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- Audit - 2011

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX  
PLOT NO. 6776/B1, "SIDDHI SADAN" BUILDING,  
NARAYAN UPADHYAY MARG,  
BHAVNAGAR - 364 001.

OIO No. 16 (1)

F. No. V/15-72/Dem/HQ/2010-11

Date of order : 30.12.2011

Date of issue : 19.01.2011

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No. 16/ADC/BVR/2011-12

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this order may appeal against this order to the Commissioner Central Excise (Appeals), Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.50 paise only.

The appeal should be filed in form EA-1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2002.

- It should be accompanied with the following :
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy OR the other must bear a court fee stamp of Rs. 2.50 paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Sub:-Show Cause Notice Number F. No. V/15-72/Dem/HQ/2010-11 dated 18.4.2011.

BRIEF FACTS OF THE CASE

1. M/s Mepro Pharmaceuticals (P) Ltd. (Unit II), Q Road, GIDC, Wadhwan City, (hereinafter referred to as "assessee"), holding the Central Excise Registration No. AABCM4177GXM002 is engaged in the manufacture of PP Medicines falling under chapter 30 of the Central Excise Tariff Act, 1985 as amended. The assessee is engaged in manufacturing of PP Medicines for their customers and clearing the same by affixing the brand name / trade name of their respective customers on these medicines. The said PP medicines were the notified goods under Section 4A of the Central Excise Act, 1944.

1.1 During the course of audit of the assessee, it was observed that the assessee had cleared the physician samples on payment of duty by assessing the value as transaction value of the said goods. Central Board of Excise & Customs, New Delhi vide Circular No. 813 /10/2005-CX dtd.25.04.2005 had clarified that "in case of free samples, the value should be determined under Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000". Therefore, the information regarding the clearance of physician samples and duty paid thereof was called for from the assessee for the period from April, 2010 to September, 2010 and information so received is attached to show cause notice as Annexure "A". Scrutiny of information (given in Annexure "A") revealed that the assessee had cleared the physician samples by determining the value under Section 4(1)(a) of the Act and paid the duty based on value so arrived at.

1.2 The assessee had been determining the value of goods viz. PP Medicaments on the basis of MRP declared on the packing of the goods after deducting allowed abatement. The physician's samples of the PP Medicaments are also sold to customers along with the PP

Medicaments meant for retail sale. Therefore, the goods which have been sold claiming as physician samples of PP Medicaments and the PP Medicaments which have been sold affixing MRP thereon are similar goods. Hence, the value for the purpose of payment of duty of physician's samples cleared should be determined on the basis of MRP excluding abatement under Section 4A of such goods viz. PP Medicaments.

1.3. In terms of Board's Circular No. 813 /10/2005-CX dated 25.04.2005, the value of physician's sample should be determined under Rule 11 read with Rule 4 of the Valuation Rules. Further, Central Board of Excise & Customs, New Delhi vide Circular No. 915/5/2010-CX dated 19.02.2010 had clarified that the value for payment of excise duty for physician's sample would be the value determined under Section 4A for the similar goods (subject to adjustment for size & pack etc.). The details of amount of duty involved and required to be paid by the said assessee under section 4(1)(a) of the Central Excise Act, 1944 is as per Annexure "B", attached to the show cause notice. It was found from the said "Annexure "B" that assessee had short paid the duty by Rs. 7,64,224/- (inclusive of Basic Excise Duty and Educational Cess and Secondary Higher Education Cess) for the period from 1.4.2010 to 30.9.2010.

1.4. The work sheet at "Annexure-B" covers product wise quantity cleared, rate adopted for sample pack and details of assessable value and excise duty paid from column No. 3 to 11, the assessable value is arrived based on MRP subject to deduction of abatement and excise duty payable from column No. 12 to 19. Differential duty has been arrived at column No. 20 to 22.

1.5. The assessee had not paid the duty on physician's samples as per the provisions of Valuation Rules and not declared the same in their periodical returns in the form ER-1. Assessee continued the practice of assessing the value of physician's sample as per Section 4 inspite of the fact that they were made aware of the correct method of valuation of the physician's samples in earlier notices and under the Board's Circulars referred to in para supra. Therefore, the assessee had contravened the provisions of Rule 6 of the Central Excise Rules, 2002 with intention to evade payment of duty and they are liable for penalty under Section 11AC of the Act.

