केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

केंद्रीय कर भवन, 7th Floor, GST Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

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6675 to 6679

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(30)60/Ahd-South/2018-19
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-056-2018-19**
दिनाँक Date : **11-09-2018** जारी करने की तारीख Date of Issue _____ 23/10/2018

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

ग Arising out of Order-in-Original No. **MP/11/AC/Div-III/2017-18** दिनाँक: **13.03.2018** issued by Assistant Commissioner, Div-III, Central Tax, Ahmedabad-South

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

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 प्रकिया 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–बी/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

Appeal has been filed by M/s LGS Formulations, 5306, Phase-IV, GIDC Vatva, Ahmedabad [for short – 'appellant'] the appellant against OIO No. MP/11/AC/Div- III/2017-18 dated 13.03.2018 issued by the Assistant Commissioner, Central Excise, Division III, CGST Ahmedabad South Commissionerate [for short - '*adjudicating authority*'].

2. Briefly stated, a show cause notice dated 05.10.2017 was issued to the appellant, inter alia, alleging that:

[a] that they had wrongly availed benefit of exemption notification No. 16/2012 CE dated 17.03.2012 and Notification No. 1/2013 CE dated 01.03.2013 by clearing the goods on payment of duty @ 2.06% (including EC & HSEC) instead of pay the duty at the tariff rate on excisable goods manufactured and cleared by them during the period from September- 2015 to April-2016;

[b] that they had been paying Central Excise duty on the physicians sample of Ayurvedic medicaments manufactured and cleared by them on the valued arrived at based on the manufacturing cost + 10% and has been paying Central Excise duty on the assessable value arrived at under Section 4A (MRP based assessment) of the Central Excise Act, 1944

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

The show cause notice therefore, demanded central excise duty of Rs. 23,48,235/- + 3,24,702/- along with interest, proposed penalty on the appellant; proposed to confiscate the excisable goods cleared during the period from 01.09.2015 to 30.04.2016; proposed to classify their goods under 30049011.

3. The adjudicating authority vide his impugned OIO dated 13.03.2018, held as follows:

(i) that the ayurvedic medicines manufactured by the appellant are correctly classifiable under CETSH No 30039011;

(ii) that the appellant wrongly availed the benefit of exemption notification No. 1/2011-CE dated 1.3.2011 as amended by notification No. 16/2012-CE dated 17.3.2012 and therefore confirmed the demand of short paid duty of Rs. 23,48,235/- under section 11A(1) of Central Excise Act, 1944 read with Section 142 of CGST Act, 2017;

(iii) confirmed the demand of Rs, 3,24,702/- short paid on physicians' Samples, under Section 11(A) of Central Excise Act, 1944 read with Section 142 of CGST Act;

The adjudicating authority confirmed the demand along with interest and imposed penalty on the appellant. The adjudicating authority held the goods to be liable for confiscation but refrained from imposing any redemption fine.

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

(i) The Assistant Commissioner has rejected the benefit of exemption Notification, but the rejection is an action without jurisdiction. The conclusion by the adjudicating authority is also factually incorrect and overlooking the factual assertion made by the appellant in their letter dated 21.02.2018 submitted to the Superintendent (Audit). On a query raised by the Audit party as regards the claim to concessional rate of duty under Notification No. 01/2011, the appellant had clarified that the ayurvedic medicines manufactured by them were exclusively in accordance with "Arya Bhishak" which was one of the authoritative books specified in the first schedule to the Drugs and Cosmetics Act, 1940. Relevant extracts of the said book along with other documents like product permission granted by the Licensing Authority under the Drugs and Cosmetics Act, printed labels etc. were also submitted along with this letter. The adjudicating authority has however, rejected the benefit of the said notification on the ground that the product manufactured/by the appellant were sold in the market by them in their own trade names and not in the names specified in the 1st schedule to the Drugs and Cosmetics Act or pharmacopeia. The adjudicating authority has failed to appreciate that the label of our product also carried with its composition wherein names as mentioned in the specified books were incorporated on the label. Therefore, the requirement of the exemption notification was duly complied with by the appellant. Both the requirement of the product being manufactured in compliance with the formulae described in the authoritative books as well as requirement of mentioning the name as specified in such books were duly complied with. Moreover, the said notification has also been amended by virtue of Notification No. 1/2013 wherein even goods sold under different brand name i.e., brand name other than names mentioned in the authoritative text, are permitted for benefit of concessional rate of duty. Thus, assuming that the product was entirely under different brand name and without mentioning the names a specified under the authoritative text, the benefit of concessional rate of duty was available to the appellant from the date the said notification was amended vide Notification No. 1/2013. This amendment to the notification has also been overlooked by the adjudicating authority while concluding the issue against the appellant.

