IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

FIRST APPEAL NO. 2231 OF 2014

Commissioner of Central Excise and Customs
Town Centre, N-5, CIDCO,
Aurangabad. **.. APPELLANT**

VERSUS

M/s Atra Pharmaceuticals Ltd.
MIDC, Waluj, Aurangabad. .. **RESPONDENT**

Mrs. Kalpalata B. Bharaswadkar, advocate for appellant.
=====

CORAM : R.M. BORDE &
A.I.S. CHEEMA, JJ.
DATE : 15th JANUARY, 2016.

PER COURT :

1. Heard learned counsel for appellant.

2. Appeal is presented by the revenue challenging the decision rendered by the Custom Excise and Sevice Tax Appellate Tribunal, Mumbai in Appeal no. E588/2008 decided on 03.09.2009 confirming the judgment delivered by the Commissioner, (Appeals) of Central Excise and Customs, Aurangabad, dated 26.03.2008.

3. Respondent is engaged in manufacturing medicaments and has been availing cenvat credit of duty paid on inputs under Rule 3 of Cenvat Credit Rules, 2002. Respondent is also manufacturing and clearing physician samples which are meant for free distribution to the physicians. In view of Board Circular dated 01.07.2002, the valuation of samples which were to be

distributed free as per marketing strategy or as gift or donation was to be done on 115% of the cost of production. The aforesaid circular was challenged in Writ Petition No. 246/2006 before the Principal Seat of this Court, however, the petition came to be dismissed by order dated 28.09.2009. It is the contention of revenue that respondent was paying duty on the physicians samples upto 22.06.2005 on the basis of value arrived at 110% of the cost of production. The duty was not being paid as per the Circular of the Board dated 24.04.2005 and as such, there was under-valuation. It was thus contended that respondent had contravened the provisions of section 4 of the Central Excise Act r/w rule 4 of the Central Excise Valuation (Determination of Excisable Goods) Rules, 2000, as respondent failed to pay proper duty on clearance of physician samples for a period between 25.04.2005 to 31.08.2006. The differential duty was worked out and it was held that respondent has willfully suppressed the facts and under-valued the product and as such, respondent is liable to pay the differential duty demanded together with interest and amount of penalty under section 11A. On an appeal presented to the Commissioner (Appeal), the duty demand was confirmed however, penalty imposed on respondent was waived. Aggrieved by the decision rendered by the Commissioner (Appeal), further appeal was presented by the revenue with the CESTAT which came to be dismissed.

4. Perused the judgment and order passed by all the authorities below. It is noticed that duty demand of Rs. 9,17,616/- has already been paid by the assessee almost 10 months before issuance of show cause notice. Since

the duty demand together with interest was paid before issuance of show cause notice and, since it was observed by both the authorities below that there was no intention on the part of the assessee to evade duty, the decision rendered by the Commissioner (Appeal) as well as CESTAT directing waiver of penalty under section 11AC of the Central Excise Act, 1944, does not appear to be erroneous. It has been observed that imposition of penalty under section 11AC of the Act is warranted only when there is fraud, collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or rules made thereunder with an intention to evade payment of duty. Since these circumstances do not exist in the instant matter, imposition of penalty worked out under section 11AC of the Act was not justified and has been rightly waived. Apart from that, as per the instructions issued by the Central Board of Excise and Customs on 17.12.2015, in respect of providing mandatory limit for filing appeal by the department before CESTAT, High Court or the Supreme Court, the threshold limit prescribed in that behalf should have been applied and the instant appeal ought not to have been presented by the revenue. Even otherwise, on consideration of merits of contentions also, no interference is called for in the appeal. Appeal is devoid of substance hence stands dismissed.

(A.I.S. CHEEMA)
JUDGE

(R. M. BORDE)
JUDGE

dyb