



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

वस्तु एवं सेवा

GST Building, 7th Floor,,

Near Polytechnic,

Ambavadi, Ahmedabad-

380015

सातवीं मंजिल, पॉलिटेक्निक के पास,

आम्बावाडी, अहमदाबाद-380015

☎ : 079-26305065

टैलेफैक्स : 079 - 26305136



क फाइल संख्या : File No : **V2(30)50,44,45,46,47,48,49/GNR/2017-18/10776**

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-0160 to 166-17-18**

दिनांक Date : **30.11.2017** जारी करने की तारीख Date of Issue: **15-12-17**

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश :
60/D/2008-09 दिनांक : **16.06.2008** से सृजित

Arising out of Order-in-Original: **60/D/2008-09**, Issued by: Assistant Commissioner,
Central Excise, Div:RRA, Ahmedabad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. M/s Bombay Tablet Mfg. Co. Pvt Ltd

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिथि नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

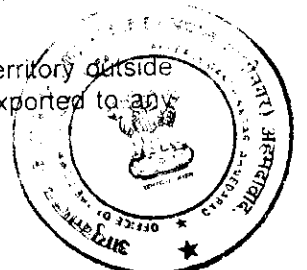
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.



- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
- (c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रती भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- णबी/35-इ के अंतर्गत:-

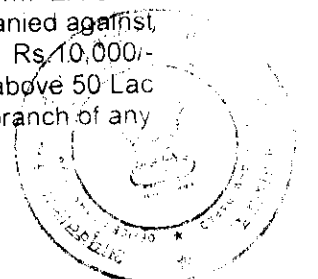
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियों सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against, (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any



nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

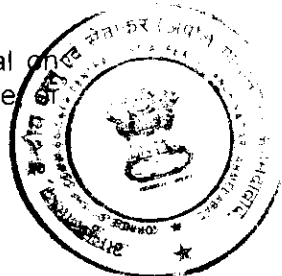
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute or penalty, where penalty alone is in dispute."



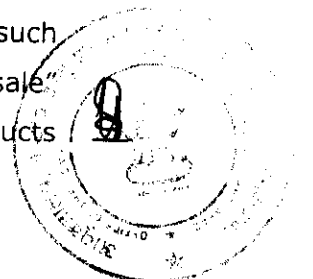
ORDER-IN-APPEAL

Following seven appeals have been filed by the appellant mentioned at Col. No. (3) of below table against the Orders-in-Original mentioned at Col. No.(4) of below table, passed by the Additional Commissioner of Central Excise, Ahmedabad-III/Assistant Commissioner of Central Excise, Gandhinagar Division.

S No	Appeal No	Name of appellant	Order-in-Original No. & Date	Amount involved	Penalty imposed
1	2	3	4	5	6
1	<u>50/GNR/17-18</u> 44/AHD-III/08	Bombay Tablet Mfg.Co.Pvt Ltd	9/Addl.Commr /2008 dated 31.01.2008	4,52,606/- 71,147/-	5,23,753/- -
2	<u>44/GNR/17-18</u> 46/AHD-III/08	Praful S Gupta, Quality Controller of Bombay Tablet Mfg.Co.Pvt Ltd	-do-	-	10,000/-
3	<u>45/GNR/17-18</u> 45/AHD-III/08	Praful A Shah, Director of Bombay Tablet Mfg.Co.Pvt Ltd	-do-	-	50,000
4	<u>46/GNR/17-18</u> 47/AHD-III/08	Prahlad R Sharma, Depot in-charge of Bombay Tablet Mfg.Co.Pvt Ltd	-do-	-	10,000/-
5	<u>47/GNR/17-18</u> 234/AHD-III/08	Bombay Tablet Mfg.Co.Pvt Ltd	6/D/2008-09 dated 16.06.2008	3,63,106/-	3,63,106/- -
6	<u>48/GNR/17-18</u> 234/AHD-III/08	Bombay Tablet Mfg.Co.Pvt Ltd	8/D/2008-09 dated 21.01.2008	1,43,509/-	1,43,509/- -
7	<u>49/GNR/17-18</u> 233/AHD-III/08	Bombay Tablet Mfg.Co.Pvt Ltd	9/D/2008-09 dated 21.08.2008	1,27,717/-	1,27,717/- -

2. Briefly stated, that facts of the cases are that M/s Bombay Tablet Manufacturing Co.Ltd, Plot No.909, GIDC, Sector-28, Gandhinagar, mentioned at Sr.No.1, 5 to 7 of above table [hereinafter referred to as "the appellant"] are engaged in the manufacture of P & P Medicines and cleared on MRP based assessment under Section 4 of Central Excise Act, 1944 (CEA).