1.6. In view of the foregoing paras, duty amounting to Rs. 7,64,224/- (inclusive of Basic Excise Duty and Educational Cess and Secondary Higher Education Cess) as detailed in Annexure "B" to this show cause notice was required to be recovered from the assessee for the period from 1.4.2010 to 30.9.2010 along with the interest under section 11A and 11AB of the Act.

7. Accordingly, the show cause notice was issued to M/s Mepro Pharmaceuticals (P) Ltd. (Unit II), Q Road, GIDC, Wadhwan City, asking them to called upon to show cause as to why:

- a) Differential duty amounting to Rs. 7,64,224/- (Rupees seven lacs, sixty four thousand, two hundred and twenty four only) (inclusive of Basic Excise Duty Rs. 7,41,974/- and Education Cess Rs.14,834/- and Secondary Higher Education Cess Rs. 7,416/-) as detailed in Annexure "B", attached thereto should not be recovered from them under Section 11A of the Central Excise Act, 1944.
- b) Interest at the appropriate rate should not be levied on the duty short paid under the provisions of Section 11AB of Central Excise Act, 1944.
- c) Penalty should not be imposed upon them under Section 11AC of the Central Excise Act, 1944.

#### **WRITTEN SUBMISSIONS:**

2.1 The Notice vide their letter dated 25.5.2011 submitted reply to SCN, wherein they interalia submitted as under:

- 1) The physician samples are not meant for retail sale; the package of the goods clearly bear the remark that the goods are meant for free distribution to the doctors and are not meant for sale; The words 'not meant for sale' means not meant for retail sale.

OIO Na. 16 (3)

- 2) The CBEC has clarified that when no MRP is affixed on the product, the value of the product shall be determined in terms of section 4 of the Central Excise Act. The circular No. 625/16/2002 is applicable to the facts.
- 3) MRP is not required to be affixed statutorily on physician samples; the products are clearly marked 'samples not for sale'.
- 4) When value under section 4(1)(a) is available, no recourse shall be made to Rule 4 of Valuation Rules. The Central Board of Excise & Customs vide circular No. 625/16/2002 CX dated 28-2-2002 has clarified that where the products which are notified under section 4A of Central Excise Act, if the manufacturer is not legally obliged to print MRP on the packages of goods, the value for such product shall be determined in terms of section 4 of Central Excise Act.
- 5) As mentioned above, the Noticee manufacture products on loan licence basis as well as manufacture the goods for one customer. In case of products manufactured for one customer, these samples are sold to them. For example, product Ramistar 10 Cap PS is sold to M/s Lupin Ltd. The prices at which the goods are sold to the customers represent the transaction value under section 4 of Central Excise Act. It has all the ingredients of transaction value under section 4 of Central Excise Act. Therefore, value under section 4 of Central Excise Act is available and recourse to Rule 4 of Valuation Rules, 2000 should not be availed.
- 6) The Noticee cited following citations in support of their contentions:
  - a. Jayanti Food Processing (P) Ltd. Vs. Commissioner of Central Excise, Rajasthan 2007 (215) ELT 327 (SC);
  - b. Grasim Industries V/s CCE 2004 (164) ELT 257;
  - c. Filament India V/s CCE 2003 (160) ELT 314 and
  - d. Tata Engineering V/s CCE 2005 (185) ELT 165.
- 7) Rule 4 is notified under section 4(1)(b). The provisions of section 4(1)(b) is applicable only when value under section 4(1)(a) is not available. Rule 3 of the Central Excise Valuation Rules 2000 clearly specifies that value of excisable goods shall for the purpose of clause (b) of section 4(1) be determined in accordance with the rule.
- 8) The show cause notice also admits that they manufacture and sell the goods (samples). In this case, the price under section 4(1)(a) is available.
- 9) In this connection the Noticee relies upon the judgment of Hon. Commissioner (A) in the following cases:
  - a. Medibios Laboratories (P) Ltd. Order in appeal No. KKS/21/Th-II/09 dated 13.02.2009 Amstrin Pharma (P) Ltd.,
  - b. Order in appeal No. SRK/335&336/M-II/2007 dated 06.09.2007
- 10) The Noticee also cited case law of Hon. Mumbai High Court in case of Indian Drugs Manufacturers Association reported in 2008 (222) ELT;
- 11) Since, the value under section 4 is available, the proportionate price of the value under section 4 shall be considered. The demand therefore is required to be recomputed in case the contention mentioned in para 1 and 2 is not accepted.
- 12) The Noticee further relied upon case of Mayer Health Care (P) Ltd. vide order No. 361/2009 wherein it has held that when the transaction value is available, the duty is payable on the said transaction value and not on the value determined under rule 4 of the Central Excise Valuation Rules.

