enacted for different purposes. The provisions of the Drugs and Cosmetics Act, 1940 pertain to manufacture of drugs and quality of the drugs, etc. The manufacturer of the drugs has to see that the quality of the drugs manufactured by him is as per certain standards and if there is any defect in the drugs manufactured by him or someone working under him, he becomes responsible or liable under the said Act. There is also a provision in the said Act with regard to getting the drugs manufactured by someone else. So a manufacturer, who is having a license to manufacture, can get the drugs/medicaments manufactured by another person under his supervision and he would be liable if the drugs manufactured by someone else are not as per the prescribed quality. Though the drugs/medicaments might not have been manufactured by the one who is a licensee and the actual manufacturer is guilty of manufacturing substandard drugs, the licensee becomes responsible and liable under the provisions in the said Act.*

*19. On the other hand, the provisions of the Central Excise Act, 1944 are for the purpose of imposing duty on the goods manufactured. The manufacturer becomes liable to pay certain duty as per the provisions of the said Act.'*

with the implication that the liability to discharge of duty vests, by default, with the actual manufacturer who, in this case, is M/s Alcon Industries Ltd and be treated as the entity so obliged to do under Central Excise Act, 1944. In *re Intas Pharmaceuticals Ltd,* by placing reliance on various decisions of the Hon'ble Supreme Court as well as on *re Cosme Remedies Ltd,* and the circular referred to *supra,* it was held that

*'6. After hearing both the sides and on perusal of the records, we find that the issue is no more res integra in view of the decision of Hon'ble Supreme Court in the case of Cosme Farma Laboratories Ltd. (supra). We find that on the identical issue, the Tribunal in the case of Cosme Remedies Ltd. by majority decision held as under :-*

> *"28. As regards the view taken by learned Member (Technical) and Member (Judicial), I find that the agreement between the loan licensee and the job worker is very clear that the supervision and control will be that of the job worker only and as in every job work, the manufacture has to be carried out as per the price indicated by the raw material supplier and as per the specifications laid down by the raw material supplier and the raw material supplier has a right to inspect and draw samples at each stage to ensure that the standards prescribed by him are being followed especially so in the case of drugs where he ultimately has to be held liable for any deficiency in quality where the human lives are involved. No evidence has been brought out to show that the premises had been hired on a shift basis or otherwise and on the contrary, the agreement clearly shows that the manufacturing charges will be paid at the rate specified in the Schedule on the basis of per unit and there is no reference to payment on the basis of any shift or any particular period. The agreement may be at variance with the undertaking given to the Drug Licensing Authorities but there is no evidence that the agreement has been departed with and that the payments were not being made as per the agreement or that the entire supervision was that of the raw material supplier. I am, therefore, of the view that the matter is fully covered by the Larger Bench decision of the Tribunal in the Lupin Laboratories case cited supra and followed in subsequent judgments by the Tribunal. I am therefore in agreement with the views expressed by learned Member (Technical) Shri S.S. Sekhon. The reference is accordingly answered that appeals are to be allowed as held by Member (Technical)."*

*7. In the impugned order, the Commissioner observed that though by majority, it was held by the Tribunal that the actual processor of the goods was the manufacturer and that the duty demanded on the price at which the raw material supplier sold* *the goods, was not sustainable, the Department has filed a Civil Appeal before Hon'ble Supreme Court. The Adjudicating authority proceeded on the basis of the minority view of the said decision. We find that the Hon'ble Supreme Court upheld the majority view in the case of M/s. Cosme Farma Laboratories Ltd. (supra). It has been held as under :-*

> *"23. Once it has been determined that the job workers are the manufacturers, the assessable value of the goods would be a sum total of cost of raw material, labour charges and profit of the job workers, as per Circular No. 619/10/2002-CX, dated 19-2-2002 and the law laid down by this Court in the case of Pawan Biscuits (supra) and other cases. In such a case, the price at which the respondent brand owner sells its goods would not be the assessable value because the duty is to be paid at the stage at which the goods are manufactured and not at the stage when the goods are sold."*

and which has been upheld by the Hon'ble Supreme Court.

7. Following the above decisions, we find that the impugned order has erred in determining the differential duty liability. Accordingly, we set aside the impugned order and allow the appeal.

*(Pronounced in open court)*

**(C J Mathew)**
***Member (Technical)***

**(P Dinesha)**
***Member (Judicial)***

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