2.1. Based on information that the appellant mentioned at Sr.No.1 of above table was clearing goods without of payment of duty claiming quantity discount and was also clearing certain quantity as samples to the physicians without paying appropriate central excise duty, records/ documents and samples of products were verified/scrutinized by the central excise officer. On detailed verification, it was revealed that [i] apart from clearing the goods on payment of duty, the appellant were also supplying free goods to their distributor as "quantity discount" and such free supplied items were printed with MRP and no marking such as "Not for sale" was made on such free supplied goods; and [ii] certain quantity of their products



were cleared as "samples to the physicians" without appropriate central excise duty. Accordingly, a show cause notice dated 31.01.2006 for the period of 2003-04 to 2004-05 was issued to the appellant for recovery of duty of Rs.4,52,606/- short paid on the goods cleared as "quantity discount" and for Rs.74,147/- as duty short paid on the goods cleared as "physician samples" with interest and imposition of penalty. The said show cause notice also proposes for penal action to Shri Praful S Gupta, Quality Controller, Shri Praful A Shah, Director and Shri Prahlad R Sharma, Deport in-charge, of the appellant. Vide order dated 29.05.2006, the Additional Commissioner of Central Excise has confirmed the demand of said short payment of duty with interest and imposed penalty of Rs.1,50,000/- on the appellant and Rs.10,000/-, Rs.50,000/- and Rs.10,000/- respectively on Shri Praful S Guptar, Shri Praful A Shah, and Shri Prahlad R Sharma. The appellate authority vide OIA No.143 to 146/2006 dated 30.08.2006 has set aside the demand of Rs. 4,52,606/- short paid on the goods cleared as quantity discount and the issue of samples cleared to physician, involving duty amounting to Rs.71,147/-, has remanded to the adjudicating authority.

2.2 Meanwhile, the department has filed an appeal against the said OIA No.143 to 146/2006 dated 30.08.2016 before CESTAT and the CESAT has also remanded the case to the original adjudicating authority for fresh decision, vide order No.A/1547/WZB/A'bad/2007 dated 20.06.2007, in light of the law declared by the Larger Bench of Tribunal in case of M/s Indica Laboratories Ltd [2007 (80) RLT 487] and in case of M/s Blue Cross Laboratories [2006 (202) ELT 182.

2.3 In view of Hon'ble CESTAT order dated 20.06.2007 and appellate authorities OIA dated 30.08.2016, both the issues viz. short payment duty on "quantity discount" and "physicians' samples" *supra* were decided by the Additional Commissioner of Central Excise, vide the impugned order mentioned at Sr.No.1 of above table, wherein he has confirmed the both the duty involved in clearance of goods as quantity discount as well as samples cleared to physician with interest and imposed penalty equal to the duty amount confirmed. He also imposed penalty of Rs.10,000/-, Rs.50,000/- and Rs.10,000/-respectively on the appellant Shri Praful S Guptar, Shri Praful A Shah, and Shri Prahlad R Sharma as mentioned at Sr.No.2 to 4 of above table.

2.4. Further periodical show cause notices for the period of September 2006 to January 2007, February 2007 to April 2007 and May 2007 to September 2007 were issued to the appellant mentioned at Sr. No. 5 to 7 for recovery of short paid duty of Rs. 3,63,106/-, 1,43,509/-, and 1,27,717/- respectively on the goods cleared as "quantity discount" with interest and imposition of penalty. The Assistant Commissioner of Central Excise, Gandhinagar Division, vide order mentioned against Sr.No.5 to 7 of above table has confirmed the demand with interest and imposed penalty as mentioned at Col. No.6 against them.

