Unichem Lab Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-06-1996

Reported in : (1998)(102)ELT267TriDel

Appellant : Unichem Lab Ltd.

Respondent : Collector of Central Excise

Judgement :

1. The brief facts of the case are that the appellants herein had applied for exemption for patent and proprietary medicines (Unizyme Syrup-170ml) cleared as physician's sample under Notification No.48/77-C.E. during the period May, 1986 to September, 1986. The exemption Notification contains 3 conditions (1) clearances of such samples in any month are limited to a quantity not exceeding 4% by value of total duty paid clearances during the preceding month of all types of PP Medicines; (2) such samples are intended for supply to Hospitals, Nursing Homes or Medical practitioners and (3) such samples are packed in a form distinctly different from regular trade packing and each smallest packing is clearly and conspicuously marked "Physician Sample, not to be sold". The Assistant Collector denied the benefit of the Notification on the ground that condition (3) of Exemption Notification was not fulfilled because the packing of the physician sample was the same as the regular trade packing. The Collector (Appeals) upheld the order of the Assistant Collector relying upon the Tribunal's order in the case of Indian Drugs and Pharmaceuticals Ltd., Hyderabad v. CCE, Hyderabad reported in 1987 (31) E.L.T. 829 in which the Tribunal had held that it is not

sufficient for the purpose of Notification that physician sample contains the marking "physician sample, not to be sold", but the packing itself should be distinctly different from the regular trade packing. Hence this appeal.

2. Learned Counsel, Shri Rajesh Chibber submits that the marking on the Unizyme Syrup 170 with the words "physician sample, not to be sold" itself constitutes a difference between such packing and the regular trade packing. He also submits that in the IDPL case, no contention has been put forth regarding the meaning of distinct marking. Learned SDR, Shri Agarwal draws our attention to the Tribunal's order and in particular to the arguments of the learned DR in that case regarding the meaning of "distinct" and submits that all aspects have been dealt with and the judgment supra covers the present case in totality and, therefore, prays that the impugned order be upheld and the appeal rejected.

3. On a careful consideration of the submissions made by both sides, we find that the learned SDR is correct in pointing out that the Tribunal in the IDPL order supra has noted all aspects of the matter and has dealt with all the contentions, including the contention regarding distinction between packing for a regular trade and packing for physician sample. The judgment cited supra is on all fours with the present case and following the ratio thereof, we uphold the order of the Collector (Appeals) and reject the appeal. We, however, allow the prayer of the appellants as far as the request for allowing money credit of the amount of duty adjudged (and paid through debit in PLA by the appellants) is concerned, we allow this request subject to verification of all other particulars regarding eligibility to the benefit of Modvat credit, noting that the appellants had filed the relevant declarations under the Modvat Scheme and that their claim that the item is covered under this Scheme, has not been rebutted or refuted by the Department. The appeal is disposed of in the above terms.

4. While I broadly agree with my Ld. Colleague and also her conclusion, I would like to add few lines as I feel it was necessary to project the main thrust of the appellant's arguments and why it was not acceptable to us.

5. The appellant has mentioned in the appeal memo and the Ld. Counsel has emphasised during the course of hearing that the appellants had shown

substantial compliance with all the conditions of the notification. He has taken pains to mention in this connection that there is no charge of non-supply of such samples to hospitals or doctors or that they were not supplied free of charge; and that moreover each of the bottles were marked distinctly with the words "PHYSICIANS SAMPLE NOT TO BE SOLD" and not only that the carton in which the bottles were packed was also similarly marked and did not indicate the price which was otherwise required to be statutorily indicated and these in turn had been packed in the form of packing distinctly different from that of the regular trade packing and the labels thereon were similarly marked with words "PHYSICIANS SAMPLE NOT TO BE SOLD" and no price was shown thereon.

6. They have also emphasised that the classification list submitted by them had been duly verified and approved by the proper officers. It was also their submission that the Tribunal has held in several cases that a substantive benefit should not be disallowed merely on account of procedural lapse.

7. In our opinion while above submissions are correct to the extent that the department has not brought out any charge of diversion, misuse or sale of the goods cleared as clinical samples and therefore in the normal course it can only be inferred that they had been supplied as free samples to the hospitals and doctors etc. for the intended use as samples. It is also correct that a classification list had been duly submitted and approved by the proper officer after necessary verification in this regard. However, it could help them only if they could plead time bar but the show cause notice having been issued on 25-11-1988 in respect of May, 1988 to September, 1988 covered the normal period of limitation and therefore it was open to the department to rectify a mistake in approval of the classification list. It is also correct that they clearly marked the samples with the words "PHYSICIANS SAMPLE NOT TO BE SOLD" and the label on the packing showed a similar marking and they had not shown the price on the bottles, their containers or the carton packings as evident from the samples filed by them.

8. However, the Tribunal has held in the case cited by the Ld. DR that such a marking by itself was not sufficient and the container or the packing must be distinctly different and there is no reason for us to differ from that order passed in

the case of Indian Drugs and Pharmaceuticals Ltd. (supra). The only question which therefore remains for consideration is whether in spite of this being insufficient in the facts and circumstances of the case the appellants could be said to have substantially complied with the provisions of the notifications and it was only a question of procedural lapse. We have noted in this respect that the notification is conditional and the condition that the samples are packed in a form distinctly different from regular trade packing is a very important condition and its non-observance cannot be considered simple as a matter of minor procedural infraction. Further more, this condition is in addition to the condition of marking each smallest packing clearly and conspicuously with the words "PHYSICIANS SAMPLE NOT TO BE SOLD". Since all these aspects have already been dealt in details in the abovesaid order of the Tribunal and this case is similar to that, the Ld. Collector's order was required to be upheld on this aspect. However, as already mentioned in para 3 above the request for allowing Modvat benefit was required to be duly considered by the authorities below as already announced in the open court.