

Heilenlab Vs. Commissioner of Central

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-24-2000

Reported in : (2000)(72)ECC448

Judge : J T J.H., G Srinivasan

Appellant : Heilenlab

Respondent : Commissioner of Central

Judgement :

1. These two Appeals Nos. E/1818-R&V and E/2156-R&V/99-Mum have been filed by the appellants respectively against the decisions made by the Commissioner-II, Central Excise, made in Order-in-Original No. V-Adj (CH-30) 15-221/92, 35 to 38/99 dated 29.4.1999 and Order-in-Original No. V-Adj (CH-30) 15-54/98,44-48/99 dated 18.5.1999 whereunder he ordered as follows: _____ Appeal

No.	Old	No.	Deposit	of	Penalty
Duty					1818/99
35 to 38	19,01,965	3,00,000	(Appeal 1818/99)	2156/99	44-48/99 1,33,893
	2,00,000	6,11,322	(2156/99)		2. The appellant is a manufacturer of patent or proprietary medicaments falling under Chapter 30 of the Schedule to the Central Excise Tariff Act. It is a small scale unit and it is duly registered to manufacture excisable goods under the Central Excise Act, 1944 and Rules made thereunder. The appellant has been manufacturing her own patent or proprietary medicament and also manufacturing such medicaments of her loan licensee M/s. Sigma

Laboratories, under loan licence granted by the Food and Drug Administration of the State of Maharashtra. She has been paying duty on such products manufactured on job work basis for the loan licensee, the said Sigma Laboratories.

3. In respect of these two appeals following were the show cause notices issued by the adjudicating authority: SCN date Period Amount OIO Appeal No.

SCN	date	Period	Amount	OIO	Appeal No.
1.3.97	1,33,893	15-54/98/ 2156/99 to 44-48/99	27.10.97	1.4.97	6,11,322 " " to out of 8.1.98
1.7.97	8,73,534	" " to 30.3.98	1.9.97	5,27,531	" Dropped to 30.5.98
1.11.97	8,53,375	" " 15-221/93 1988-89	2,23,031	15-221/99/ 1818/99	1.1.93 1989-90 out of 35-38/99
12.27.04	44Heilen/92	July 91	5,54,933.74	" " 31.1.92	to out of 4.

In respect of Appeal No. 2156/99 is concerned show cause notices alleged inter alia that the assessees were not entitled to the benefits of Notification No. 175/ 86 and they were wrongly valuing their goods inasmuch as their relationship with Sigma Laboratories was not on principal to principal basis as Sigma Laboratories were getting 30% discount from the appellants but passed on only 8% discount to its customers. It was also alleged that the assessee was paying Sigma Laboratories 22% as service charges after delivery stage which was an additional consideration. The invoice price disclosed was not the sale consideration for the sale and hence 22% trade discount retained by Sigma Laboratories was an additional consideration for the sale and 22% retained by Sigma Laboratories should have been included in the assessable value. The show cause notices dated 27.10.97 and 8.1.98 also alleged inter alia that they were not entitled to exemption of duty in respect of their own products, they were ineligible for exemption under Notification No. 16/97 dated 1.4.97 inasmuch as in terms of paragraph 2(iii) of notification were not available to a manufacturer who availed Modvat credit under Rule 57A of the Central Excise Rules, and in this case since the assessee was enjoying Modvat she was not entitled to the benefit of notification. Show cause notices dated 30.3.98 and 30.5.98 alleged that originally the appellants entered into a sole selling agency agreement dated 1.3.89 with Sigma Laboratories, whereby the appellant agreed to give Sigma Laboratories 30% trade discount on the invoice prices. But it was observed that Sigma Laboratories retained 22% with them and passed on only 8% to their customers. It

was due to confirmation of demand notices issued earlier they changed to buy a fresh agreement dated 1.9.97 entered into between the same parties indicating Sigma Laboratories as wholesale dealer.

This change it was alleged in notice because of confirmation of demand.