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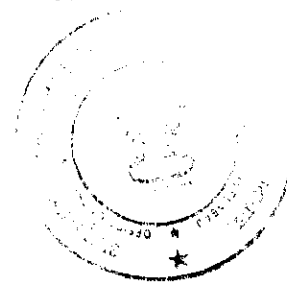
3. Being aggrieved with the impugned order passed by the Additional Commissioner of Central Excise, the appellant and Shri Praful S Guptar, Shri Praful A Shah, and Shri Prahlad R Sharma have filed the appeals mentioned at Sr.No.1 to 4 of above table and aggrieved with the impugned order passed by the Assistant Commissioner of Central Excise, Gandhinagar Division, the appellant has filed the appeals mentioned at Sr. No. 5 to 7 of above table, on the following grounds.

- The demand of duty confirmed on quantity discount is wholly illegal as the demand was ex-facie barred by limitation; that the department was aware about the practice of giving quantity discount by way of free goods, in view of order passed by the Commissioner in the year 2003, thus no suppression of facts on the appellant's part.
- Though the Appellate Tribunal has kept the issue of limitation open, while remanding the case, the adjudicating authority has held against the appellant on the ground that because of simplification by way of self remove procedure and self assessment, the appellant did not disclose the quantity discount allowed by them to the department through any documents.
- The appellant has all along claimed that the value arrived at in accordance with DPCO norms for physician's samples on all the medicines resulted in higher amount of excise duties paid by them compared to the CAS-4 data, if applied for all such physician's samples; however, the adjudicating authority has treated physicians' samples of those medicines in whose case value in accordance with CAS-4 data was higher was to be treated as a separate case of demand whereas the case of medicines whose physicians' samples were assessed to duties in accordance with DPCO norms resulting in payment of higher amount as duty compared to the value arrived at in accordance with CAS-4 norms was to be treated as separate as a case of refund. The entire case was one of re-determining of re-assessing value of physicians' samples of all medicines.
- Confirming demands with respect of short payment of duty on quantity discount allowed and supply of physicians' samples are without jurisdiction as they were barred by limitation; that there has no suppression of facts or willful mis-statement.
- Further, the penalty imposed equal to the duty is totally unauthorized; that earlier the adjudicating authority has imposed penalty of Rs.1,50,000/- and later on, the adjudicating authority has enhanced the penalty imposed by the earlier adjudicating authority is not justifiable. The appellant relied on various case laws in support of their argument.
- The penalty imposed on the Director and employees of the appellant is also not justifiable as they have not dealt with the goods in question in any way.

4. Personal hearings in all the 07 appeals mentioned above were held on 16.11.2017. Smt. Shilpa P Dave, Advocate appeared for the same and reiterated the grounds of appeals. She submitted additional written submissions and also explained through the decisions of M/s Marsha Pharma [2009-248-ELT-687 (Tri. Ahmd)] and M/s Charak Pharma Pvt Ltd [2012-278-ELT 319 (Guj)] that extended period is not invocable and penalty should not be imposed.

5. I have carefully gone through the facts of the case and submissions made by the appellants in their appeal memorandums as well as at the time of personal hearing.





6. I observe that the appeal mentioned at Sr.No.1 of above table involved issue regarding short payment of duty amounting to Rs. 4,52,606/-on quantity discount allowed; Rs.74,147/-on goods cleared as physicians' samples without payment of appropriate duty and imposition of penalty of equal to the duty thereof. The issue involved in the appeals mentioned at Sr.2 to 4 of above table is regarding personal penalty imposed on the employees under Rule 26 of Central Excise Rules 2002. The appeals mentioned at Sr.5 to 7 of above table involve issues regarding short payment of duty amounting to Rs.3,63,106/-, Rs.1,43,509/- and Rs.1,27,717/-on on quantity discount allowed and imposition of penalty of equal to the duty thereof.

