

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

WEST ZONAL BENCH

EXCISE APPEAL NO: 86175 OF 2013

[Arising out of Order-in-Appeal No: BPS/140-145/LTU/MUM/2012 dated 18th December 2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), Mumbai Zone – I.]

Maneesh Pharmaceuticals Ltd

Unit – IV, D-6, S-25 T Block
MIDC, Bhosari, Pune – 411 026

... Appellant

versus

Commissioner of Central Excise & Service Tax

LTU

29th Floor, Centre-1, World Trade Centre,
Cuff Parade, Mumbai – 400 005

...Respondent

APPEARANCE:

Shri Suyog Bhawe, Advocate for the appellant

Shri Xavier Mascarenhas, Superintendent (AR) for the respondent

CORAM:

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

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86388/2023

DATE OF HEARING: 29/05/2023

DATE OF DECISION: 26/09/2023

PER: C J MATHEW

The issue in this dispute of M/s Maneesh Pharmaceuticals Ltd,

viz. valuation of ‘physician samples’, against order¹ of Commissioner of Central Excise & Service Tax (Appeals), Mumbai Zone-I, and peculiar to the pharmaceutical industry, has been a subject of controversy stretching back in time. Indeed, from the operative portion of the impugned order, it would appear that facts and circumstances of the relevant clearances were not on record during investigation and beyond and that the controversy remains undiminished, despite judicial pronouncements, even now.

2. We have heard Learned Counsel for the appellant and Learned Authorized Representative at length. Six show cause notices, for overlapping periods between February 2009 and March 2011, proposing recovery of ₹ 7,64,414, along with applicable interest thereon, and for imposition of penalty under rule 25 of Central Excise Rules, 2002 came to adjudicated against the appellant herein. In appeal thereafter, it was held that

‘14. In cases where the samples are supplied to the manufacturers for free distribution, recourse has to be taken to Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, as clarified by the CBEC in their Circular No. 915/5/2010-CX dated 19.02.2010, as referred to supra. In such a case, the value has to be pro-rata MRP price of the final pack of the medicine, as made applicable by applying Rule 4 of Valuation Rules 2000. Reliance in this regard may also be placed on the

¹ [order-in-appeal no. BPS/140-145/LTU/MUM/2012 dated 18th December 2012]

ratio of the Hon'ble Supreme Court's judgment dated 22.09.2010 in the case of Bal Pharma - 2010 (259) E.L.T.10 (S. C).

15. *However, in cases where the physician's samples are manufactured and sold on their own account, the valuation of such physician samples has to be done under Section 4 of the Central Excise Act, 1944. If the Appellants' manufacturing activity consists of "physician samples" on their own account i.e. for the products manufactured by them for which physician samples are cleared on the basis of outright sale of physician samples to the customers. In such cases of outright sale of physician samples to the customers, the Appellants will have to discharge the duty liability based upon the invoice price i.e. its transaction value. The said price cannot be rejected by the Revenue without any basis. Reliance in this regard is placed upon the Hon'ble CESTAT (Mumbai-Bench) decision in the case of SOFTESULE PVT. LTD. vs. COMMISSIONER OF C. EX., MUMBAI-II- 2011 (271) E.L.T. 445 (Tri. - Mumbai). In view of this, I hold that the transaction value', if any, known for the above transactions i.e. outright sales of the said samples, will have to be accepted for the purpose of valuation of the subject goods.*

16. *The Respondent Deputy Commissioner of Central Excise shall re-quantify and recover the demands of differential duty, if any, along with interest leviable thereon, by applying the above yardsticks in determining the value of the physicians' samples cleared by the Appellants during the periods under reference.*

17. *Since the issue involved is regarding correct interpretation of the statute and Valuation Rules made there under and there have been divergent views expressed by various Judicial Foras, I do not consider it a fit case for*

imposition of any penalty on the Appellants under Rule 25 of the Central Excise Rules, 2002.'

3. The issue itself has seen several twists and turns, in departmental clarification and through judicial decisions, that, at its root, has a simple formulation: replica of dutiable goods are removed from factory for free distribution to medical practitioners with the cost thereof implicitly included in the valuation of the goods removed on payment of duty into an exclusive and regulated distribution channel. For long, and with administrative approval, 'physician samples' were treated as goods that are 'captively consumed' and valued on the basis of 'cost of production' framework employed for such clearances.