- 13) Though the physician samples are sold to distributors, they are actually meant for free distribution to doctors or chemists. They are not sold in the open market. They are sold on principal to principal basis based on the transaction value. Hence, the manufacturer is not obliged to print MRP on the package as they are not meant for retail sale. Since the manufacturer is not obliged to print the MRP, the provisions of section 4(A)(4) will not apply as it is applicable only for the manufacturers who are required to declare the retail sales price on the package.
- 14) With regard to penalty under section 11AC of the Central Excise Act, 1944, Central Board of Excise & Customs, New Delhi has in July 2002 clarified that the value is required to be determined in terms of Rule 8 of the Central Excise Valuation Rules, 2000. However, subsequently in April, 2005, the said clarification was withdrawn and it was clarified that the value shall be determined in terms of Rule 4 of the Central Excise Valuation Rules, 2000. This itself substantiate that there is a confusion in interpretation of the provision of Valuation Rules for determining the value of samples. The revised circular substantiate that two views on determination of value of physician sample is possible. The Tribunal has in the following cases held that Rule 4 of the Central Excise Valuation Rules 1975 does not apply for determination of value.
- a. Mayo India Ltd. 2001 (127) ELT 192 (T)
  - b. Cheryl Lab 1997 (93) ELT 129 (T)
- 15) The Noticee was under the bonafide belief that the value is not required to be determined under Rule 4 of the **Valuation Rules, 2000**. Therefore, it is submitted that no penalty shall be levied.
- 16) No penalty shall be levied when dispute relates to interpretation of the provision of the Act or rules. In this case, the dispute is the applicability of rule for determination of value for samples. Therefore, no penalty shall be levied. The Noticee relies upon the following judgments:
- a. Blue Cross laboratories vide order no. A/1529/C-IV/SMB/2007
  - b. M/s Sports & Leisure Apparel Ltd. CCE., Noida 2005 (180) ELT 429
  - c. Aquamall Water Solutions Ltd. 2003 (153) ELT 428.
  - d. Morarjee Brembana Vs. Commissioner of Central Excise, Belapur 2003 (154) ELT 500 (Tri-Mum)
  - e. Hanil Era Textiles Ltd. Vs. Commissioner of Central Excise, Belapur 2007 (210) ELT 414.
  - f. Sona Wires Pvt ltd. Vs. CCEx. 1996 (87) ELT 439 (T)
  - g. Synthetics & Chemicals Ltd. 1997 (89) ELT 793 (T)
  - h. Man Industries Corporation 1996 (88) ELT 178 (T)
- 17) There is no malafide intention. They also relies upon the following judgments:-
- a. Cosmic Dye Chemical Vs. Collector of Central Excise , Bombay 1995 (75) ELT 721 (SC).
  - b. CCE Vs. Chemphar Drug and Liniments 1989(40) ELT 276 (SC)
  - c. Pushpam Pharmaceuticals company VS. CCE Bombay 1995 (78) ELT 401 (SC)
- 18) The Tribunal has recently in the case of Themis Laboratories (P) Ltd. vide Order No. A/187-189/11/EB-C-II dated 1.2.2011 has decided the issue relating to valuation of physician samples when the same is sold to the brand owner. The Tribunal held that since the price under section 4(1)(a) is available, the value of the goods shall be considered based on the said price. The judgment of Hon. Mumbai High Court in the case of Indian Drug Manufacturers Association has not been followed as the judgment of Hon. High Court was based on different facts. The fact of the case of IDMA was different than in the case of M/s Themis Laboratories. The Tribunal relied upon the judgment in the case of Meyer Healthcare Ltd.

