

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.06.2017

CORAM:

THE HONOURABLE THIRU.JUSTICE RAJIV SHAKDER
AND
THE HONOURABLE THIRU.JUSTICE R. SURESH KUMAR

C.M.A.No.488 of 2008

M/s.Tablets India Ltd.,
179, T.H. Road,
Chennai-600 081. Appellant

Vs.

1. The Customs Excise and Service Tax Appellate Tribunal
South Zone Bench, I Floor,
Shastri Bhavan Annexe,
Haddows Road,
Chennai-600 006.

2. The Commissioner of Central Excise,
Chennai-600 034. Respondents

PRAYER: This Civil Miscellaneous Appeal filed under Section 35 G of the Customs and Excise Act, to set aside the impugned Final Order No.172/2007, dated 23.2.2007 passed by the 1st respondent and thereby direct the 2nd respondent to sanction the refund as ordered by the 1st Appellate authority.

For Appellant : Mr. T.Ramesh

For Respondent : Mr.A.P.Srinivas

JUDGEMENT

1. This is an appeal directed against the final Judgment and order of the Customs, Excise and Service Tax Appellate Tribunal (in short, 'the Tribunal') dated 23.2.2007. The Appeal has been preferred by the Assessee.

2. The captioned appeal was admitted on 14.02.2008 and the following questions of law were framed for consideration by this Court:

"1. In the facts and circumstances of the case, where the entire proceeding was on the basis of Board Circular dated 01-07-2007 and the entire proceedings was on the basis of the said circular, whether the 1st respondent was correct in directing the authority to follow the another circular for the first time which was not the subject matter of the proceedings initiated against the Appellants for the denial of refund claim?"

2. In the facts and circumstances of the case, where it is well settled that the Board circular would be applicable only prospectively, whether the 1st respondent was correct in directing the authority to follow the Board circular dated 13.02.2003 for the past period?"

3. According to us, the main grievance of the Assessee is that the Tribunal while allowing its appeal has directed that the cost of production be calculated based on the circular dated 13.2.2003, issued by the Government of India, Ministry of Finance and Company Affairs, Department of Revenue (in short, '2003 circular')

4. The Assessee claims that this circular is based on the Cost Accounting Standards - 4 (in short, 'CAS - 4') which, inter alia, is concerned with determination of cost of production relating to captively consumed goods.

5. It is the Assessee's case that the Tribunal ought to have applied, instead, the circular bearing No.643/34/2002-CX, dated

1.7.2002 (in short, '2002 circular'), issued by the Central Board of Customs and Central Excise (in short, 'Board') in arriving at, the cost of production of the subject goods.

6. The Revenue, quite obviously, takes a contrary view and, thus, seeks to oppose the captioned appeal.

7. Therefore, in order to adjudicate upon the instant appeal, the following broad facts are required to be noticed:

7.1. The record shows that during the period in issue, i.e., 1.8.2001 to 31.7.2002, the Assessee cleared a major part of their production on payment of duty, which was calculated, based on the market price of the goods manufactured by it.

7.2. The Assessee, who is in the business of manufacture of P or P of Medicaments which fall under Chapter 30 of the schedule to the Central Excise tariff Act, 1985, also supplied, a part of their production, free of cost to physicians for promotion of their business.

7.3. Therefore, the Revenue was faced with a situation, as to how, that part of the production which was sold as physician's samples had to be valued.

7.4. The Assessee, however, paid duty on the physician's samples on the basis of assessable value arrived at, on a pro-rata basis, which was a ratio of the sale price of similar goods sold in the market.

7.5. It appears that at some point in time, the Assessee became aware of the 2002 circular issued by the Board and thus, proceeded to re-work the assessable value, in respect of the products put into the market in the form of physician's samples. Accordingly, the value arrived qua physician's samples by the Assessee was 115% of the cost of the production.

7.6. It appears that the Assessee found that upon re-working the assessable value, based on the aforesaid formula, it had, in fact, paid duty in excess, to the extent of Rs.39,82,302/-. Having become aware of this aspect of the matter, the Assessee filed for refund.

7.7. It appears that the show cause notice was issued to the Assessee as according to the Revenue, the assessee had not included in the cost of production, certain expenditure by treating the same as a component of selling and distribution expenses. The show cause notice issued to the Assessee was adjudicated, where upon, the assessee's refund claim was scaled down by the Adjudicating Authority to a sum of Rs.38,873/-.

