केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

15744 to 1579

क फाइल संख्या : File No : V2(30)/41&24(EA-2)/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-345&346-2017-18**
दिनाँक Date : **23-02-2018** जारी करने की तारीख Date of Issue 17/3/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **20/CX-I Ahmd/JC/KP/2017** दिनाँक: **30/3/2017** issued by Joint Commissioner, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s LGS Formulations
Ahmedabad

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

Any person a 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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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.

(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।

(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 मामलें 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.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट 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 दिनाँक 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 प्रति 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–वी/35–इ के अंतर्गतः–

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

(क) 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 मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) 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.

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. Registar 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 ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

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 not withstanding 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 रू.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 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 in 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस 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।

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

The below mentioned two appeals have been filed by the appellants against OIO No. 20/CX-I Ahmd/JC/KP/2017 dated 31.3.2017 issued by the Joint Commissioner, Central Excise, Ahmedabad-I Commissionrate [for short - '*adjudicating authority*'], the details of which are as follows:

Sr. No.	Name of the appellant	Appeal No.	Review Order No. date and reviewed by
1	M/s. LGS Formulations, 5306, Pnase-IV, GIDC, Vatwa, Ahmedabad- 382 445	V2(30)41/AHD-I/2017-18	Not applicable
2	The Assistant Commissioner, Central Tax, Division III, Ahmedabad South Commissionerate.	V2(30)24/EA-2/Ahd-I/2017-18	6/2017-18 dated 30.6.2017, issued by the Commissioner, CGST, Ahmedabad South Commissionerate.

2. Briefly stated, a show cause notice dated 1.5.2015 was issued to the appellant mentioned at Sr. No. 1, *inter alia*, alleging that:

[a]they had wrongly classified their goods under CETSH 30039011 instead of 30049011;

[b]that they had wrongly availed benefit of exemption notification No. 1/2011-CE dated 1.3.2011 amended by notification No. 16/2012-CE dated 17.3.2012 and paid duty @ 2.06% on excisable goods manufactured and cleared by them during the period from April 2014 to February 2015; that they were supposed to pay Central Excise duty at the tariff rate being in force at the relevant time;

[c]that for arriving at the assessable value of the physicians sample, assessable value arrived as per Section 4A calculated on proportional basis has to be adopted, however, the appellant had cleared ayurvedic medicaments manufactured and cleared by them on the value arrived at based on the manufacturing cost + 10% and availed benefit of concessional rate of duty as per exemption notification no. 1/2011-CE as amended by notification no. 16/2012;

The show cause notice therefore demanded central excise duty of Rs. 28,26,128/- + 2,15,774/- along with interest, proposed penalty on the appellant; proposed to confiscate the excisable goods cleared during the period from April 2014 to February 2015; proposed to classify their goods under 30049011.

3. The adjudicating authority vide her impugned OIO dated 31.3.2017, held as follows:

(i)the products being manufactured by the appellant are classifiable under chapter heading 3004 of CETA '85;

(ii)that their product is being manufactured in compliance with the formula described in the authoritative books i.e. 'Aryabhishak' and mentioning name on the product as per the authoritative books specified in the first schedule to Drugs and Cosmetics Act, 1940; that they are eligible for the benefit of (a)notification No. 1/2013-CE dated 1.3.2013 as far as abatement of MRP is concerned and (b)notification No. 1/2011-CE dated 1.3.2011as amended by notification No. 16/2012-CE dated 17.3.2012 as far as payment at concessional rate of duty is concerned;

(iii) that they should have cleared the physician samples on MRP value as per Section 4A of the CEA '44 on payment of duty at tariff rate.