(ii) The order passed by the adjudicating authority is ex-facie illegal as the ayurvedic medicines manufactured by the appellant were correctly classified under SH No. 30039011 of the Tariff. In the impugned order, the adjudicating authority has held that the classification of the goods in question under Chapter Heading 3003 was not correct and the goods were correctly classified under Chapter 3004, which is wrong.
The duty demand of Rs. 3,24,702/- for Physician's samples is also illegal and void. The Hon'ble High Court of Gujarat in the case of Tuton Pharmaceuticals 2018 (360) E.L.T. 33 (Guj.) has held that Excise duty on physicians Samples can only be levied under Section 4 and not under Section 4A. In light of the Judgment of the Hon'ble Gujarat High court, the entire demand which is made under Section 4A is illegal and liable to be set aside in the interest of justice.

(iii) The Assistant Commissioner has also misdirected himself in upholding penalty as the Assistant Commissioner has not

given any justifiable reason or ground for imposing penalty on the appellants herein while passing the impugned order. As regards penalty, the appellant states that the action for imposition of penalty is also bad in law inasmuch as there is no violation of any nature committed by the appellants. The appellants have not acted dishonestly or contumaciously. The matter of penalty is governed by the principles as laid down by the Hon'ble Supreme Court in the landmark case of M/s Hindustan Steel Limited reported in 1978 ELT (J159) wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the asseessee was guilty to conduct contumacious or dishonest and the error committed by the assessee was not bonafide but was with a knowledge that the assessee was required to act otherwise, penalty might be imposed. It is held by the Hon'ble Supreme Court that in other cases where there were only irregularities or contravention flowing from a bonafide belief, even a token penalty would not be justified.

(iv) The action of ordering recovery of interest under Section 11AA of the Act is also without any authority in law inasmuch as the provision of Section 11AA is not attracted in the instant case. Section 11AA provides for interest in addition to duty where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment duty. In the instant case, there is no short levy or short payment or non-payment of any excise duty. The action of the authorities below ordering recovery of interest under Section 11AA of the Act is also bad and illegal and liable to be set aside. The order of the Adjudicating Authority is even otherwise bad, illegal, and incorrect, without any authority in law and jurisdiction and therefore, they deserve to be set aside.

(v) The appellant has prayed that impugned OIO passed by the Assistant Commissioner may be set aside with consequential benefits.

5. Personal hearing was held on 28.08.2018 wherein Smt. Shilpa Dave, Advocate appeared on behalf of the appellant. She reiterated the grounds of appeal and requested to condone the delay of one day.

6. I find that there is a delay of one day in filling the appeal. The appellant has requested to condone the delay of one day during the course of personal hearing. In terms of proviso to section 35 of Central Excise Act, 1944, I condone the delay.

6.1 The appellant in his grounds of appeal has stated that the adjudicating authority erred in classifying their goods under 3004. However, on going through the OIO, I find that the adjudicating authority has classified the goods in question under Chapter Heading 3003. Therefore, there is no merit in the grounds raised and the classification made by the adjudicating authority is upheld.

6.2 Now moving on to the rest of the issue, I find that there are mainly the following two issues, which have been raised by the appellant in the present appeal, viz.

[a] 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 ; and

[b] valuation of physicians' sample

6.3 I have already decided the aforementioned issues of the appellant vide OIA (i) No. AHM-EXCUS-001-APP-090 & 091-2016-17 dated 31.3.2017 and (ii) No. AHM-EXCUS-001-APP-347 & 348-2017-18 dated 23.02.2018. I now take up the issues one after the other:

Issue I : [a] 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

6.4 The adjudicating authority has held that the appellant had wrongly availed the benefit of the subject notification during the relevant period for which they were liable to pay differential duty of Rs. 23,48,235/-. I had already decided the matter, vide my OIA dated 31.3.2017 and 23.02.2018. The relevant extracts of OIA dated 31.03.2017 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.*

6.5 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

by me, **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 has correctly disallowed the benefit of the notification to the appellant. It is because of this aforementioned findings, the appellant is not eligible for the benefit of notification No. 1/2013-CE (NT) dated 1.3.2013.

7. **Issue II: [b] valuation of physicians' sample**

I have already decided the matter, vide my OIA dated 23.02.2018, the relevant extracts of which is reproduced below:

> *6. [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.

7.1 On the basis of above judgement of the Hon'ble High Court of Gujarat, the matter was remanded back to the adjudicating authority for determination of value in terms of the judgement of the Hon'ble High Court of Gujarat.

7.2 In view of the my earlier order based the judgement of the Hon'ble High Court of Gujarat , the findings of the adjudicating authority that the appellant is required to pay duty on MRP value as per Section 4A on physicians' sample, is set aside. 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 physicans' sample.

8. In view of the foregoing, the appeals filed by appellant decided as follows:

[a] 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 and the notification No. 1/2013 dated 01.03.2013; that the confirmation of demand of Rs. 23,48,235/- is upheld along with interest and penalty.

[b] confirmation of the demand of Rs. 3,24,702/- along with interest 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.

09. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

09s. The appeal filed by the appellant stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)

Date : 11.9.2018

Attested

(Vinod Lukose)
Superintendent (Appeals),
CGST, Ahmedabad.

By RPAD.

To,

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

Copy to:-

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