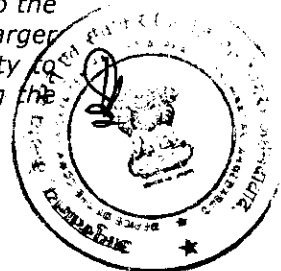
7. Before going to decide the issue, it is to mention here that all the 07 appeals mentioned above were filed in the year 2008 and transferred into call book on the grounds that the department has challenged the Hon'ble CESTAT, Ahmedabad's order No.A/1994 to 2001/WZB/AHD/2007 dated 31.07.2007 in case of M/s Tuton Pharmaceuticals & Others before the Hon'ble High Court of Gujarat, involving identical issue of goods cleared without payment of duty on quantity discount by way of giving goods free of cost; that the Hon'ble CESTAT has confirmed the duty on quantity discount allowed and set aside the penalty by holding that the issue involved is of legal interpretation and does not reflect upon any mala-fide on the part of appellants. All the 07 appeals were retrieved from call book, in view of Hon'ble Gujarat High Court's decision dated 21.01.2015, on the above referred appeal filed by the department.

8. From the facts of the case discussed above, I observe that the appeals involving the issue regarding quantity discount and valuation of physician samples come to decide before me at this stage, in view of [i] Hon'ble CESTAT's order No.A/1547/WZB/A'bad/2007 dated 20.06.2007 in case of the appellant, under which the CESTAT has remanded the case to the original adjudicating authority to decide the issue on the basis of Tribunal's LB decision in the case of M/s Indica Laboratories Pvt Ltd [2007 (213) ELT 20- LB] and in the case of M/s Blue Cross Laboratories Ltd [2006 (202) ELT 182 LB]; and [ii] Tribunal's order No. A/1994 to 2001/WZB/AHD/2007 dated 31.07.2007 in case of M/s Tuton Pharmaceuticals & Others.

9. While remanding the case to the adjudicating authority, the CESTAT vide order dated 20.06.2007 in case of the appellant *supra* has held that:

"Both sides appearing for the Revenue and respondent fairly agree that the issue involved as regards valuation of the goods under Section 4A as also of valuation of physician samples stand decided by the Larger Bench decision of the Tribunal in the case of M/s Indica Laboratory Ltd Vs CCE, Ahmedabad-II and in the case of M/s Blue Cross Laboratories Ltd V/s CCE Mumbai. Shri P.M.Dave submits inasmuch as there are other issues including the issue of limitation, matters may be remanded to the lower authorities for fresh decision.

In view of the above, we set aside the impugned order and remand the matter to the original authority for fresh decision in the light of the law declared by the Larger Bench referred supra. It is however made clear that the respondent is at liberty to raise the issue of limitation or any other plea in support of their defence during the denovo adjudicating. Revenue appeal is thus allowed by way of remand.



10. I, therefore, first take the issue regarding short payment of duty on quantity discount allowed by the appellant and imposition of penalty thereof, involved in the appeals mentioned at Sr.No.1, 5 to 7 of above table. I observe that in all the said appeals, the adjudicating authority has decided the issue of quantity discount on the basis Hon'ble Tribunal Larger Bench decision in case of M/s Indica Laboratories Pvt Ltd. Therefore, it is necessary to reproduce the gist of the said decision here.

"15.2 *The present case deals with P & P medicaments which are governed by the provisions of DPCO which prescribed in detail the mode of fixing the retail prices, the extent of margin to be given to the retailers, the manner of indicating the retail prices on the packages. It is also mandatory to affix retail prices even in packets of medicaments which are claimed to be supplied free. In the present case, it is basically the linked sale which is sale of 125 boxes at the price applicable to 100 boxes. Therefore, the claim that the goods are supplied free is not acceptable. The reliance placed by the appellant on the decision of the Tribunal in the case of Vinayaka Mosquito Coil Manufacturing Company cited supra is, therefore, misplaced. Further, we are not in agreement with the contention that if there is no sale, no duty is payable. No such ratio can be attributed to the order of Hon'ble the Supreme Court summarily dismissing the appeal against the order made by the Tribunal in Vinayaka Mosquito Coil Manufacturing.*

