CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO.2

EXCISE APPEAL NO: 87085 OF 2013

[Arising out of Order-in-Appeal No: BR(10)MV/2013 dated 21st February 2013 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone– I.]

P & B Laboratories Ltd
Excel House, Sativali, Vasai (E) – 401 208 … ***Appellant***

versus

Commissioner of Central Excise
Mumbai – V
5th Floor, Utpad Shulk Bhavan, C-24, Block 'E'
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

APPEARANCE:

Shri J C Patel, Advocate for the appellant

Shri Amrendra Kumar Jha, Deputy Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85347/2024

DATE OF HEARING: 21/09/2023
DATE OF DECISION: 19/03/2024

PER: C J MATHEW

Once upon a time, but not so long ago as to be blurred in our memories, assessment to duties of central excise was based on 'normal price' and its variants that were identifiably distinguished for that purpose. Once upon a time, but not so long ago as to be erased from our minds, a rigid procedure mandated prior declaration of such price under section 173C of Central Excise Rules, 1944. And in those time, specifically in 1990, there arose a dispute that was permitted to fester till now – a dispute peculiar to those times and peculiar for throwing all canons of judicial determination to the winds.

2. M/s P&B Laboratories Ltd, the appellant and also an entity in the group comprising M/s Pharma Chem Distributors and M/s P&B Pharmaceuticals Pvt Ltd, were manufacturers of 'medicaments' that were marketed through M/s Pharma Chem Distributors who had also been incurring certain expenditure towards these products between 1990 and 1999. Price lists filed for approval between 9th July 1990 and 12th April 1991 set the ball rolling. There were, in fact, two streams of disputes: the first, by notice dated 26th July 1991, questioned the non-inclusion of certain expenditures borne by the sole din the assessable value following the judgement of the Hon'ble Supreme Court in *Union of India v. Bombay Tyre International [1982 (4) ELT 1986 (SC)]* while the other, by notice dated 4th November 1991, questioned the manner in which price was arrived at owing to alleged relationship with distributors to whom the goods were sold. Both came to be adjudicated by the jurisdictional Assistant Collector of Central Excise against the assessee in order dated 11th February 1992 but, when carried in appeal

to, was set aside by Collector of Central Excise (Appeals) in order of 29th February 1992 by holding that the assessee were not distributed and, insofar as the other controversy was concerned, the original authority was directed to quantify the expenditure on advertisement and sales promotion incurred on behalf of appellant and to consider adding notional interest on amount loaned by distributor to the appellant.. No appeal was filed by either side against this partial grant of relief and partial remand.

3. In the meanwhile, and later during the torturous meanderings of the dispute, six notices for demands continued to be issued for re-visit of declared price on grounds of relationship with buyer having influenced it. These were taken up for disposal along with the remanded show cause notice and, by order of 16th May 1995, the Assistant Collector of Central Excise confirmed the demand thereto by placing reliance on the decision of the Tribunal in *P&B Pharmaceuticals Pvt Ltd v. Commissioner of Central Excise [1995 (76) ELT 616 (Tribunal)]*. The first appellate authority, while disposing off appeal of assessee once again in order of 28th February 1996, noted that the decision relied upon did not concern the appellant therein and that the finding of the first appellate authority on the former occasion precluded further processing in the *de novo* proceedings to remand the matters once again. The seesaw of adjudication, appeal and remand went through yet another cycle in orders of 28th March 1996 that was restored to the

original authority on 19th November 1996. Once again, the demands confirmed in order of 30th April 1996 was set aside and issues remanded by order of 24th February 1997. A further cycle culminated in order of Commissioner of Central Excise (Appeals) on 1st October 1999 remanding the matter to original authority which was challenged before the Tribunal which was disposed off in order of 21st November 2005 by dismissing the departmental appeal against the remand. The notices, by now increased to twenty four, were all taken up together and order dated 26th October 2006, duty of ₹ 78,12,954.58 was ordered for recovery under section 11A of Central Excise Act, 1944 along with penalty under Central Excise Rule, 1944 again drawing upon the decision in re P&B Pharmaceuticals Pvt Ltd which was upheld in order[1] of Commissioner of Central Excise (Appeals), Mumbai Zone– I that is impugned here.