4. Feeling aggrieved, the **appellant-1,** has filed this appeal on the grounds that:

(a) the duty demand of Rs., 2,15,774/- for physician sample is ex facie illegal & void; that the appellant are prohibited from declaring sale price or retail sale price on physicians sample because the samples are intended for distribution to the medical profession as free sample; under these circumstance, assessment of physicians sample never be made on the basis of the value of such other goods sold by the appellant because assessment of such goods sold by the appellant is made on the basis of retail sale price printed on such other goods under Section 4A of the CEA '44;

(b) that in the present case, however physicians samples are not even sold nor are they meant to be sold by the appellant and therefore there is obviously no retail sale price declared on packages containing physicians samples of medicines;

(c) the adjudicating authority has erred in classifying the goods in question under chapter heading 3004;

(d) the adjudicating authority has listed the ayurvedic medicaments manufactured by the appellant with the details of ingredients use therein, and on the basis of such published ingredients, the adjudicating authority has concluded that the medicaments manufactured by the appellant were in *measured doses*;

(e)the true and correct meaning of the term *measured doses* has not been appreciated by the adjudicating authority and mere publication of ingredients has been wrongly construed as measured doses; that *measured doses* means "the quantity of medicament to be administered to a patient, as directed by the physician"; the term does not refer to use of specific ingredients but refers to preparation of predetermined quantity of medicine required to be administered in single doses to a patient for specific ailment;

(f) the HSN in respect of chapter heading 3004 mentions that measured doses should be in the form of tablets, ampoules, capsules, cachets, drops or pastilles prepared for taking as single doses for therapeutic or prophylactic use;

(g)that ayurvedic medicaments manufactured by the appellant are not prepared in pre determined doses and therefore the same cannot be classified under chapter heading 3004;

(h)the order of confiscation of the goods valued at Rs. 39,08,433/- is ex facie illegal, because none of these goods have ever been seized and all such goods have been cleared under proper central excise documents; that when there is no seizure, redemption fine cannot be imposed as per the judgement of Shiv Kripa Ispat [2009(235) ELT 623];

(h) that no justifiable reason or ground has been given for imposing penalty on the appellant; that where no suggestion or allegation of any malafide intention to evade payment of duty is even made out against the appellant there is no justification in the imposition of penalty in law as well as in facts;

(i) that the action of ordering recovery of interest under Section 11AA is without any authority in law in as much as the provision of section 11A is not attracted in the instant case;

4.1 The department has also filed an appeal against the impugned OIO dated 31.3.2017, raising the following averments that in a identical case the Commissioner(A) had informed OIA No. AHM-EXCUS-001-APP 090 & 091-2016-17 dated 31.3.2017, wherein the issue of classification, benefit of notification was decided; that the adjudicating authority has decided the issue in an erroneous manner which is neither legal or proper which needs to be quashed in the interest of justice.

5. Personal hearing in respect of the appeal mentioned at Sr. No. (1) supra, was held on 30.11.2017 wherein Smt. Shilpa Dave, Advocate appeared on behalf of the appellant. She reiterated the grounds of appeal and further stated that the issued had been decided vide OIA dated 31.3.2017. Shri Paresh M Dave, Advocate, appeared before me on 10.1.2018, on behalf of the appellant in respect of the departmental appeal mentioned at Sr. No. (2) and reiterated the grounds of appeal. In the written submissions on the departmental appeal, the appellant raised the following averments:

- that the grounds and appeal filed by the Revenue is not maintainable nor justified in facts as well as in law;
- the order of the adjudicating authority in dropping the demand of Rs. 28,28,128/- is legal and valid;
- that the ayurvedic medicament manufactured by the appellant are not in any pre determined doses and hence the same cannot be classified under chapter heading 3004 and is correctly classifiable under 3003;
- that the ayurvedic medicaments manufactured by them were in accordance with 'aryabhishak which is one of the authoritative books specified in the first schedule to the Drugs and Cosmetics Act, 1940;
- that the requirement of the products being manufactured in compliance with the formula described in the authoritative books as well as requirement of mentioning the name as specified in such books were duly complied with by them.

6. As is already mentioned in the departmental appeal, I have already decided the issue of the appellant vide OIA No. AHM-EXCUS-001-APP-090 & 091-2016-17 dated 31.3.2017. However, I would like to decide the issues one after the other:

[a]classification of finished goods i.e. whether under chapter sub heading 3004 as claimed by revenue or under 3003.