4. In circular no. 643 dated 1st July 2002, Central Board of Excise & Customs (CBEC) had directed that, insofar as 'physician's samples' are concerned,

*'Since the goods are not sold Section 4(1)(a) will not apply and recourse will have to be taken to the Valuation Rules. No specific rule covers such a contingency. Except Rule 8 all the other rules cover contingencies where **sale is involved** in some form or the other. Therefore, the residuary Rule 11 will have to be adopted along with the spirit of Rule 8. In other words, the assessable value would be 115% of the 'cost of production or manufacture' of the goods.'*

In further circular no. 813 dated 25th April 2005, it was, however, directed that

‘In case of free samples, the value should be determined under Rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.’

leading to writ proceedings before the Hon’ble High Court of Bombay in *Indian Drugs Manufacturing Association v. Union of India* [2008 (222) ELT 22 (Bom)] and the competency of the tax authorities to revise its stand in accordance with law was upheld and the correctness of lack of option for recourse to rule 8 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000 approved thereby directing recourse to rule 4 therein which prescribed adoption of the ‘price of goods sold for delivery at time nearest to the time of removal of the goods under assessment’ for determination of duty liability.

5. In the context of further placement of pharmaceuticals within the ambit of ‘retail sale price (RSP)’ assessment after January 2005, the correctness of the valuation preference for price at the nearest ascertainable time of removal was referred to a Larger Bench of the Tribunal and, in *Cadila Pharmaceuticals Ltd v. Commissioner of Central Excise, Ahmedabad* [2008 (232) ELT 245 (Tri-LB)], it was held that

‘30. The fact that medicines/medicaments are specified goods within the meaning of Section 4A of the Act since January, 2005, does not appear to have been brought to the notice of the Bombay High Court but this would hardly make any difference, for, the

MRP is to be treated as value of the goods i.e. deemed value in place of the transaction value under Section 4(1)(a) and it does not take the goods out of the pale of Rule 4. Besides, it is to be kept in mind that the Bombay High Court was seized of a legal issue in the context of challenge to the validity of a circular issued on 25-4-2005, that is, in the aftermath of the notification under Section 4A(1).

31. In view of the above discussions, I am of the opinion that notwithstanding the non-availability of the normal sale price under Section 4(1)(a) of the Act, by reason of the goods being specified under Section 4A(1) making the retail sale price i.e. MRP as its deemed value, the appropriate rule governing the valuation of physician's samples would continue to be Rule 4 and the decision of the Larger Bench in Blue Cross Laboratories Ltd.'s case (supra) mutatis mutandis continues to be good law. The reference is accordingly answered in the affirmative in favour of the Revenue and against the appellant/assessee.'

6. In *Commissioner of Central Excise & Customs, Surat v. Sun Pharmaceuticals Industries Ltd* [2015 (326) ELT 3 (SC)], the Hon'ble Supreme Court held that

'10. As mentioned above, the assessee had put up the defence that since physician samples were not meant for sale by distributors but were to be given free of cost to the physicians, the assessee had charged lesser price. This statement of the assessee had not been doubted. The only reason in the show cause notice given was that since the physician samples were given free of cost by the distributors and no price was charged, the case was not covered by the provisions of Section 4(1)(a) of the Act. This is clearly fallacious and wrong reason. The transaction in question was between the assessee and the distributors. Between them,

admittedly, price was charged by the assessee from the distributors. What ultimately distributors did with these goods is extraneous and could not be the relevant consideration to determine the valuation of excisable goods. When we find that price was charged by the assessee from the distributors, the show cause notice is clearly founded on a wrong reason. The case would squarely be covered under the provisions of Section 4(1)(a) of the Act. In view thereof, the Central Excise Rules would not apply in the instant case.