16. We, therefore, hold that :

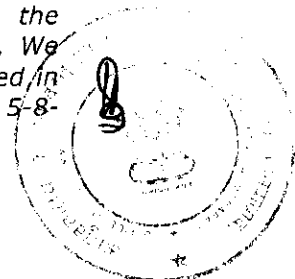
- (a) *Sale is not a necessary condition for charging to excise duty. Duty becomes payable (unless otherwise exempted) in respect of every removal of excisable goods.*
- (b) *The concept of quantity discount applicable in the context of valuation under Section 4 is not applicable in determining value under Section 4A for the forgoing reasons.*
- (c) *In the present case, the sale is for the gross quantity at the net price and the claimed free supply is not meant for the ultimate customer; such quantity claimed to be given also carried MRP. Therefore, duty shall be discharged on the entire quantity including goods covered as "the quantity discount" on the basis of valued arrived at under Section 4A after giving the abatement provided for.*

17. *In the light of the above we hold that the appeals are liable to be dismissed and accordingly dismiss the same."*

11. I observe that the above said decision was challenged before the Hon'ble High Court of Gujarat by M/s India Laboratories Pvt Ltd and the Hon'ble Court has issued notice on 22.06.2007. While issuing notice in the said appeal, the High Court has passed the following order:

5. Considering the reasons already recorded in the interlocutory order dated 13-6-2007 passed in Special Civil Application No. 14068 of 2007, we are not granting any stay against operation of the provisions of Section 4A of the Central Excise Act, 1944 or against operation of the judgment dated 21-5-2007 of the Larger Bench of the Customs, Excise and Service Tax Appellate Tribunal in Central Excise Appeal Nos. 183 & 184 of 2007.

6. However, in view of the statement being made by Mr. Paresh M. Dave that henceforth the petitioner will be paying, without prejudice to its rights and contentions in this petition, central excise on the goods being manufactured by it without availing of any quantity discount and that the interest payable as per the orders of the departmental authorities giving rise to this petition will be paid by 31st July 2007, we grant interim stay against recovery of penalty levied by the department, on account of the petitioner having availed of quantity discount. We make it clear that this interim stay against recovery of penalty is being granted in view of the fact that all along the petitioner was relying upon the decision dated 5-8-



2004 of the Tribunal in the case of Vinayaka Mosquito Coil Manufacturing Company v. CCE Bangalore, 2004 (174) E.L.T. 107, appeal against which was dismissed by the Hon'ble Supreme Court on 3-1-2005 and it is only recently on 21-5-2007 that the Larger Bench of the Tribunal has decided the matter against the petitioner."

12. In view of above referred decision, I am of the considered view that demand with interest confirmed by the adjudicating authority during the relevant period in dispute regarding payment of central excise duty on the goods being manufactured by the appellant without availing of any quantity discount is no more *res integra*; that the duty shall be discharged on the entire quantity including goods covered as "the quantity discount" on the basis of valued arrived at under Section 4A after giving the abatement provided for. Therefore, I uphold the decision of the adjudicating authority so as to it relates to confirmation of duty amount with interest on the said issue mentioned in the appeal mentioned at Sr.No.1 and 5 to 7 of above table.

13. Now, I take the issue of penalty imposed on the appellant. I observe that the adjudicating authority has imposed penalty equal to the duty amount under Section 11 AC of the Central Excise, Act, 1944(CEA) on the appellant mentioned at Sr.No. 1of above table, by invoking extended period and appellant mentioned at Sr. No. 5 to 7 of above table under normal period. The adjudicating authority, while imposing penalty, has held that the appellant has adopted a novel modus operandi to remove the goods without payment of duty and they never informed the department about the same. While remanding the case of department's appeal, The CESTAT vide order dated 20.06.2007 has directed the appellant to raise the issue of limitation or any other plea in support of their defence during the denovo adjudicating. Accordingly, they submitted before the adjudicating authority that all the clearances in question were reflected in their monthly return, which had been assessed by the officers without any objection; that where all the facts discussed in the show cause notice were within knowledge of the department, the notice issued to them is barred by limitation. I observe that the adjudicating authority has discussed the issue of limitation at a length in the impugned order. In the era of self-assessment, many documents were no more part of periodical returns and considerable amount of trust has been placed on the manufacturer. In the circumstances, the department has no way to notice the invoice wise clearances etc made by the appellant, unless they informed. In the instant case, it is an undisputed fact that during the relevant period in question, the appellant has never disclosed the department regarding clearance of quantity discount. In the circumstances, the adjudicating authority has rightly invoked the extended period.