The adjudicating authority has classified the goods under chapter heading 3004 of CETA '85. However, I had already decided the matter, vide the OIA dated 31.3.2017, the relevant extracts is reproduced below:

> *8. I will go through these questions one after the other. Moving on to the first question supra, regarding* ***classification of goods****. The notice alleged that the ayurvedic medicaments put up in measured doses or in forms or packings for retail sale are classifiable under chapter sub heading 3004 instead of 3003. The adjudicating authority in his impugned OIO held that the basic difference of products to be classified under chapter sub heading 30049011 and 30039011 is that the former includes medicaments in measured doses while the latter includes medicaments not in measured doses; that on going through list of various medicaments of the appellant it is evident that each and every medicament is manufactured from mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses. The appellant however, has contested this finding by quoting Butterworth Medical Dictionary which defines 'measured doses' as – the quantity of medicament to be administered to a patient as directed by the physician and by quoting the explanatory notes of HSN under chapter sub heading 3004, wherein it is specifically provided that the measured doses should be in the form of tablets, ampoules, capsules, cachets, drops or pastilles prepared for taking as single doses for therapeutic or prophylactic use. The reasoning expounded by the adjudicating authority does not appear to be logical or tenable. Since the logic adopted by the adjudicating authority in classifying the goods is flawed, the finding of the adjudicating authority classifying the goods manufactured by the appellant under chapter heading 3004 of Central Excise Tariff Act, 1985, is set aside.*

Since both the appellant and the departmental appeal has questioned the classification arrived at by the adjudicating authority in the impugned OIO, in view of the foregoing, it is held that the appellant's product is classifiable under chapter heading 3003 and the finding of the adjudicating authority classifying the product under chapter heading 3004 of the CETA '85 is set aside.

[b]whether the appellant is eligible for benefit of notification No. 1/2011-CE dated 1.3.2013 as amended by notification No. 16/2012-CE dated 17.3.2012. under chapter sub heading 3004 as claimed by revenue or under 3003.

The adjudicating authority has held that they are eligible for the benefit of (a)notification No. 1/2013-CE dated 1.3.2013 as far as abatement of MRP is concerned and (b)notification No. 1/2011-CE dated 1.3.2011as amended by notification No. 16/2012-CE dated 17.3.2012 as far as payment at concessional rate of duty is concerned. However, I had already decided the matter, vide the OIA dated 31.3.2017, the relevant extracts is reproduced below:

> *10.1 As far as the period from 1.4.2011 to 31.3.2014, is concerned, the appellant availed the benefit of notification No. 1/2011-CE dated 1.3.2011, as amended by notification No. 16/2012-CE dated 17.3.2012. For goods falling under chapter 30, the exemption is for excisable goods, as mentioned below:*
>
> *Medicaments (including those used in Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic systems), manufactured exclusively in accordance with the formulae described in the authoritative books specified in the First Schedule to the Drugs and Cosmetics Act, 1940 (23 of 1940) or Homeopathic Pharmacopoeia of India or the United States of America or the United Kingdom or the German Homeopathic Pharmacopoeia, as the case may be, and sold under the name as specified in such books or pharmacopoeia.*
> *[emphasis added]*
>
> *I find that the charge against the appellant is that the goods were not manufactured as per the formulae in the authoritative books and were sold by appellant-1 under their own brand name. It was precisely because of the aforementioned change that I had raised doubts and sought clarification from the advocate as to why certain ingredients which were a part of 'Arya Bhyishak' were not mentioned as ingredients in the cover of welzyme syrup. The advocate was not in a position to give a proper answer. The discussion held during the personal hearing is already mentioned in para 5, supra and is therefore not being repeated for the sake of brevity. Inspite of granting 15 days to provide necessary clarifications, nothing has been heard from the appellant's side till date. Inspite of providing ample time, appellant-1, has failed to rebut the allegations of the revenue that the goods were not manufactured as per the formulae in the authoritative books and were sold by appellant-1 under their own brand name. The confirmation of the demand along with interest and imposition of penalty in this respect is upheld.*

