The Commissioner of Central Excise Vs. Okasa Ltd.

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Court : Mumbai

Decided On : Jun-10-2009

Reported in : 2009(167)LC155(Bombay); 2009(241)ELT359(Bom)

Judge : F.I. Rebello and ;J.H. Bhatia, JJ.

Acts : Central Excise Tariff Act, 1985; Customs Tariff Act, 1975 - Sections 3; Central Excise Rules, 1944 - Rules 56A and 57A

Appeal No. : Central Excise Reference No. 2 of 2002

Appellant : The Commissioner of Central Excise

Respondent : Okasa Ltd.

Advocate for Def. : Prakash Shah and ;J. Sanghvi, Advs., i/b, PDS Legal Advs.

Advocate for Pet/Ap. : P.S. Jetly and ;Rajinder Kumar, Advs.

Judgement :

J.H. Bhatia, J.

1. To state in brief, the respondents are manufacturers of Pharmaceutical product falling under Chapter 30 of the Central Excise Tariff Act, 1985. They inter alia manufacture Pediatric drop for children. They filed declaration under Modvat Scheme declaring the plastic dropper supplied with the bottle containing drops as

an input used in or in relation to manufacture of final product namely Novamox product (Pediatric drops). However, the department objected this on the grounds that this droppers are separately kept in the cartons sealed bottle of the Pediatric drop. These droppers are neither used in the manufacture of pediatric drop nor used in relation to the manufacture of the final product.

2. Show cause notice was issued to the Respondents and the case was adjudicated upon. The Assistant Commissioner disallowed the credit of duty paid on plastic droppers. Appeal against the said Order of the Assistant Commissioner was also rejected by the Commissioner (Appeal) vide his order-In Appeal No. GS/1023/BI/93 dated 20.11.1992.

3. Being aggrieved by the dismissal of the appeal by the learned Commissioner (Appeals), the respondents filed Appeal No. E/1897-Bom before the Customs, Excise & Gold Control Appellate Tribunal (CEGAT). That appeal was allowed by the order dated 14.10.1996 relying upon a decision of the Tribunal in the case of Heal Well Pharma 1994 (72) ELT (Tribunal). The Revenue filed Reference Application before the Tribunal in the present case as well as in the Heal Well Pharma case. The Tribunal framed the following question:

Whether in the facts and circumstances of the case, the Tribunal, based on their interpretation of the decision of the Apex Court in Eastern Paper Ind. : 1989(43)ELT201(SC) and Jay Engineering Works 1989 (20) ECR 3 (SC) and having regard to the concept of the value addition envisaged in the modvat scheme, is correct in holding that plastic dropper packed in the pack of pediatric drops and marketed at the factory gate in that condition could be construed to be an input used in or in relation to the manufacture of final product, as laid down in Rule 57A of central Excise Rules, 1944 ?

4. Heard the learned Counsel for the parties.

5. According to the applicant i.e. Revenue, the dropper is not used either in manufacture or in relation to the manufacture of pediatric drops. It is merely placed in the cartons along with the sealed bottle of drops. Sealed bottle of drops is the final product to be marketed and it is ready for marketing even without the dropper.

Dropper is not a packing material used in relation to packing of the pediatric drops. It is a facility given to the consumer for using it after they open the bottle for use. Packing of a dropper along with a bottle of pediatric drops is not a `MUST, nor can it be stated that, it is a component of such drops. Hence, basic requirement of Rule 57A is not satisfied as the items are not in any way used either in the manufacture or in relation to the manufacture of final product. As such MODVAT cannot be admissible, merely because they are sent with the final product including their value.

6. On the other hand,it is the contention of the respondent- company that the said Plastic Dropper is invariably contained in the printed carton of the concerned Pharmaceutical Product i.e. Novamox Pediatric Drops and therefore the same amounts to the adoption of a treatment to render the said Pharmaceuticals Product marketable to consumer. As such the said Plastic dropper forms part and parcel of the manufactured Pharmaceuticals Product. Further, it is contended by the respondents that even if they had desired they would not be in a position to sell the Pharmaceutical Product without the said Plastic Droppers, in as much as the Drug Controller of India has directed all Pharmaceutical manufacturers that any oral liquid pediatric preparations sold by them should contain a suitable dispensing measure made of transport clear plastic along with the bottle in a carton for proper dispensing of the drug. It is contended that this direction from the Drug Controller of India is binding and the respondents are bound to follow the same. Hence on this ground, modvat credit is required to be allowed in respect of the duty paid on the said droppers.

7. Under Rule 57A of the Central Excise Rules, 1944, provision is made for giving credit of the duty paid on the excisable goods used as inputs for such excisable goods or final products as may be specified by the Central Government by a Notification in the Official Gazette. Rule 57A reads as follows:

RULE 57A. Applicability (1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the final products), as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional

duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) as may be specified in the said notification (hereinafter referred to as the specified duty) paid on the goods used in or in relation to the manufacture of the said final products (hereinafter referred to as the inputs) and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification :

Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted.

Explanation (For the purposes of this rule, inputs include

(a) inputs which are manufactured and used within the factory of production, in or in relation to, the manufacture of final products,

(b) paints and packaging materials, and

(c) inputs used as fuel. .