13.1 However, as regards imposition of penalty in the said issue, I observe that the Hon'ble CESTAT, Ahmedabad has set aside the penalty imposed on identical issue in the case of M/s Tuton Pharmaceuticals & Others. The Hon'ble Court has held that:

9



3. It is seen that the appellants relied upon the Tribunal's decision in the case of *Vinayaka Mosquito Coil Mfg Co. Vs CCE Bangalore* reported in 2004 (174) ELT 107 (Tri-Bangalore), before the lower authority, in support of their plea that such free items would not attract any excise duty. At this stage, both side agrees that the law declared in case of *Vinayaka Mosquito Coil Mfg.Co* is no more good law, as the same has been over ruled by the Larger Bench's decision of the Tribunal in case of *M/s Indica Laboratories (P) Ltd & Others Vs CCE Ahmedabad*, vide final order No.1141 & 1142/WZB/Ahd/07 dated 21.05.07. However, Shri P.M.Dave, learned advocate submits that since the matter was not free from doubt and has been set at rest by Larger Bench's decision of the Tribunal, the appellants cannot be held to the guilty of any suppression or mis-statement, so as to invoke penalty clause against them. He accordingly prays for setting aside the penalty.

4. In view of the Larger Bench's decision of the Tribunal, the duties in all the appeals are confirmed. However, we agree with the learned advocate that the issue involved is of legal interpretation and does not reflect upon any mala-fide on the part of the appellants. Accordingly, the penalties imposed upon all the appellants are set aside."

As discussed in para 8 above, all the appeals were transferred into call book as the department has filed a Tax Appeal against the above said Tribunal's order before Hon. High Court of Gujarat. However, the Hon. High Court has dismissed the appeal on limitation of monetary ground that the tax appeal below Rs.10 lakh is not maintainable. Though the department has accepted the decision of Hon High Court on limitation of monetary ground, but by principal of law it appears that the department has not accepted the High Court's decision *supra*.

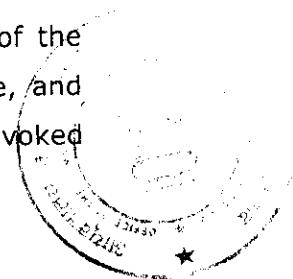
13.2 Further, I observe that the Hon'ble Tribunal, Ahmedabad in case of *M/s Saga Laboratories V/s CCE Ahmedabad-1* [2017 (346) E.L.T. 485], while deciding identical issue held that:

"5. On careful perusal of the records and the submissions of both the sides, we find force in the arguments of the learned Advocate that at the relevant time, there was sufficient reason for the appellants to have had bona fide belief that duty is not payable on the free supply of goods in view of the decision of the Tribunal in the case of *Vinayaka Mosquito Coil Mfg. Co. (supra)*. As the issue was under dispute and was finally settled only later by the decision of the Larger Bench in the case of *Indica Laboratories Pvt. Ltd. (supra)*, imposition of equivalent penalty under Section 11AC is not justified. Hence, we set aside the imposition of penalty under Section 11AC in respect of both the appeals. The impugned orders are upheld with the said modification."

The above referred decision has also been not accepted by the department and the appeal filed against the said decision by the department, by questioning penalty whether imposable for non-payment of duty on free supplies based on a Tribunal decision though issue settled later on by Larger Bench, has been admitted by the Hon. High Court of Gujarat [2017 (346) E.L.T. A145].

14. From the above discussions, I observe that the Hon'ble Tribunal in case of *M/s Tuton Pharmaceuticals & Others, M/s Saga Laboratories supra* and in case of *M/s Redson Pharmaceuticals* [2009 (235) ELT 191 (Tri-Ahmd)] has set aside the penalty imposed regarding issue of clearance of goods without payment duty on "quantity discount" on the ground [i] that the matter was not free from doubt and during the relevant period there was a decision by the Tribunal in favour of the assessee; and [ii] it is settled law that when the issue was under dispute, and there was *bona fide* belief on the part of the assessee, penalty cannot be invoked

[Signature]



under Section 11 AC of CEA. In the circumstances, though the department has preferred the appeal against the CESTAT's order on the issue, I am considering the view taken by the Hon. Tribunals in the above cited decisions on merit, especially on the ground that the Hon'ble High Court has stayed the recovery of penalty on the issue in the case of M/s Indiacal Laboratories Pvt Ltd *supra*. Accordingly by applying the ratio of the said decisions, I set aside the penalty imposed on the appellant mentioned at Sr.1, 5 to 7 for non-payment of duty on free supplies as quantity discount.