4. Learned Counsel for appellant submits that the issue of relationship having influenced price to warrant adoption of alternative valuation stood settled in their favour as far back as 29th February 1992 upon finding of the first appellate authority disclaiming relationship with sole distributor and failure of Revenue to file appeal thereto. Reliance was placed on the decision of the Hon'ble Supreme Court in *Commissioner of Customs v. Kushalchand & Co [2015 (325) ELT 813 (SC)]*. It was submitted that the impugned order upholding of the

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[1] [order-in-appeal no. BR(10)MV/2013 dated 21st February 2013]

correctness of the demand by original authority in blatant violation of judicial discipline patently violates all canons of judicial decorum. That the first appellate authority had traversed propriety in not enforcing its own earlier decision was sought to be buttressed by decision of the Tribunal in *Collector of Central Excise v. Eupharma Laboratories [1989 (43) ELT 471 (Tribunal)]* and in *Commissioner of Central Excise, Panchkula v. Ish Rolling Mills [2004 (167) ELT 126 (Tri-Del)]*.

5. It was further submitted that, as far back as 28th February 1996, the first appellate authority had discountenanced the reliance placed by the original authority on the decision of the Tribunal in *re P&B Pharmaceuticals P Ltd* for not being in congruity with the facts of the dispute before them despite which the original authority continued to be guided by that in later *de novo* proceedings. Furthermore, the original authority unfailingly and the first appellate authority on the last occasion overlooked the setting aside of that purported precedent by the Hon'ble Supreme Court in *P&B Pharmaceuticals P Ltd v. Collector of Central Excise [2003 (153) ELT 14 (SC)]*.

6. As the limited issue for consideration in this appeal is the scope that devolved on the original authority in remanded proceedings consequent upon order of the first appellate authority on 29th February 1992, we do not delve into the merit of the submissions. We have heard Learned Authorized Representative on this issue.

7. There were two issues in dispute: inclusion of certain elements of cost in assessable value and revision of the method of determining assessable value applicable to transactions between related persons. The controversy attained finality on the latter issue in the very first round of litigation and at the stage of first appeal with the ruling of the two being unrelated not having been challenged further. The remand proceedings was to be limited to inclusion of advertisement and sales promotion costs alone. This is settled law as set out in *re Eupharma Laboratories* and in *re Ish Rolling Mills* this

> *'4. We do not find merit in the appeal of the appellant-Collector. Firstly, this point had already been decided by the lower appellate authority as early as October 1978 and the scope of remand by the said authority to the original adjudicating authority was limited in its scope i.e. of verifying the facts on two aspects as mentioned above. The readjudicating authority could not go beyond the terms of the directions of remand of the superior appellate authority. Secondly, even on merits the word "directly" used in the notification would also cover the retail chemist shops approved by the ESIS authorities. Supply of P or P medicines to such approved shops is to be considered as good as supply to the Government department because such shops are the outlets of medicines for such Government department. Accordingly, the appeal is dismissed.'*

and

> *'4. We have considered the submissions of both the sides. It is not disputed by the Revenue that the Order-in-Original was*

passed by the Deputy Commissioner on remand by the Appellate Tribunal in Aggarwal Rolling Mills case (supra). The Appellate Tribunal, while remanding the matter, has considered the question of eligibility of the appellants to Notification No. 214/86 and clearly held that the duty liability, if any, would lie on the supplier of the raw material. It is not the case of the Revenue that this finding recorded by the Appellate Tribunal in the remand order, was challenged in any higher Appellate Forum. Once the finding of the Tribunal has not been challenged, it is binding on the authority while adjudicating the matter on remand. In de novo proceedings, the adjudicating authority cannot go beyond the remand order. The Commissioner (Appeals) has referred to the decision of the Calcutta High Court in the case of Scientific Instruments Co. Ltd., 1980 (6) ELT 89 (Cal.) wherein it has been held that when an order is remanded with specific directions, the powers and jurisdiction of lower authority is limited to the extent the cases is remanded back. The learned Commissioner (Appeals) has also relied upon the decision of the Tribunal in the case of C.C.E. v. Eupharma Laboratories, 1989 (43) ELT 471 (T) wherein the Tribunal has held that readjudicating authority cannot go beyond the terms of the directions of remand of the superior appellate authority. The Calcutta High Court has, further, observed that in remand cases, entire matter is not at large before the lower authority nor such authority is free to decide the case in his own way. The different view taken by the Tribunal in another case cannot be relied upon by the adjudicating authority against specific findings in the case of the respondents themselves by the Tribunal, which has not been set aside. Accordingly, we do not find any reason to interfere with the impugned order passed by the Commissioner (Appeals). The appeal, filed by the Revenue, is rejected.'