Admittedly, clauses (a) and (c) of the Explanation are not applicable to the present case. According to the learned Counsel for the respondents, the droppers are necessary packaging material for marketing of the drug and therefore, the said material will be covered by the words packaging material and therefore they should be deemed to have been used for the manufacture of the final product because the final product cannot be marketed without such droppers in view of the directions given by the Controller of Drugs for India. There is no dispute that the medicine or the medicament involved in the present case fall under Heading 30.00 in Chapter 30 of the Central Excise Tariff of India which deals with pharmaceutical products. Note 5 to the said Chapter 30 reads as follows:

5. In relation to products of heading No. 30.00, conversion of powder into tablets or capsules, labelling or rebelling of containers intended for consumers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to `manufacture.

8. The learned Counsel for the respondents pointed out that by the Drug Controller of India had addressed a letter dated 22.4.1992 advisory to all the Drug Controllers in the country pointing out that the Indian Academy of Pediatrics, Bombay had brought to their notice that some manufacturers were not providing a measure with oral liquid preparations. The letter said that these measures are necessary for proper administration of the drug in desired quantities as advised by the medical practitioner. Therefore the Drug Controller of India observed that these dispensers should be transparent and of clear plastic and the marking on these dispensers should be clearly visible. In view of this, a decision was taken in the 26th Drugs Consultative Committee Meeting held on 9th/10th July,19810 that a suitable measure should be supplied with a pack of antibiotic liquid oral preparations. In view of this decision all the Drug Controllers in the country were requested to advise all the manufacturers of oral pediatric preparations to provide a suitable measure along with the bottle in the carton for proper dispensing of the drugs. Issuance of this letter is not disputed by Revenue. Even though the advice given by the Drug Controller of India does not have the statutory force, the drug controllers and the drug manufacturers have to take such advice/direction seriously. For the administration and dispensation of the pediatric drugs in the desired quantity as prescribed by the medical practitioners, it is necessary that the container containing the medicine should be accompanied with some suitable measure having clearly visible markings on the same. This necessity has been emphasised in the advice given by the Drug Controller of India.

9. The learned Senior Counsel for the respondents demonstrated before us by showing a carton containing Novamox Pediatric drops that the drug is in powder form and the bottle containing the drug is originally closed with a cap having screws and it is accompanied by a plastic dropper with similar cap having screws. Once original cap is removed, as per the instructions given on the label, certain quantity of pure water has to be added to convert the powder into liquid. For purpose of dispensation or administration of the drugs, another cap with the dropper has to be affixed on the said bottle and with the said dropper,drops can be administered. Without such a dropper, it would be very difficult for the consumers to administer the drops in proper quantity as per the medical prescription. Therefore, for administration of the drug in the proper quantity as per prescription,

it is absolutely necessary to have such a dropper with the bottle. Further as pointed out earlier, the Drug Controller of India has also given advice and the drug manufacturers cannot ignore that advice for the purpose of marketing their product. In view of Note 5 to Chapter 30 for adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. In view of this Note 5 read with the directions given by the Drug Controller, it must be held that the provision of a dropper with marking of measurement supplied in the carton along with the bottle containing drug, amounts to manufacture so that the final product can be properly marketed to the consumer.

10. In Collector of Central Excise v. Jay Engineering Works Ltd. : 1989(39)ELT169(SC) , as the Departmental Commodity . : 1989(43)ELT201(SC) , it was held that since paper is marketed in packed or wrapped condition, the wrapping paper used in wrapping of paper, it is to be treated as raw material or component part for other variety of paper which is wrapped. The manufacturer was held entitled to proforma credit on wrapping paper under Rule 56A of Central Excise Rules. Relying upon Collector v. Jay Engineering Works in upon H.M.M. Ltd. v. Collector of Central Excise : 1994ECR17(SC) , Metal screw cap put on Horlicks bottle treatable was treated as a component part of the product and eligible for benefit of set-off of duty. Relying on these authorities, the CEGAT in the matter pertaining to M/s. Heal Well Pharmaceutical Bombay held that where dropper is provided in the carton along with bottle containing the drug it amounts to manufacture and the manufacturer is entitled to credit of duty paid on such product being input of the firm product. The said Judgment was relied upon by the CEGAT in the present matter and the appeal was allowed.

11. The learned Counsel for the Revenue placed reliance on Tata Engineering & Locomotive Co.Ltd. v. Union of India : 1994ECR495(Patna) . In that case, it was held that Tool kits are not inputs for the manufacture of chasis of truck and,therefore, credit for duty paid on those kits purchased from outside could not be given. In our considered opinion, the said authority has no application to the facts of the present case. In that case, it was held that it was not necessary for the manufacturer of chasis of the truck to provide the tool kits and it was given only as an additional benefit to the purchaser. However, in the present case, the provision

of the dropper with marking of measurement is essential for the proper administration or dispensation of medicine in the quantity prescribed by the medical practitioner.

12. Taking into consideration all the facts, circumstances and the legal position, we are satisfied that the CEGAT was right in holding that the plastic dropper packed in the pediatric drops and marketed at the factory gate in the condition could be construed to be an input used in or in relation to the manufacture of the final product as laid down in Rule 57A of the Central Excise Rules.

13. We answer the Reference in the affirmative accordingly.