15. Now, I take the issue regarding valuation of physicians' samples. This issue involves only in the appeal mentioned at Sr.No.1 of above table, wherein the adjudicating authority has confirmed the demand of Rs.71,147/- with interest pertains to the period of 2003-04 to 2004-05 and imposed penalty equal to the duty amount. This issue was decided by the adjudicating authority vide the impugned order dated 31.01.2008 on the basis of Commissioner (Appeals) order No.143 to 146 dated 30.08.2006 and Hon. Tribunal's order No.A/1547/WZB/A'bad/2007 dated 20.06.2007 *supra*. The Commissioner (Appeals) remanded the case on the basis of appellant's contention that the duty paid by them on basis of DPCO (Drug Price Control Order) norm is much higher than 115% of cost production worked out in terms of CAS-4 norms which was not considered by the earlier adjudicating authority. The Hon. Tribunal has remanded the issue for fresh decision light of Larger Bench's decision in case of M/s Blue Cross Laboratories Ltd [2006 (202) ELT(182)-T LB], where in it has been held that "*Physician's samples distributed free are to be valued under Rule 4 of Valuation Rules based on value of such goods sold and delivered at any other time nearest to the time and place of removal of such samples*". I further observe that the decisions has been followed by the Hon. Tribunal Ahmedabad in case of M/s Cadila Pharmaceuticals [2008 (232) E.L.T. 245] and also affirmed by the Hon. High Court of Mumbai in case of M/s Indian Drugs Manufacturers Assocn [2008 (222) ELT 22].

15.1 However, I observe that the Hon. Tribunal, Ahmedabad, Division Bench has decided an identical issue in the case of CCE, Daman V/s Sun Pharmaceuticals Ltd, vide order dated 27.02.2009 [2009 (245) ELT 749]. A conflicting opinion/decision has passed in the said order by the two members of Tribunal. The Technical Member has taken a view that price was not the sole consideration and therefore, requirement of Section 4 (1) (a) of the CEA not fulfilled. On other side, the Member, Judicial took contrary view that all the conditions envisages by Section 4(1) (a) of the CEA i.e sales of the goods from the factory gate where price is the sole consideration and the buyer and seller are not related persons, stand fulfilled. However, both the decisions were referred to the third Member and the third Member has concurred with the view taken by the Technical Member.





15.2 By considering the appeal filed M/s Sun Pharmaceuticals Ltd against above referred order, the Hon'ble Supreme Court has decided the matter along with the appeal filed by the department in case of the same assessee against CESTAT order No. A/177-179/WZB/AHD/06 dated 10.11.2006. The Hon'ble Supreme Court's order is reproduced below:

6. As already noted above, the only ground which was mentioned in the Show Cause Notice was that since the goods had not been sold, the provisions of Section 4(1)(a) of the Act could not be applied. We find that in the show cause notice, the Department has, thus, accepted that no monetary consideration or any other consideration had been received by the assessee or the distributors from a doctor or concerned to whom free distribution of sample packs had been made. Further there was no allegation in the show cause notice that the price at which the goods were sold by the assessee to the distributors was not sole consideration. In fact, the genuineness of the price at which the physician samples were sold by the assessee to the distributors was not even doubted. It is only on the ground that the goods were not actually sold by the distributors to the physicians, which was the ground on which it was contended that the case was not covered under Section 4(1)(a). The CESTAT, therefore, in our opinion, has gone beyond the Show Cause Notice and on this ground alone, the judgment of the CESTAT dated 27-2-2009, which is the subject matter of Civil Appeal No. 3263 of 2009, warrants to be set aside. Civil Appeal No. 3263 of 2009 is, accordingly, allowed.

