- Audit-2009

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

F. No. V/15-25/Dem/HQ/2009

Date of order : 30.12.2011
Date of issue : 27.02.2011

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No. 17/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 No. F. No. V/15-25/Dem/HQ/2009 dated 19.05.2009.

Brief Facts :

1. M/s Mepro Pharmaceuticals (P) Limited, Unit-II, GIDC, Wadhwan City hereinafter referred to as "assessee", holding Central Excise Registration No. AABCM4177GXM002 is engaged in the manufacture of PP medicaments falling under chapter 30 of the Central Excise Tariff Act, 1985. The asseessee is also availing the benefit of Cenvat credit as provided under Cenvat Credit Rules, 2004.

1.1 It was observed by the Audit during the course of scrutiny of Central Excise records and other relevant records of the said assessee that they had received back its own duty paid goods i. e. 1125198 strips of tablets and capsules (final products i.e. PP medicaments) during the period from March, 2008 to August, 2008. The said assessee availed CENVAT credit of Rs. 33,49,228/- (CENVAT duty credit of Rs. 32,69,389/- + Education Cess of Rs. 65,884/- and Secondary and Higher Education Cess of Rs. 13,995/-) under Rule 16 of the Central Excise Rules, 2002. The assessee had again cleared 898724 strips of PP medicaments during the period from May, 2008 to February, 2009 and paid Central Excise duty of Rs 3,39,635/- (CENVAT duty credit Rs. 3,29,750/- + Education Cess of Rs. 6,589/- and Secondary and Higher Education Cess of Rs 3,296/-) after repacking and reducing MRP under Rule 16(2) ibid i. e. Central Excise duty was paid on reduced MRP at the rate prevailing on the date of clearance. The action taken by the said assessee did not amount to manufacture and hence, the said assessee was liable to pay an amount equal to the CENVAT credit taken under sub-rule (1) of Rule 16 ibid. This has resulted in short reversal of CENVAT credit / short payment of Central Excise duty of Rs. 29,01,738/- (Central Excise duty credit of Rs. 28,34,402/-, Education Cess credit of Rs. 57,191/- and H & S Education Cess credit of Rs. 10,145/-).

1.2 In view of the above, it appeared that the CENVAT credit short reversed / short paid amounting to Rs. 29,01,738/- (Central Excise duty credit of Rs. 28,34,402/-, Education Cess credit of Rs. 57,191/- and H & S Education Cess credit of Rs. 10,145/-) was required to be recovered from the said assessee under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11 A of the Central Excise Act, 1944 along with interest under Section 11 AB of the Central Excise Act, 1944. The said

assessee was also liable for penalty under Rule 25 of Central Excise Rules, 2002 read with Section 11 AC of Central Excise Act, 1944 for breach of provisions of Rule 16 of Central Excise Rules, 2002. The said assessee was also liable for penalty under Rule 27 of Central Excise Rules, 2002 for breach of provisions of Rule-16 ibid.

1.3 Therefore, assessee was called upon to Show Cause to the Additional Commissioner, Central Excise, Bhavnagar as to why:

a) The CENVAT Credit short reversed / short paid amounting to Rs. 29,01,738/- (Central Excise duty credit of Rs. 28,34,402/-, Education Cess credit of Rs. 57,191/- and H & S Education Cess credit of Rs. 10,145/-) should not be recovered from them under Section 11A of the Central Excise Act, 1944 read with Rule 14 of CENVAT Credit Rules, 2004.

b) The interest at the prescribed rate should not be charged from them under the provisions of Section 11AB of the Central Excise Act, 1944.

c) Penalty should not be imposed upon them under Rule 25 of Central Excise Rules, 2002 read with Section 11 AC of Central Excise Act, 1944 for breach of provisions of Rule 16 of Central Excise Rules, 2002.

d) Penalty under Rule 27 of Central Excise Rules, 2002 for breach of provisions of Rule 16 ibid should not be imposed upon them.

