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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 124 OF 2016

Commissioner of Central Excise &
Service Tax ...Appellant

Versus

M/s. Macleods Pharmaceuticals Limited
(Unit-III) ...Respondent

Mr. Swapnil Bangur, for the Appellant.

Mr. M.H. Patil, a/w Mr. T. Chandran Nair, for the Respondent.

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA, JJ.

DATE : 14 December 2017

ORDER :

1. This Appeal under Section 35G of the Central Excise Act, 1944 ("***the Act***" for short) challenges the order dated 22nd November 2011 passed by the Customs, Excise & Service Tax Appellate Tribunal ("***the Trubunal***" for short). By the impugned

order dated 22nd November 2011, the appeal of the Respondent was allowed holding that the demands were barred by time under Section 11A of the Act.

2. Mr. Bangur, the learned Counsel for the Revenue, urges the following questions of law for our consideration:-

> "Whether as the facts and in the circumstances of the case the Tribunal committed error while interpreting provision of Section 11-A of the Act to hold the demands were barred by Limitation, as there was incomplete detail submitted in ER-1 form filed by the Assessee?"

3. The Respondent-Assessee is engaged in manufacture of pharmaceutical goods (goods) falling under Chapter 30 of the Central Excise Tariff Act, 1985.

4. On 11th November 2009 a show cause notice was issued to the Respondent-Assessee seeking duty aggregating to

Rs. 93.57 lakhs on goods removed during the period January 2005 to July 2007 without payment of duty. This on the ground that the Respondent-Assessee had not discharged the duty on free goods (the quantitative discount) under the provisions of Section 4A of the Act. The Respondent-Assessee contested the issue, both on merits as well as on limitation. However, the Commissioner of Central Excise by order dated 22nd October 2010 has confirmed the show cause notice demand of Rs. 93.57 lakhs and also imposed an equivalent penalty under Section 11AC of the Act.

5. Being aggrieved, the Respondent preferred the Appeal before the Tribunal. The Respondent conceded the issue on merits in view of the decision of the larger Bench of the Tribunal in ***Indica Laboratories Pvt.Ltd. Vs. Commissioner of Central Excise***[1] rendered on 21st May 2007. In the above case it has been held that no clearance of the goods (P & P medicaments) free of duty is available under Section 4A of the Act on the ground of quantitative discount. However, the

1 ***2007(213) ELT pg. 20***

Respondent-Assessee contested the demands confirmed by the Commissioner on it being barred by limitation, as being beyond the normal period of limitations.

6. The impugned order of the Tribunal on consideration of the facts record, held that the Respondent-Assessee has regularly being filing monthly ER-1 Return in which they have indicated the quantum of goods are being removed from their factory without payment of duty. This was along with details of the goods being cleared on payment of duty in the ER-1 Returns. The same was accepted by the authorities. Thus, on appreciation of facts, the Tribunal by the impugned order allowed the Appeal of the Respondent-Assessee on the issue of limitation as there was full disclosure of all facts (no suppression).

7. Mr. Bangur, the learned Counsel for the Appellant in support submits that once the Respondent-Assessee conceded on merits that the duty is payable on the goods removed without

payment of duty (on account of quantitative discount) *ipso facto* would be evidence of suppression on the part of the Respondent. In the above circumstances, the larger period of limitation under Section 11A of the Act is invocable. It was further submitted that in any event the ER-1 Returns did not indicate the rate of duty chargeable on the goods being cleared without payment of duty. This non-declaration of rate of duty amount to suppression entitling the Revenue to invoke the larger period of limitation.

8. We note that the period involved in this Appeal is from January 2005 to July 2007.

9. The submissions on the part of the Revenue that as the Respondent has accepted the larger Bench of the Tribunal in ***Indica Laboratories Pvt.Ltd.*** (supra) and conceded the fact that duty is payable on the goods (removed as quantity discount) on non-payment of duty without anything more amount to suppression *ipso facto* is not acceptable. This aforesaid

submissions ignore the fact till the larger Bench decision was rendered, there was a view taken by the Tribunal which was in accordance with the view taken by the Respondent-Assessee on merits. The fact that the issue was referred to a larger bench of the Tribunal would itself evidence that the issue was debatable. This debate or difference of view on the issue stood resolved only when the larger Bench decision in ***Indica Laboratories Pvt.Ltd.*** (supra) was rendered only on 21 May 2007. It is of thereafter, the Respondent was obliged to pay the duty of the same. The show cause notice in this case was issued on 11th November 2009.

10. Further, we note that the impugned order of the Tribunal on examination of facts has come to the conclusion that the Respondent-Assessee has made effective disclosure of the fact that they are clearing goods without payment of duty under its quantitative discount scheme. This was on the basis of the ER-1 Returns filed. This is being faulted by the Revenue on the ground that the rate of duty was not declared in the ER-1

Returns. The Tribunal has held that the Respondent has declared the facts that goods have been removed under the quantitative discount scheme. The mere non mentioning of the rate of duty in the ER-1 Returns would not by itself lead to suppression as rate of duty which was chargeable in respect of goods cleared without payment of duty is identical to the goods being cleared on payment of duty as is declared to the Revenue. This information is of no consequence to attribute lack of knowledge to the revenue inasmuch as the rate of duty of goods cleared on payment of duty and without payment of duty are identical as they fall under the same classification. Thus, the finding of the Tribunal are essentially findings of facts and would not give rise to any substantial questions of law.

11. In the above view, the question as proposed does not give rise to any substantial question of law. Therefore, Appeal dismissed. No order as to costs.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**