7. We now advert to the central issue, viz., whether provisions of Section 4(1)(a) of the Act are applicable or not.

8. Section 4 reads as under :-

"Section 4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time a) and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.

(b) ..

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section, -

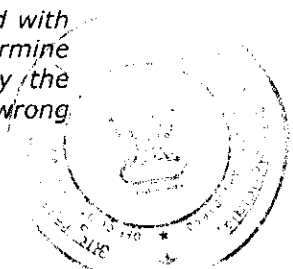
(a) to (cc)

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

9. As per the aforesaid provision, it is the transaction value which is to be determined and on which excise duty is payable.

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.

Vide above referred decision, I observe that the Hon'ble Supreme Court has been set at rest the issue of valuation of physicians' samples and hold that the valuation would be covered by the provisions of Section 4(1) (a) of the CEA.

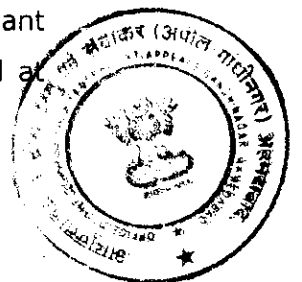
16 Since the Valuation Rules 2000 do not contain a specific rule for valuing physicians' samples, the CBEC has clarified the valuation of physicians samples, vide Circular No.643 dated 01.07.2002, wherein it has been stated that "Since the goods are not sold Section 4(1)(a) will not apply and recourse 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". The said circular has been amended vide Circular No.813 dated 25.05.2005, which states 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".

17. I further observe that vide circular No. 1006/13/2015-CX dated 21.09.2015, CBEC has ~~been~~ clarified that the Board Circulars contrary to the judgments of Hon'ble Supreme Court become non-est in law and should not be followed. In view of above, by applying the ratio of the decision of Hon'ble Supreme Court, the demand of differential duty in this issue is not sustainable and required to be set aside. Since the demand is not sustainable, the question of demanding interest and penalty thereof is also not sustainable.

16. Finally, I take the issue involved in the appeal mentioned at Sr.No.2 to 4 of above table regarding imposition of penalty on the employees of the appellant viz Shri Praful S Gupta, Quality Controller, Shri Praful A Shah, Director and Shri Prahlad R Sharma, Depot in-charge. I observe that the adjudicating authority has imposed penalty of Rs.10,000/-, Rs.50,000/- and Rs.10,000/- respectively as they have actively involved in short payment of central excise duty amounting to Rs.5,23,573/- by the appellant mentioned at Sr.No.1 of above table. As discussed above, since the penalty imposed on the appellant mentioned at Sr.No.1 of the table is set aside, the penalty imposed on the said employees of the appellant is also required to be set aside and I do so.

17. In view of above discussion, I partly allow the appeal filed by the appellant mentioned at Sr.No.1, 5 to 7 and the appeal filed by the appellant mentioned at Sr.No.2 to 4 above table is allowed.





18. All the 07 appeals are accordingly disposed of.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

Date: /11/2017.

Attested

(Mohan V.V.)

Superintendent (Appeal)

By RPAD

To

1. Bombay Tablet Mfg.Co.Pvt Ltd
Plot No.909, GIDC, Sector-28, Gandhinagar.
2. Praful S Gupta, Quality Controller
Bombay Tablet Mfg.Co.Pvt Ltd
Plot No.909, GIDC, Sector-28, Gandhinagar
3. Praful A Shah, Director
Bombay Tablet Mfg.Co.Pvt Ltd
Plot No.909, GIDC, Sector-28, Gandhinagar
4. Prahlad R Sharma, Depot in-charge,
Bombay Tablet Mfg.Co.Pvt Ltd
Plot No.909, GIDC, Sector-28, Gandhinagar

Copy to:-

1. The Chief Commissioner, CGST Zone, Ahmedabad.
2. The Commissioner, CGST, Gandhinagar
3. The Additional Commissioner, CGST, Gandhinagar
- ✓ 4. The Addl./Joint Commissioner, (Systems), CGST, Gandhinagar
5. The Dy. / Asstt. Commissioner, CGST Division Gandhinagar
6. Guard file.
7. P.A