Written Submission :

2. Assessee submitted defence reply vide letters dated 22.06.2009 and 05.12.2011 stating as under.

2.1 The company is engaged in the manufacture of P&P medicaments falling under chapter 30 of the Central Excise Tariff Act, 1985. The company has manufactured different types of medicaments and cleared the same on payment of duty. However, 11,25,198 strips of tablets or capsules, details of which are attached as Annexure I were received back during the period March, 2008 to August, 2008 along with the duty paying documents. The strips which were received back indicated the batch number **and the invoice on the basis of which credit with the batch number mentioned in the excise invoice, the credit of excise duty paid on the P&P medicaments received back was taken by the company**.

The company carried out the following process on the medicaments received by the company.

a) Opened the strip and has removed the tablets/capsules.

b) Repack the tablets and capsules in the strips.

c) The MRP indicated on the strip after repacking was less than the MRP indicated on the medicaments which was received by the company.

d) The company also received back the physician samples of these products which was converted into trade pack. The number of tablets/capsules was higher than the number of tablets/capsules in the sample pack.

For example, Ostage Tablet, the physician sample contains 2 tablets and the trade pack contains 10 tablets.

2.2 The company had cleared the medicaments after repacking and altering MRP by paying Central Excise duty on the trade pack which had been cleared. As per the show cause notice, the company has cleared 8,98,724/- strips of P&P medicaments during the period May, 2008 to February, 2009 and paid Central Excise duty of Rs. 3,39,635/- in aggregate. It is admitted in the show cause notice itself that the said medicaments have been cleared after repacking and reducing the MRP.

2.3 The process carried out by the company amounts to the process of manufacture:-

Section 2(f) of Central Excise Act defines the word manufacture as follows:-

'manufacture' includes any process,-

(i) Incidental or ancillary to the completion of manufactured product;
(ii) Which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or
(iii) Which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer

And the 'manufacturer' shall be construed accordingly and shall include not only a person who employees hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

2.4 It will be evident from the above that the meaning of word "manufacture" is very wide for the products which are specified in Schedule III of Central Excise Tariff Act, 1985. The product P & P Medicaments are classified under chapter 3003 and all the goods classified under chapter 3003 are specified in Schedule III. As per clause (iii) of the definition of word 'manufacture' packing, repacking or alteration of MRP is the process of manufacture of goods. As mentioned above, in respect of all 898724 strips, the process of repacking and alteration of MRP (reduction of MRP) has been completed. Therefore, the company had carried out the process of manufacture of goods.

2.5 It may be mentioned that it is admitted in the Show Cause Notice itself that the company had repacked and altered the MRP i. e. reduced the MRP. The definition of the word 'manufacture' is very wide for the products which are specified in schedule III to the Central Excise Tariff Act. As per clause (iii) of section 2(f) which is applicable for the products specified in schedule III, the following process amounts to the process of manufacture:-

a) Packing of goods in a unit container or
b) Repacking of such goods in a unit container
c) Labelling of such goods in container
d) Relabeling of goods in container
e) Declaration or alteration of retail sales price
f) Adoption of any other treatment on the goods to render the products marketable.

2.6 It is thus evident that if on the products which are specified in clause (iii), the processes as mentioned above amounts to the process of manufacture. It is admitted in the Show Cause Notice that for 8,98,724 strips, the company has carried out the process of repacking and alteration of MRP. These processes amount to the process of manufacture.

The provisions of Rule 16 (2) has been reproduced in the Show Cause Notice.

As per the provision contained in rule 16 (2).

a) If the process carried out by the company on such goods received does not amount to manufacture of goods, the company shall reverse the credit of duty or
b) If the process amounts to manufacture, the company shall pay the duty at the rate applicable on the date of removal and on the value determined under section 4 or section 4A.