The department demanded the duty as per revised value. The show cause notices dated 31.1.92, 1.1.93, 30.12.92 and 15.9.93 the assessee had affixed their trade mark as well as trade mark of Sigma Laboratories; Sigma Laboratories did not pass on entire discount of 30% but only 80% which were agency commission; the price which the assessee got from Sigma Laboratories were not the sole consideration but include also service charges paid to Sigma Laboratories for post sale services.

Replies were also filed. After hearing the parties the adjudicating authority passed the impugned orders. Hence the present appeals.

5. It was argued by the learned Advocate for the appellant that the agreements entered into between the appellants and Sigma Laboratories were pure and simple contract of sale indicating the price of the goods. The manufactured goods were sold entirely to the purchaser Sigma Laboratories who undertook to sell the products produced by the appellant and also undertook to store the same, create demand for the goods, despatch of the goods, collection/recover the money and settle the difficulties arising under expiry and breakages. The transaction between the parties were on principal to principal basis and at arms length. Reliance of the case of *Coromandel Fertilisers v. UOI* was wrong inasmuch as in that case question was not at all about nature of transaction between seller and purchaser but about meaning of word "commission" and that is not the question in this case before the Tribunal. It was emphatically argued that in similar circumstances Bombay High Court in the case of *UOI v. Mahindra and Mahindra* (wrongly printed in ELT as Calcutta as Her Lordship Mrs. Sujata Manohar was never a Judge of Calcutta High Court) had held that where seller did not accept any responsibility for loss or damage to the products after delivery to the purchaser such circumstance was held to be wholesale price within the meaning of Section 4 of the Central Excise Act. The learned Advocate further pointed out that in the

adjudicating order V-Adj (CH 30) 15-54/98-640-44-48 dated 19.5.99 (against which Appeal No. E/2156/99 has been filed) the authority had held that in the terms and conditions it appeared that the transactions of Heilen Lab with M/s. Sigma Laboratories were at arms length, on principal to principal basis and were based on purely commercial consideration and in the instant case goods have actually been sold to M/s. Sigma Laboratories by M/s. Heilen Lab and therefore it is argued that the finding that value had to be revised for purpose of levy of duty was wholly wrong. He also cited number of other decisions. Learned DR adopts the reasoning of the adjudicating authority.

6. We have considered the rival submissions. The assessee is a woman entrepreneur. She is manufacturing P or P medicines. She entered into agreements dated 1.3.89 and 31.8.97 for sale of her products. Relevant clauses in agreements are mentioned below: 1. The party of the Second Part namely M/s. Sigma Laboratories having its office at 43 (South), Wadala, Bombay 400 031, are hereby appointed as 'Selling Agent' of the Party of the First Part namely HEILENLAB, with effect from 1st March, and both the Parties doth hereby have mutually agreed that this contract shall be valid for 3 years, and shall be renewable at the option of the Party of the First Part.

2. M/s. Sigma Laboratories have agreed to sell the products produced by HEILENLAB, as and when produced, who will also undertake storage of the same and creation of demand, despatch of goods, collection/recovery of money, settlement of expiries & breakages, etc.

3. The Party of the First Part will despatch all the goods so produced on freight to pay basis from their Factory. Howsoever, the Party of the Second Part shall despatch the orders of the customers residing in the vicinity of the factory of the Party of the First Part in order to make smooth distribution of the products.

4. The Party of the Second Part agree and undertake to bear the Taxes & Duties, Charges & Levies or claims whatsoever, as may be imposed by any Government or any local authority.

5. The Party of the Second Part agree and undertake to make full payment in respect of goods supplied by the Party of the First Part on a 75 days bill of exchange accepted by the Party of the Second Part, failing which this contract shall be liable to be terminated by the Party of the First Part, as and when the need arises.

6. The Parties hereto agree and declare that the Party of the Second Part will be entitled to employ Distributors/Stockists, Servants etc., in their absolute discretion and at their own cost and expenses in the conduct of this agreement.