11. As a result, we are of the opinion that the decision dated 10-11-2006 rendered by the CESTAT depicts the correct position of law and rightly holds that the case would be covered by the provisions of Section 4(1)(a) of the Act and in view thereof Rule 6(b)(ii) of the Rules would not apply. Resultantly, Civil Appeal Nos. 3742-3744 of 2007 of the Revenue fail and are hereby dismissed.'

which, it may be noted, pertains to the period prior to issue of circular that came up for challenge in the Hon'ble High Court of Bombay *supra*. In *Medispray Laboratories Pvt Ltd v. Commissioner of Central Excise, Goa* [2017 (5) GSTL 300 (Tri-Mumbai)], the Tribunal opined that

'5.1 We find that all the three appellants are manufacturing physician samples not for their own but on behalf of the buyers either on job work basis or on principal to principal basis. Therefore, the issue of valuation as regards the physician samples is not concerned with the present appellants. Rule 4 of Central Excise Valuation Rules, 2000 shall apply only in those cases where the manufacturer manufacturing the physician samples and they themselves supplying free sample in the market.

In the present case, all the three appellants are not supplying physician samples free of cost either in case of job work basis or in the sale basis, the goods are sold to the principal. In such case, irrespective [of the fact that] it is physician samples, the valuation shall be governed by Section 4 of the Central Excise Act. In case of job work, the value should be in terms of principles laid down by the Hon'ble Supreme Court in the case of Ujagar Prints - 1989 (39) E.L.T. 493 (S.C.). Accordingly, the valuation shall be determined on the basis of cost of raw material + job charges including the profit of the job worker. It is not the case of the Revenue that the value determined by the appellant is less than the value to be arrived at on the principles of Ujagar Print's case.

5.2 As regards the physician samples manufactured and sold by Okasa Pvt. Ltd. to their principal, the transaction is on principal to principal basis. Therefore, whatever goods were sold by the appellant to their principal is correct transaction value in terms of Section 4. In both type of clearances in any circumstances, Rule 4 valuation shall not apply.'

7. We also take note that the facts and circumstances of each clearance of 'physician's samples' undertaken by the appellant must determine the applicability of the appropriate rule in Central Excise (Determination of Price of Excisable Goods) Rules, 2000. The orders of the original authority that were disposed off in the impugned order are bereft of any discussions thereto. On perusal of

'39 I have noted that Rule 96(ix) of the Drugs and Cosmetics Rules 1940 stipulates that the words "Physicians Samples not to be sold" shall be overprinted on the packing of the samples. Physicians Samples are always distributed free

of cost to medical practitioners, patients and others. There is no sale involved. The cost of the Physicians Samples is eventually recovered in course of business from the buyer of medicines which are later on sold in normal course of trade, after the physician's samples have popularized the concerned medicines. Even though such goods are shown to be sold through distributors /wholesalers or returned back on sale basis to the principal manufacturer by the manufacturing loan licensee these sales are not genuine sales which are conducted at arm's length in the normal course of trade. The principal manufacturer has bought the physician samples from the manufacturing loan licensee i.e M/s Maneesh Pharma. Both the parties have interest in the business of one another. Similarly in the case of transactions between the principal manufacturer and his distributors/ wholesalers etc. such sales are not genuine sales as the buyer of physician samples has to ultimately distribute them free of cost- In this case the assessee has produced a statement of invoices to show that sale is involved. I find that all these invoices are issued to principal manufacturers who are the brand name owners. I do not accept the transaction value as acceptable for the purpose of payment of excise duty. This not a sale to an independent buyer conducted at arms length. In view of the above I find that there is ground for not accepting the sale value/transaction value as declared at the time of clearance in respect of the physicians' samples sold There is also ground for applying the Valuation Rules. I find that the value to be adopted would be MRP price made applicable by applying Rule 4-of Valuation Rules 2000.'

the findings are not tenable for its lack of clarity on the transactions that were sought to be brought within the tax net. We also fail to see how goods cleared to principal manufacturer from raw materials

supplied by them can take recourse to rule 4 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000, as held by the first appellate authority, when rule 8 is specific to such a situation. It would also appear to us that rule 4 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000 is applicable when, as held in *re Cadila Pharmaceuticals Ltd*, no sale occurs at the time of removal warranting recourse to price at which goods are sold at the nearest time of removal.

8. The facts and circumstances of each removal and the nature of the transaction with the recipient of such clearances will determine the specific provision in Central Excise (Determination of Price of Excisable Goods) Rules, 2000 that must be applied. It would be in the fitness of things for such detailed scrutiny to be undertaken by the original authority. Needless to say, the finding in the impugned order on applicability of penalty is not an issue before the original authority.

9. Accordingly, the impugned order is modified and the terms of remand to the original authority altered accordingly.

(Order pronounced in the open court on 26/09/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)