2.7 Thus, it is evident that where the process amounts to the process of manufacture, the company is only required to pay the duty on the date of removal at the rate prevailing on the date of removal. As mentioned above, the process carried out by the company of repacking or alteration of MRP amounts to the process of manufacture. Therefore, the company is not required to reverse the credit of duty. The company has paid the appropriate amount of duty at the time of removal of goods. The Show Cause Notice also does not dispute the same. Therefore, it is submitted that no duty is payable by assessee.

2.8.1 The process of manufacture has been carried out on the other balance strips also

As per the Show Cause Notice, the company has received 11,25,198 strips of tables during the period March, 2008 to August, 2008 and has cleared 8,98,724 strips. In case of balance strips also, the company has carried out the same process of reducing MRP and repacking. However, due to shortage of demand, the same has not been cleared from the factory. It is submitted that for the reasons mentioned above, the company is only required to pay the duty at the time of clearance of goods and not reversed the credit of duty at all.

2.9 Demand for credit taken in March 2008 is time barred

The Show Cause Notice demands duty in respect of credit taken on the P&P medicaments received in March, 2008, May, 2008 and August, 2008. The company has taken the credit of Rs 31,11,823/- basic, education cess-Rs. 62,236/-, SHE cess-Rs. 12,404/- aggregation to Rs. 31,86,463/- in March, 2008. The same was reflected in the ER-1 Return, copy of which is attached as Annexure-4. The Show Cause Notice seeks to reversal of credit of duty and is dated 19.5.2009. It is submitted that the Show Cause Notice has been served after a period of one year from the relevant date which expired on 9.4.2009.

Assessee submitted that the demand for the credit availed for the month of March, 2008 is time barred for the following reasons:-

a) There is no allegation in the Show Cause Notice that the credit has been availed due to fraud, suppression, misstatement etc. The Hon'ble Supreme Court has in the case of HMM. 1995 (76) ELT 497 (SC) has clearly held that whenever the extended period as provided in proviso to section 11A (1) is invoked, the Show Cause Notice must clearly specify the nature of suppression, misstatement etc. in order to invoke the extended period of five years. In this case, there is no allegation that the company has availed the credit with malafide intention. On this ground alone, the demand for the month of March 2008 should be set aside.

b) There was no malafide intention as the process carried out by the company amount to the process of manufacture. Therefore, there was a bonafide belief that in terms of the provisions of Rule 16 (2), the company is only required to pay the excise duty at the time of clearance of goods and not reverse the credit of duty.

The Hon'ble Supreme Court has in number of cases has held that the manufacturer shall have malafide intention in non payment of duty where the proviso to section 11A is invoked. The company relies upon the following judgements:-

> Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay 1995 (75) ELT 721 (SC). The court held that 'intent to evade duty must be proved for invoking proviso to section 11A (1) of the Central Excise Act, 1944' which deals with the provisions for extended period of limitation. In this case, it was held that misstatement or suppression of fact in the SSI declaration cannot be called wilful, unless it is proved that it was done wilfully with an intent to evade duty, for the purpose of invoking the extended period of limitation.

The Supreme Court has observed in the above case that –

- Intent to evade duty is built in to the expressions 'fraud' and 'collusion'
- 'mis-statement' and 'suppression' have been qualified by immediately preceding words 'wilful'.
- 'contravention of any of the provisions of this Act or Rules' has been qualified by the immediately following words 'with intent to evade payment of duty'

Thus to invoke the proviso to the section and the extended period of limitation, it should be proved that the assessee made a misstatement or suppression which is 'wilful' or has acted with 'intent to evade payment of duty'

> ***In CCE vs. Chemphar Drug and Liniments 1989 (40) ELT 276 (SC), the court held that something positive, rather than mere inaction or failure on the part of manufacturer, has to***

be proved before invoking the extended period of limitation as per proviso under section 11A (1). Also it has been held that where department has full knowledge about the facts and the manufacturer's action or inaction was based on the belief that they were required or not required to carry out such action or inaction, the extended period cannot be made applicable.