8. Even if further show cause notices were to be disposed off,

judicial discipline does not condone reopening of settled issue except by way of further appeal. The finality, insofar as the first notice was concerned, was equally applicable to subsequent ones. The claim of higher precedent from decision of the Tribunal was also settled by the first appellate authority in later order despite which the obduracy on the part of the original authority continued to be manifested in remand proceedings. Even so, the finality accorded to that precedent by the Hon'ble Supreme Court in *re P&B Pharmaceuticals P Ltd* should have sufficed for the original and first appellate authority in the latest round. This is evident from

> *'16. From the facts noted hereinabove, it is apparent that there was a dispute as regards the valuation of the goods manufactured by the petitioner-company and sold to a partnership firm of Mumbai, Messrs Pharma Chem Distributors. The first ground raised by the department was that the distributor of the petitioner is a related person, therefore there had been short levy of duty; and the second ground was that after insertion of para 7 in Notification No. 175/86-C.E., the petitioner-company was not entitled to exemption as a small scale industry as the petitioner and M/s. P & B Laboratories Ltd., had been using the logo of "P/B". - By the order-in-original dated 26-9-1991 the total demand of Rs. 79,47,034/- came to be confirmed against the petitioner-company in respect of the above referred two issues. The demand also came to be confirmed for the extended period of limitation, that is, for the period from 1-5-1985 to 31-12-1989. The matter was carried before the Customs, Excise and Gold (Control) Appellate Tribunal, who decided the issues against the petitioners. Being aggrieved, the petitioners preferred an*

appeal before the Supreme Court, which came to be allowed by the judgment and order dated 19-2-2003. Before the Supreme Court, it was the entire order of the Tribunal which was subject matter of challenge. The Supreme Court has passed a speaking order in relation to the question of availing exemption under Notification No. 175/86-C.E. and held that the petitioners were entitled to use the logo as well as to avail all benefits of exemption as an SSI unit. Insofar as the question as regards Messrs Pharma Chem Distributors being a related person is concerned, the Supreme Court has taken note of the fact that earlier show cause notices had been issued in relation to the said question wherein the department had taken a view in favour of the petitioners. However, subsequently, the case of the department is that Messrs Pharma Chem Distributors is a related person. The Court observed that so far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The Court held that it was therefore futile to Chem Distributors being a related person. The Court, accordingly, held that there was no justification for invoking of the proviso to Section 11A of the Act for making the demand for the extended period. Though it is true that there is no specific discussion in respect of the issue regarding Messrs Pharma Chem Distributors being a related person, in the ultimate result, the Supreme Court set aside the order of the Tribunal in toto. Thus, the order of the Tribunal stands merged with the order of the Supreme Court and does not retain any identity of its own. The Supreme Court in the case of Pernod Ricard India (P) Ltd. v. Commissioner of Customs, ICD, Tughlakabad (supra) has held that when the appellant has preferred statutory appeal against the order of the Tribunal, dismissal of appeal by the Supreme Court, though by a non-speaking order, was in exercise of appellate jurisdiction, *wherein the merits of the order impugned were subjected to judicial scrutiny. In the circumstances, the doctrine of merger would be attracted and the appellant was estopped from raising the issue, which was already considered earlier, at a subsequent point of time. Adverting to the facts of the present case, as noticed hereinabove, against the order of the Tribunal, the petitioners had preferred a statutory appeal before the Supreme Court under Section 35L of the Act. The Supreme Court in exercise of appellate jurisdiction, wherein the order of the Tribunal was subjected to judicial scrutiny, has set aside the entire order of the Tribunal. In the circumstances, the doctrine of merger would be squarely attracted in the facts of the present case and as such it is not permissible for the department to now raise the contention that part of the order of the Tribunal still survives and can be relied upon by the department.*