7.8. Aggrieved by the same, the Assessee preferred an appeal to the Commissioner (Appeals). The Commissioner (Appeals) allowed the appeal which resulted in the Revenue approaching the Tribunal.

8. The Tribunal via the impugned Judgment and Order came to the following conclusions:

(i) That the assessable value of the physician's samples would be 115% of the cost of production of the goods;

(ii) The valuation of the physician's samples should be carried out in terms of CAS-4 read with, the 2003 circular;

(iii) Based on these conclusions, the Tribunal allowed Assessee's appeal and remanded the matter to the Adjudicating Authority for a de novo adjudication in terms of its order.

9. Mr. Ramesh, who appears on behalf of the Assessee says, that the Tribunal has erred in law and in fact in directing the application of the 2003 circular for the following reasons:

(i) The circular can apply only be prospectively. For this purpose, he relies upon the language of the circular, in particular, the use of the expression, "henceforth" in the circular. It is, thus, submitted that, since, the period in issue spans between 01.08.2001 and 31.7.2002, it cannot apply to the case of the Assessee.

(ii) The circular, pertains to valuation of captively consumed goods and therefore, has no relevance to the goods in issue, i.e., the physician's samples, which are not intermediate, but final products.

(iii) Since, the information with respect to the cost of production of physician's sample is available, there is no reason as to why the 2002 circular cannot be applied in calculating its assessable value.

10. Mr. Srinivas, on the other hand submits that, since, the Assessee was not able to provide the break-up of factory overheads for the periods, 2001-2002 and 2002-2003, the Tribunal chose to apply the 2003 circular. Furthermore, in support of his submissions, the learned counsel seeks to rely upon the impugned Judgment of the Tribunal.

11. Heard the learned counsel for the parties and perused the records.

12. According to us, what is required to be adjudicated upon is: as to how the Adjudicating Authority is to determine the assessable value of a physician's samples, which is, off loaded in the market, albeit, free of cost by the Assessee to promote its business.

13. Importantly, it is common ground between parties (as is recorded by the Tribunal) that the, physician's samples is to be valued at 115% of the cost of production of the goods. This principle of valuation, admittedly, emanates from the 2002 circular. If this is the principle which both parties seek to adhere to, we see no reason as to why the Tribunal was required to take recourse to the 2003 circular. As correctly argued by Mr.Ramesh, the 2003 circular applies to captively consumed goods. This is apart from his argument that the 2003 circular can only apply prospectively.

14. In our opinion, the assessable value of the Physician's sample can only be based on the actual cost of production to the assessee. The assessable value, as indicated in the 2002 circular, is 115% of the cost of production. The Tribunal having come to this conclusion, in our opinion ought not to have taken recourse to the 2003 circular. Mr.Srinivas's argument that because the Assessee was not able to furnish the break-up of factory overheads that the Tribunal was compelled to take recourse to the 2003 circular does not seem to emerge upon reading of the Judgement of the Tribunal. As a matter of fact, the Tribunal quite clearly, seeks to apply the 2003 circular which adverts to the CAS-4 methodology. Furthermore, as it appears, the Tribunal only to obtain more clarity qua the ascertainment of cost of production has remanded the matter to the Adjudicating Authority.

15. Thus, having regard to the foregoing discussion, we are of the view that the impugned order deserves to be set aside. It is ordered accordingly. The matter is, however, remanded to the Adjudicating Authority for processing the Assessee's refund claim in accordance with the principles reflected in the 2002 circular which sets the assessable value at 115% of the cost of production. The cost of production, as indicated above, can only be actual cost incurred by the Assessee in manufacturing the final product, i.e., Physician's sample. The final result of the refund application, however, can only be in accordance with law. Therefore, the questions of law as framed are answered in favour of the Assessee and against the Revenue.

16. The appeal is disposed of accordingly. There shall be no order as to costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Customs Excise and Service Tax Appellate Tribunal
South Zone Bench, I Floor,
Shastri Bhavan Annexe,
Haddows Road,
Chennai-600 006.

2. The Commissioner of Central Excise,
Chennai-600 034.

+1cc to M/s.T.Ramesh, Advocate, SR.No.44068

C.M.A.No.488 of 2008

RK(CO)
CU(13/07/2017)

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