7. The Parties of the agreement shall agree and declare that the Party of the Second Part will be paid 30% as trade discount on the invoice.

8. The Party of the First Part shall not be responsible for any damage or loss of the consignment during the course of transit and the responsibility of such damage and/or loss shall be absolutely to the account of the Party of the Second Part.

(1) The Party of the first part hereby agrees to sell the goods manufactured to the party of the second part as its buyer that is wholesale dealer for the whole of Union of India for marketing & selling the products manufactured by the party of the First Part.

(2) The Party of the second part shall act as a wholesale Dealer and marketing and selling of the goods of the party of the First Part for the sale of products manufactured by the party of the first part.

(3) The Agreement shall be effective from the 1st day of September, 1997.

(4) This Agreement shall remain in force upto 31st March, 2000 and shall be renewed thereafter as may be mutually agreed, if both the parties so desire.

(5) The Party of the First Part shall sell the goods to the party of the Second Part at the rates mutually agreed to by both the Parties and dealing shall be purely on commercial basis.

(6) The party of the Second Part shall sell the products of the party of the First Part at the trade rates as may be fixed by the party of the Second Part and shall sell

the goods following the normal trade norms and practice and the party of the First Part shall have no control on it whatsoever.

(7) The party of the Second Part shall make payment to the party of the First Part for the goods sold by the party of the First Part to the party of the Second Part within 75 days from the date of supply and the payment may also be made by the party of the Second Part on account as may be required by the party of the First Part. In case of delay of payment beyond 75 days, the party of the First Part reserves the right to claim interest @ 18% to be calculated on weekly basis or part thereof. The party of the First Part can also call upon the party of the Second Part to sign and accept 75 days Bill of Exchange/Hundi, if required, against payment of invoices of party of the First Part.

(8) It is agreed between the parties to the agreement that once the goods manufactured by the party of the First Part are sold to the party of the Second Part raising invoice by the party of the First Part on the party of the Second Part on the goods sold, it will be the sole responsibility of the party of the Second Part to promote, market, sell and distribute the goods as the party of the Second Part may deem proper and necessary.

(9) It is also agreed between the parties to this agreement that it will be responsibility of the party of the Second Part to sell the goods as per the trade norms and practice, collect and pay the taxes, duties, charges, levies and claims whatsoever and the party of the First Part is in no way concerned or responsible for the same.

(10) Though the party of the Second Part has been appointed as wholesale Dealer of party of First Part under this agreement, the party of the First Part reserves its right to appoint additional wholesale Dealer for the sale of their products, if deemed necessary by the party of the First Part.

(11) The party of the First Part can terminate the above agreement without giving any notice, should the party of the Second Part fail to fulfill its commitments and obligations under the Agreement or violate any of the terms and conditions of the Agreement.

(12) It is agreed between the parties to the agreement that save and except what is stated under Clause 11 above, this agreement can be terminated any time by giving three months' notice in writing by either of the parties to this agreement or by mutual understanding.

From the reading of Clause 1 of agreement dated 1.3.89 it is clear Sigma Laboratories were termed as selling agent. Clause 2 thereof Sigma Laboratories agreed to sell the products and also undertook to store the same and create the demand despatch the goods, collect and recover money settlement of expiries, breakages etc. Under Clause 5 Sigma Laboratories agreed to make full payment in respect of goods supplied.

Under Clause 7 30% trade discount was to be paid to Sigma and last by the assessee under Clause 8 were not responsible for any damage or loss of the consignment during the course of transmit.

7. Under agreement dated 30th August 1997, in the preamble portion there is a specific covenant that Sigma Laboratories agreed to undertake sale of products of the assessee similar to what is contained in Agreement dated 1.3.1989. The Clauses in the agreement specifically state that assessee was selling the goods to Sigma Laboratories (Clause 5 & 6).