***In Pushpam Pharmaceuticals Company vs. CCE Bombay 1995 (78) ELT 401 (SC)** is important in construing the meaning of the words 'suppression of facts' as used in the proviso to section 11A (1) of the Act. The gist of the judgement is as follows:-*

- *The expression 'suppression of facts' has been used in the company of strong words such as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet in the surroundings in which it has been used, it has to be construed strictly. It does not mean any meaning and that is 'that the correct information was not disclosed deliberately to escape from payment of duty'.*

- *The assessee cannot be held guilty on the mere 'suppression of facts' when the law itself is not clear or there are conflicting judgements or when the position is not settled in law, unless it can be proved that the intention of the assessee was to evade payment of duty.*

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Since, in this case, there is no malafide intention, the extended period cannot be invoked. Hence, demand for March, 2008 is time barred as demand is raised after one year.

Penalty

The Show Cause also seeks to levy penalty under Rule 11AC of the Central Excise Act, 1944 for breach of Rule 16 of Central Excise Rules, 2002.

In view of the submissions made above:

a) There is no allegation that the credit has been availed due to fraud, suppression misstatement. Therefore, the provisions of section 11AC do not apply. The provisions of section 11AC applies only when the demand arises on account of fraud, suppression, mis statement etc.

b) There was a bonafide belief that the company is only liable to pay the excise duty.

In view of this, the penalty under section 11AC is not leviable.

The Show Cause Notice also proposes to levy penalty under Rule 27 of the Central Excise Rules, 2002. It is submitted that the penalty under this Rules is leviable only when no penalty is provided in any other rule. In this case, the Show Cause Notice itself propose to levy penalty under section 11AC read with Rule 25. This itself means that the penalty for the breach of Rule 16 is leviable under Rule 25 and hence, the penalty under Rule 27 is not leviable.

Assessee requested for personal hearing.

Personal Hearing:

3. Shri Manoj Chauhan C.A. appeared for personal hearing on 05.12.2011 on behalf of the assessee and submitted additional written submission stating that as per Chapter note 6 to chapter 30 of the Central Excise Tariff Act, 1985, the process of relabelling amounts to manufacture. That the process mentioned above includes relabelling i.e. affixing new MRP in place of old MRP. That the Hon'ble Tribunal has interpreted the chapter note 5 of chapter 30 (now chapter note 6) in the case of Macleods Pharmaceuticals Limited V/s. CCE Thane 2004 (170) ELT. 411 (Tri- Mumbai) wherein it was held that affecting change in MRP of the medicaments brought back to the factory for changing labels and sticker showing MRP i. e. putting of sticker on outer packing of medicaments amounts to manufacture as per note 5 of chapter 30 of the Central Excise Tariff and thus appellant not liable to pay an amount equal to Cenvat credit taken by them. Duty correctly paid by the appellant on lower assessable value at the time of second removal. That the company also relies upon the judgement of Cipla Ltd versus CCE Raigadh 2007 (208) ELT 140 (Tri-Mumbai). That in view of the above, it is submitted that the company has correctly valued the goods at lower MRP and paid the duty on the

same. Thus, it is submitted that a demand made in the SCN is not correct in law and needs to be dropped.

Discussion & findings:

4. I have gone through the facts, records and written reply filed by the assessee. In the present case, the issue involved is whether a process of repacking and changing of MRP on the product falling under chapter 30 amounts to manufacture as defined under section 2(f) (iii) of the Central Excise Act, 1944 or otherwise.

4.1 Before arriving at conclusion, I would like to explain and discuss the provisions of Rule 16 of the Central Excise Rules, 2002, chapter note 6 of chapter 30 of the Central Excise Tariff Act, 1985 and definition of manufacture as defined under section 2(f) of the Central Excise Act, 1944.