I find that in terms of notification No. 1/2011-CE dated 1.3.2011 as amended by notification No. 16/2012-CE dated 17.3.2012, as is already held, the appellant is not eligible for the benefit of the notification, in view of the reasons mentioned supra. Hence, I find that the adjudicating authority erred in allowing the benefit of the notification to the appellant. Thus, the finding of the adjudicating authority dropping the demand of Rs. 28,26,128/- is therefore, set aside. Consequently, I confirm the demand of Rs. 28,26,128/- along with interest and also impose penalty of an equivalent amount under Rule 25 of the Central Excise Rules, 2002.

[c] valuation of physicians sample

I find that the adjudicating authority has in respect to valuation of physicians sample, held that the appellant is liable to pay duty on MRP value as per Section 4A of the Central Excise Act, 1944 at tariff rate as the appellant is not eligible for the benefit of the notification No. 1/2011-CE dated 1.3.2011, as amended by notification No. 16/2012-CE dated 17.3.2012. I had in my earlier OIA dated 31.3.2017, in the appellant's case held that the valuation in respect of physicians sample is to be done under Section 4A and at tariff rate. However, the appellant has relied upon judgement of the Hon'ble High Court of

Gujarat in the case of M/s. Tuton Pharmaceuticals [SCA No. 14068/2007, 1030/2008, 28490/2007, 15858/2007, 15853/2007 and 28540/2007] delivered recently on 28.9.2017 and 5.10.2017. In the said case, the Hon'ble High Court decided two questions of law [a] vires of Section 4A of the Central Excise Act, 1944; and [b] question of levy of duty on free samples provided to the doctors. The Court held as follows : [relevant extracts only]

> *38.This brings us to the question of levy of duty on free samples provided to the doctors. There is no dispute that such samples provided to the doctors by way of marketing strategy are not charged. As per sub-rule (1) of Rule 96 of the Drugs and Cosmetic Rules, it is mandatory for the supplier that on such drugs intended for distribution to the doctors as free samples, the container must carry a label providing that "Physician's sample-Not to be sold". Thus, two things are firmly established. First that the samples were provided by the petitioners free of cost to the medical professionals and that such samples are not for sale in the market. In this context, if we peruse section 4A of the Act, as per sub-section (2) thereof for the goods notified under sub-section (1) which are excisable goods and are chargeable to duty of excise with reference to value instead of providing the formula for computing duty under section 4 the same would be charged on the retail sale price declared on such goods less abatement provided by the Government. For various reasons with respect to the free samples, sub-section (2) of section 4A would not apply. The free samples provided to the doctors are not chargeable to duty with reference to value since they do not carry any value. Free samples provided to the doctors do not carry any retail sale price. Under sub-section (1) of section 4A itself, the Central Government can notify goods in relation to which, under the provisions of the Standards of Weights and Measures Act or the rules made there under, it is necessary to declare on package, the retail sale price of such goods. The free samples provided to the doctors on the contrary contain necessary declaration required under the law that the samples are free of charge and are not for sale in the market. The very first requirement of sub section (1) of section 4A of the Act in such a case fails. For such reasons duty of excise cannot be levied on such free samples in terms of section 4A of the Act. The fallacy of the stand of the respondents that even in such cases, the excise duty would be levied in terms of section 4A would be exposed further when we notice that even in such cases for valuation of the samples Rule 4 of the Valuation Rules of 2000 is sought to be resorted to. The said Valuation Rules of 2000, in plain terms, would not apply to a case covered under section 4A of the Act. Firstly, Clause (c) of Rule 2 defines the term "value" as to mean value referred in section 4 of the Act. Further Rule 3 provides that the value of any excisable goods shall, for the purposes of clause (b) of sub-section (1) of section 4 of the Act, be determined in accordance with the said Rules. Rule 5 applies to the case where excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 the Act except in the circumstances in which excisable goods are sold for delivery at a place other than the place of removal. Rule 6 applies where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except where the price is not the sole consideration for sale. There are other Rules which also refer to the various situations envisaged in section 4 of the Act. From such provisions, it is absolutely clear that the Valuation Rules of 2000 would apply in a case where the duty of excise is levied under section 4 of the Act. The respondents cannot seek to levy duty under section 4A but apply the method of computation of the value of the goods which is devised for the purpose of section 4 of the Act. Clarificatory instructions dated 25.04.2005 do not lay down correct position in law.*
>
> *40. In the result, these petitions are disposed of with following directions:*
>
> *1. The petitioner's challenge to the vires of section 4A of the Act fails.*
> *2. It is clear that the excise duty on the doctors' free samples can be levied only under section 4 of the Act and not under section 4A.*
> *3. Any instructions and directions to the contrary is set aside.*