17. A perusal of the impugned order passed by the Commissioner (Appeals) clearly shows that even though the aforesaid decision of the Supreme Court has been pointed out to the Commissioner (Appeals), he has construed the said decision as a decision holding that the petitioner-company is eligible for SSI benefit despite the fact that they had used logo 'P/B'. He has further observed that the Supreme Court in the said decision has not made any observation as regards the petitioner-company and Messrs Pharma Chem Distributors, Mumbai being related persons. The Commissioner (Appeals) has, therefore, placed reliance upon the order passed by the Tribunal to the extent it upheld the ground as regards the petitioner-company and Messrs Pharma Chem Distributors being related persons, and accordingly, held that the petitioners were obliged to discharge duty liability in view of the fact that Messrs Pharma Chem Distributors, Mumbai were related to them. The Commissioner (Appeals) has also placed *reliance upon the observations and directions given by the Tribunal that the assessable value should be determined on the basis of the sale price at the hands of Messrs Pharma Chem Distributors, Mumbai but in arriving at such assessable value, permissible deductions as per law, have to be made. Thus, it is apparent that for the purpose of deciding the issue as regards Messrs Pharma Chem Distributors being a related person, the Commissioner (Appeals) has placed reliance upon the order of the Tribunal as well as the observations made therein, despite the fact that the same stood merged in the order of the Supreme Court and had no independent existence on its own. This High Court in the case of Satellite Engineering Limited v. Assistant Collector of Central Excise (supra) as well as in the case of Ramkrishna Wire Works v. Union of India (supra) has held that once a decision is reversed and set aside, it is immaterial on which point the decision was reversed because on reversion of the decision, it ceases to be a good decision in the eye of law. In the circumstances, once the decision of the Tribunal had been reversed, the Commissioner (Appeals) could not have placed reliance upon any part of the said decision as the same ceased to be a good decision in the eye of law.*

18. The Supreme Court in the case of the Government of Goa v. A.H. Jaffar & Sons and Anr. (2008) 11 SCC 18, has held that it needs no reiteration that once the decision is rendered inter parties and attains finality, a different view cannot be taken, more so, when finality is attached by the order of the Supreme Court. In the case of O.P. Chaudhary v. Rehabilitation Ministry Employees' Coop. House Building Society, (2003) 10 SCC 170 wherein expulsion notice and resolutions passed by the society against the appellant therein had been set aside by filing a writ petition in the High Court and then Special Leave Petition in the Supreme Court had been rejected, the court held that there was no

> *justification for not restoring the original seniority to the appellant before it and assigning seniority from a subsequent date. The court held that once the expulsion order was set aside it had no existence in the eye of law and could not be taken notice of for depriving the appellant of his original seniority.*
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> *19. Examining the facts of the present case in the light of the aforesaid decisions, once the order passed by the Tribunal was set aside by the Supreme Court, it had no existence in the eye of law and could not be taken notice of by the respondents for the purpose of holding that Messrs Pharma Chem Distributors was a related person. In the light of the decision of the Supreme Court, all the issues which were subject matter of appeal before the Tribunal, had attained finality and as such it is not permissible for the department to thereafter reopen any of such issues against the petitioners herein, the same having attained finality by the decision of the Supreme Court. In the circumstances, the impugned order of the Commissioner (Appeals), which places reliance upon the order of the Tribunal for the purpose of holding that Messrs Pharma Chem Distributors is a related person, cannot be sustained, the same being contrary to the decision of the Supreme Court between the same parties, which has attained finality.'*

in the decision of the Hon'ble High Court of Gujarat in *P&B Pharmaceuticals Ltd v. Union of India [2011 (273) ELT 34 (Guj)]*.

9. The orders passed in *de novo* proceedings by the original authority were not correct in law. That last which was upheld in the impugned order was also incorrect in law. The concurrence accorded to that impropriety by the first appellate authority piles gross impropriety on impropriety. We find no cause to allow this travesty of justice and

judicial decorum to continue. Accordingly, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 19/03/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*