**PERSONAL HEARING :**

OIO No. 16 (5)

2.2 Shri Manoj Chauham, CA appeared personal hearing in this case on 5.12.2011 on behalf of the Noticee. He also submitted written submission, wherein interalia stated as under:

- (i) Issue no longer res integra, the tribunal in the case of the Themis Laboratories (P) Ltd. has held that valuation of physician samples manufactured and cleared to brand owners/buyers on principal to principal basis for a consideration and which are further distributed/delivered by the buyer free of cost to physicians/doctors shall be based on the transaction value under section 4.
- (ii) Transaction value adopted by the Noticee for the valuation of physician sample sold to brand owner is correct. The Noticee relied upon following citations in support of their contention
  - (a) GELNOVA LABORATORIES (I) P LTD VS COMMISSIONER OF CENTRAL EXCISE, BELAPUR 2011-TIOL-1387-CESTAT-MUM.
  - (b) SOFTSULE PVT LTD VS COMMISSIONER OF CENTRAL EXCISE, MUMBAI-III COMMISSIONER OF CENTRAL EXCISE, MUMBAI-III 2011-TIOL-1439-CESTAT-MUM
- (iii) The physician sample is sold to the brand owner. For instance vide Purchase Order no. 4200008226 dated 14.06.2010 Lupin Ltd. raised PO for purchase of various products. The unit rate is defined in each of the products. For item code 800116, quantity declared is with a unit rate of 1.97 per UOM/pack( exclusive of Excise Duty & CST). Quantity of 21650 of the said product was removed from the factory vide Excise invoice No. 0434/10-11 dated 30/08/2010. The unit rate of goods declared in the invoice is Rs. 1.97 totaling to Rs. 42650.50. Further vide commercial invoice No. 0434/10-11 dated 30/08/2010, the company charged CST @ 5% i.e. Rs. 2,220.38 on sale of the said product. Thus the value of the physician sample was already known at the time of removal of the goods from the factory. Further, the company has charged CST which makes it evident that the company has sold the physician sample to Lupin Ltd for a consideration and not free.
- (iv) The Noticee has been receiving periodical show cause notice from the period beginning from September 2006 on the valuation of physician sample. For the period from September 2006 to March 2009, the said show cause notice were adjudicated by Commissioner vide OIO no. 38 to 41/BVR/Commissioner/2009 dated 18.06.2009 confirming the demand made in show cause notice. The company has filed an appeal against the said O-I-O in the tribunal who vide order No. S/339/WZB/AHD/2010 dated 19.04.2010 had granted stay.

**DISCUSSION & FINDINGS:**

3.1 I have gone through the SCN, material/evidence available on records, submission made by or on behalf of the Noticee as well as those argued at the time of personal hearing.

3.2 The Noticee is the manufacturer of Pharmaceuticals goods falling under Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985, holding valid Central Excise Registration No. No.AABCM4177GXM002, and discharging central excise duty liability on the assessable value determined under Section 4A of the Central Excise Act, 1944 on the basis of MRP as notified from time to time. The Noticee had also cleared physician samples on payment of duty based on transaction value in terms of the provision of Section 4 of the Central Excise Act, 1944.

3.3 The issue for determination in the instant proceeding is the valuation of physician samples as to whether the physician samples is to be valued based on transaction value or duty is to be paid on MRP basis under Rule 4 of the **Central Excise Valuation Rules'2000**.

OIO No. 15 (6)

3.4 In the present case, the Noticee is manufacturing the PP Medicines under an agreement made between them and several other brand owners affixing their brand name. The PP Medicines are being manufactured as per specification, standard and quality control norms as given by brand owners customers. These brand owner customers have their own marketing network through which they penetrate the PP Medicines in open markets. The marketing right of these PP Medicines are not in hand of the manufacturer i. e. the Noticee in as much as the Noticee cannot decide as to whether these goods are to sold or distributes free as well as determination of MRP is also governed by the Brand Owner customers. All the PP medicines which are being manufactured by the Noticee are solely sold to the brand owners.

3.5 Therefore, this is not a case, where the Noticee is supplying free samples, but these samples are also being sold to the same brand owner customers to whom the PP Medicine is being sold on the agreed price.

3.6.1 The Noticee argued that provision of Section 4A is not applicable to them as there is no requirement of declare MRP on physician samples. Further, since value under Section 4 is available as per agreement, there is no requirement to resort any other method to arrive at value of goods for the purpose of charging duty of excise.

3.6.2 In the present case, the physician samples of PP Medicines are being manufactured by the Noticee under terms & condition of agreement executed with brand owner customers along with PP Medicines. The Noticee is collecting agreed consideration for manufacture of PP Medicine as well as physician samples of PP Medicine. Therefore, for the Noticee, PP Medicines and the sample of PP Medicines are same because both are being sold to the Brand owner customers against agreed consideration.