In view of the above judgement of the Hon'ble High Court of Gujarat, the finding of the adjudicating authority that the appellant is required to pay duty on MRP value as per Section 4A on free samples cleared by them is legally not tenable and is therefore set aside. The adjudicating authority in his findings in para 17 has held that the appellant was clearing

the physicians sample at value arrived by adding the manufacturing cost +10%. It is also mentioned that the appellant was availing the benefit of notification no. 1/2011-CE dated 1.3.2011 amended by 16/2012-CE dated 17.3.2012. I have already held supra that the appellant is not eligible for the benefit of these notifications. Hence, it would be appropriate to remand back the matter only for the limited purpose of determining the value of the physicians sample based on the aforementioned judgement of the Hon'ble High Court of Gujarat. The duty along with interest & penalty will be determined by the adjudicating authority subsequent to determining the valuation part of the physicians samples. Needless to state, that the appellant is not eligible for the benefit of the said notification.

[d] Redemption fine.

The appellant has contended that the order of confiscation of the goods valued at Rs. 39,08,433/- is ex facie illegal, because none of these goods have ever been seized and all such goods have been cleared under proper central excise documents; that when there is no seizure, redemption fine of Rs. 2,15,774/- cannot be imposed as per the judgement of Shiv Kripa Ispat [2009(235) ELT 623]. The contention being correct, I set aside the redemption fine of Rs. 2,15,774/- imposed on the appellant.

7. In view of the foregoing, the appeals filed by appellants are decided as follows:

[a]appellant's product is classifiable under chapter heading 3003;
[b]appellant is not eligible for the benefit of notification No. 1/2011-CE dated 1.3.2011 as amended by notification No. 16/2012-CE dated 17.3.2012; that the dropping the demand of Rs. 28,26,128/- is set aside; that the demand of Rs. 28,26,128/- stands confirmed along with interest and a penalty of the equivalent amount under Rule 25 of the Central Excise Rules, 2002 is also imposed on the appellant;
[c] confirmation of the demand of Rs. 2,15,774/- along with interest and penalty of Rs. 2,15,774/- in respect of physicians sample, is set aside and the matter is remanded back to the adjudicating authority for determination of value in terms of the judgement of the Hon'ble High Court of Gujarat. The duty along with interest & penalty will be determined by the adjudicating authority subsequent to determining the valuation part of the physicians samples.
[d] redemption fine of Rs. 2,15,774/- is set aside.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
8. The appeal filed by the appellants stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)

Date : 23.2.2018

केन्द्रीय वस्तु एवं सेवाकर (अपील-दक्षिण) आयुक्तालय, OFFICE OF THE COMMISSIONER CENTRAL GST(APPEALS-SOUTH) AHMEDABAD

Attested

(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad.

By RPAD.

To,

M/s. LGS Formulations,
5306, Phase-IV,
GIDC, Vatwa,
Ahmedabad- 382 445

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, Central Excise, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Excise Division-III, Ahmedabad South.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad South.
5. Guard File.
6. P.A.
7. JT. Commissioner, Central Excise, Ahmd South