8. In reply letter dated 11.6.1998 (Ex.F4 page 96 in Appeal 2156/99) to show cause notice dated 30.3.98 there is a specific allegation that there was no allegation that the sale was not on principal to principal basis. In this reply dated 1st March, 1993 in reply to show cause notice dated 1.1.93 (Appeal 1818/99 at pages 85 & 86) the assessee stated as follows: We would like to further inform you the reasons for having such an arrangement, with our distributor M/s. Sigma Laboratories. We do not have any kind of marketing experience with regard to the pharmaceuticals, which is not only highly competitive but also very complex matter. In order to ensure that pharmaceutical formulations are marketed effectively, one should have an effective distribution channel of Distributors/Stockists, Wholesalers, Retailers, etc.

Furthermore, in order to generate demand for our pharmaceutical products or for that matter for anybody in the pharmaceutical line, an effective selling organisation is also required comprising of Marketing Managers, Sales Managers, Distribution Managers, Zonal Managers, Area Managers, Medical Representatives, etc. etc. In order to set up a marketing organisation as well as distribution channel large amount of money is required to be spent before such a set-up is established. In order to establish such a set-up the Company will have to spend several crores of rupees in case and effective set-up of distribution and marketing is required all over India. We being a SSI unit, it is beyond our capacity to spend such large amount of money for this purpose. Furthermore, we do not have any marketing experience at all. Therefore, we have decided to entrust the distribution as a distributor to M/s, Sigma Laboratories, granting them 30% wholesale trade discount, in order to deal on our behalf as a wholesale dealer. It should also be noted Sir, that in a pharmaceutical industry, it is a general practice that the manufacturer who manufactures the product entrust such a job for the purpose of effective distribution and marketing to a marketing agency, who sells these products through their field organisations.

As you are aware, our products are sold on the advice of a Medical Practitioner (Doctor). In order to convince a Doctor to prescribe a particular product, vis-a-vis the competitive products available, and (supra) requires vast and experienced field organisation.

Furthermore, it should also be noted that pharmaceutical products are covered under the Drugs Price Control Order of 1987, as amended by the Government from time to time. It should also be noted that we do not have any relation with M/s. Sigma Laboratories. The goods are sold by us to M/s Sigma Laboratories, on commercial basis through cash transaction or making the payment against deliveries.

Therefore, 30% discount given is the wholesale trade discount, on the basis of Agreement/ Arrangement.

To amplify the matter further, would like to inform you that the medicines which are manufactured by us and sold to M/s. Sigma Laboratories, are sold again by M/s.

Sigma Laboratories, in turn to various Distributors, Wholesalers, Stockists and Retailers. M/s.

Sigma Laboratories, sell the goods to the Distributors who in turn sell it to various Stockists at District Head Quarters or Town, who in turn sell it to semi-Wholesalers, Chemists and so on. Ultimately such a channel will reach the consumer who will receive our goods on prescription or advice of a Medical Practitioner. In such cases, it has been held that the relevant price for assessment value, of the goods, for the purpose of excise, would be the wholesale cash price which the manufacturer receives from the sale to first wholesale dealer i.e. when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the ultimate consumer whether along a short or a long course depending upon the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently, to the goods.

In the reply it has been brought out that the assessee has been selling the goods to Sigma Laboratories. Discount has been given at 30%. This cannot be doubted as Sigma Laboratories purchases the entire quantity.

These type of purchases are normal. There is no allegation in any show cause notice that the transactions were shady and that there have been financial flow back. Moreover in the adjudicating order dated 18.5.99 (Appeal 2156/99) it has been held as follows: From the above terms and conditions it appears that the transactions of M/s. Heilen Lab with Sigma Laboratories were at arms length, on principal to principal basis and were based on purely commercial consideration. In the instant cases goods have actually been sold to Sigma Laboratories by M/s. Heilen Lab.

9. When this type of finding has been given in the Order-in-Original dated 19.5.99 it is not possible for us to take different view regarding the transaction between the same parties. It cannot be otherwise as it may amount to take illogical and non-cogent view. The fact of sale has been proved in our view. The entire approach of the adjudicating authority is wrong in passing the impugned orders. Hence the impugned orders are set aside and the appeals are allowed.