3.6.3 There is a significance difference between the physician sample manufactured by Brand Owner itself and get manufactured from other manufacturer against consideration. In the case where the physician samples are manufactured by Brand owner itself, the same is removed from factory of production, against NIL consideration as to distribute free. But, when the physician samples are got manufactured from other manufacturer against consideration, the same is removed from factory of production, as sale against agreed consideration. Thus, once the incident of sale of product is occurred, the value is required to be decided based on normal valuation of medicines i.e. under Section 4A of the Central Excise Act, 1944.

3.7 The issue of valuation of the physician samples for the purpose of levy of excise duty, has dealt by the Apex court in case of Civil Appeal No. 3626 of 2005 & Civil Appeal Nos.1354-1355 of 2010 in the matter of Medley Pharmaceuticals Ltd versus Commissioner of Central Excise, Gujarat, wherein the Supreme Court in order dated 14.01.2011 has observed as under:

*"41) Now coming to the valuation of the physician samples for the purpose of levy of excise duty, in our view, this issue need not detain us long in view of the decision of this Court in the case of Commissioner of Central Excise vs. M/s Bal Pharma [Civil Appeal No. 1697 of 2006]. This Court has upheld the conclusion of the Tribunal that the physician's samples have to be valued on pro-rata basis. The Tribunal, while arriving at the aforesaid conclusion, had relied upon its earlier decision in the case of Commissioner of Central Excise, Calicut vs. Trinity Pharmaceuticals (P) Ltd., reported as 2005 (188) ELT 48, which has been accepted by the department. Therefore, we hold that physician samples have to be valued on pro-rata basis for the relevant period."*

3.8 In view of the above, the issue of valuation has set at rest by the Apex Court. Accordingly, the value of physician sample of PP Medicine is required to be determined on the basis of pro-rata basis. Since the PP Medicines are being cleared by the Noticee by resorting valuation in terms of the provision of Section 4A of the Central Excise Act, 1944, therefore, the value of physician sample of PP Medicines is required to be determined on pro rata of the value of PP Medicines.

OIO No. 16 (7)

3.9 In the present case, the value of physician sample of each PP Medicines has arrived by pro-rata value of declared MRP, considering the quantity of PP Medicine in each sample pack, which is as per the decision of the Apex Court.

3.10. In light of the facts and circumstances of the case as enumerated hereinabove, I find that value of physician samples of PP Medicines, which is being sold, is to be determined based on pro-rata value as per Section 4A of the Central Excise Act, 1944. Therefore, during the period from April, 2010 to September, 2010, the Noticee has short paid duty of excise on clearances of physician samples of PP medicines worked out to 7,64,224, which is liable to be recovered from the Noticee under Section 11A of the Central Excise Act, 1944 alongwith interest under Section 11AB of the Central Excise Act, 1944. The present issue has already been decided by the Commissioner against the Noticee, however, the Noticee has continued the said practice with sole intention to evade duty of excise, therefore the Noticee rendered themselves liable for penalty under Section 11AC of the Central Excise Act, 1944.

3.11 In view of the above, I pass the following order:

### ORDER

- I. I confirm an amount of 7,64,224/- (Rupees seven lacs, sixty four thousand, two hundred and twenty four only) being differential duty on clearances of physician samples for the period from 1.4.2009 to 30.9.2009 and order to recover from the Noticee under Section 11A of the Central Excise Act, 1944, which should be paid forthwith by the Noticee;
- II. I order to charge and recover interest on the confirmed amount under Section 11AB of the Central Excise Act, 1944 which should be paid forthwith by the Noticee;
- III. I impose penalty of 7,64,224/- (Rupees seven lacs, sixty four thousand, two hundred and twenty four only) upon the Noticee under Section 11AC of the Central Excise Act, 1944 which should be paid forthwith by the Noticee;

SHI-

ADDITIONAL COMMISSIONER

To,  
M/s Mepro Pharmaceuticals (P) Limited (Unit-II),  
Q Road,  
GIDC, Phase IV,  
Wadhwan City,  
District Surendranagar

Copy to :-

- (i) Commissioner, Central Excise, Bhavnagar.
- (ii) Assistant Commissioner, Central Excise, Surendranagar,
- (iii) Deputy Commissioner(Audit), Central Excise, Bhavnagar.
- (iv) Superintendent, Central Excise, AR- II, Surendranagar
- (v) Guard File.

*[Signature]*  
29/11/2012

ADDITIONAL COMMISSIONER