4.2 Rule 16 of the Central Excise Rules, 2002 is reproduced here:

"Credit of duty on goods brought to the factory:

(1) Where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitle to take Cenvat credit of the duty paid as if such goods are received as inputs under the Cenvat Credit Rules,2002 and utilize this credit according to the said rules.

(2) If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the Cenvat credit taken under sub-rule (1) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of section 3 or section 4 or sectio 4A of the Act, as the case may be."

4.3 Section 2(f) of the Central Excise Act, 1944 is reproduced here:

" 'Manufacturer' includes any process,

(i) Incidental or ancillary to the completion of a manufactured product;

*(ii) Which is specified in relation to any goods in the section or **chapter notes** of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or*

(iii) Which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-lablelling of containers including the declation or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer."

4.4 A Chapter note 6 of chapter 30 of the Central Excise Tariff Act, 1985 is reproduced here:

" 6. In relation to product of heading 3003 or 3004, conversion of powder into tablets or capsule, labelling or relabelling of containers intended for consumers or repacking from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer, shall amount to manufacture".

4.5 In view of the above provisions of law, defense reply filed by the assessee and judgements cited by the assessee, I hold that the Cenvat credit taken by the assessee on the goods brought back into the factory as provided under sub rule (1) of Rule 16 of the Central Excise Rules, 2002 is correct. At para 4 of the show cause notice, it has been mentioned that the goods were brought back in the factory of manufacture and after re-packing and reducing MRP cleared and paid duty on the value shown at the time of clearance. It is undisputed fact that the goods in question medicaments is falling in chapter 30 of the Central Excise Tariff Act, 1985. It is also an undisputed fact that the medicaments falling in chapter heading 3003 is included in Schedule III of the Central Excise Tariff Act, 1985. On going through the definition of "manufacturer" as defined under section 2(f)(iii) of the Central Excise Tariff Act, 1985 and chapter note 6 of the chapter 30, it can be seen that the process

of packing, re-packing etc. amounts to manufacture. The Hon'ble Tribunal has interpreted the Chapter note 5 of Chapter 30 (now Chapter note 6) in the case of Macleods Pharmaceuticals Limited V/s. CCE Thane 2004 (170) ELT. 411 (Tri- Mumbai) wherein it was held that affecting change in MRP of the medicaments brought back to the factory for changing labels and sticker showing MRP i.e. putting of sticker on outer packing of medicaments amounts to manufacture as per note 5 of Chapter 30 of the Central Excise Tariff and thus I hold that an assessee is not liable to pay an amount equal to Cenvat credit taken by them. Duty was correctly paid by the assessee on lower assessable value at the time of second removal. The assessee also relied upon the judgement of Cipla Ltd versus CCE Raigadh 2007 (208) ELT 140 (Tri-Mumbai). In view of the above, I hold that the assessee has correctly valued the goods at lower MRP and paid the duty on the same. Therefore, I hold that an activity of re-packing and reducing of MRP undertaken by the assessee on the goods is "manufacture".

4.6 In view of the above, I pass the following order.

ORDER

I drop proceedings against M/s Mepro Pharmaceuticals (P) Limited, Unit-II, GIDC, Wadhwan City, District Surendranagar initiated vide Show Cause Notice F. No. V/15-25/Dem/HQ/2009 dated 19.05.2010.

(HARCHARAN SINGH)
ADDL. COMMISSIONER

To,
M/s Mepro Pharmaceuticals (P) Limited, Unit-II,
GIDC,
Wadhwan City,
District Surendranagar.

Copy to :-

1. Commissioner, Central Excise, Bhavnagar.
2. Deputy Commissioner (Audit), Central Excise, Bhavnagar.
3. Assistant Commissioner, Central Excise Division, Surendranagar.
4. Superintendent, Central Excise AR-II, Surendranagar.
5. Superintendent (Recovery Cell), Central Excise, Hqrs, Bhavnagar.
6. Guard file.

23/12/2012
ADDL. COMMISSIONER