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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Nov-19-2007

**Reported in :** (2008)(127)ECC42

**Judge :** M Ravindran

**Appellant :** Makers Laboratories Ltd.

**Respondent :** Ccex

**Judgement :**

1. This appeal is directed against the Order-in-Appeal No. br/102 & 103/Th-II/06 dated 20.4.2006. The relevant facts that arise for consideration are that the appellants herein are manufacturer of pharmaceutical goods on their own and are also manufacturing the said pharmaceutical goods on loan licence basis. The appellants cleared physician samples manufactured on their own as well as manufactured on loan licence basis on payment of duty. The valuation of the physician sample was in dispute with the authorities. The said dispute was resolved in favour of the appellant. Subsequently, appellant filed refund claim of Rs. 5,29,687/- in respect of duty paid on such physician sample. The said refund claim was sought to be rejected on the ground that the question of unjust enrichment arises in such cases.

The adjudicating authority has held that the appellant has raised the credit note of the amount of the duty paid on the physicians sample and recovered the same from their principal. As such, refund claim of the amount of duty on the physician

samples, which were cleared by the appellant on job work basis, is hit by doctrine of unjust enrichment.

As regards their own physician's samples, it is held that the cost of physician sample is included in the cost of the sale packs and hence, the same is also hit by doctrine of unjust enrichment. Hence, this appeal by the appellant.

2. The Id. Counsel appearing on behalf of the appellant submits that as regards the question of principle of unjust enrichment on the physician sample cleared by the appellant of the products manufactured by them, the issue is covered by the decision of the Tribunal in the case of German Remedies Ltd. v. CCE, Mumbai Final order No. 505/05-NB-A dated 6.4.2005 and decision in the case of Sarabhai Chemicals Pvt. Ltd. v.CCE, Vadodara 2004 (168) ELT 70 (Tri-Mum). As regards the physician samples cleared by them as job worker, it is his submission that the refund is not hit by the unjust enrichment as payment of the duty on such physician samples has been made by the principle manufacturer. He submits that the duty payment by the appellant for the principal manufacturer should not be considered as unjust enrichment for the reason that the duty liability on such physician sample rests with the principal. He submits that the appellants only collected the amount of the duty payable and paid to the Revenue. As such, the question of unjust enrichment does not arise. He submits that in any case no penalty is imposable on them.

3. The Id. SDR on the other hand submits that the question as regards the unjust enrichment has been squarely answered by both the lower authorities. It is his submission that the appellant having collected the amount from the principal manufacturer will be unjustly enriched if the refund is sanctioned to them. He reiterates the entire finding of the Commissioner (Appeals).

4. Considered the submissions made at length by both sides. The issue involved in this case is that the appellant was sanctioned refund claim and on an appeal, the Commissioner (Appeals) has set aside the order-in-original. During the pendency of such proceedings, a show cause notice was issued for recovery of erroneous refund sanctioned to them. The issue before me is whether the appellant is entitled for refund of the amount as claimed by them and whether the

appellant is liable to be penalized. The first issue as to whether the appellant is eligible to refund of amount of duty paid by them on their own physician samples cleared. Physician samples cleared by the appellant in respect of the goods, which are their own product, the amount of duty paid by them (as indicated by the Id. Counsel as Rs. 1,56,942/-), it is undisputed that these samples were cleared by the appellant on payment of duty and samples were of their own product. It is also undisputed that the amount of Rs. 1,56,942/- is paid in excess by valuing the physician samples based upon the sale value of the final product, while they were required to do the valuation based upon the cost of production. Since the valuation of the samples has been admittedly been done incorrectly, the refund of duty paid in excess is required to be sanctioned to the appellant. As regards the question of unjust enrichment, I find that the in the case of Sarabhai Chemicals Pvt. Ltd. (supra), the Tribunal has clearly held that question of unjust enrichment cannot arise in a case of free distribution of physician samples, as duty burden could not, have been passed on to the buyers. It is undisputed in this case that the physician samples, which were cleared on payment of excess duty, was for free distribution. If that be so, the refund claim of Rs. 1,56,942/- cannot be denied to the appellant. The impugned order to the extent it is setting aside the refund claim is liable to be set aside and I do so with consequential relief to the appellant.

5. As regard the refund of the balance amount of Rs. 3,82,745/- of the duty paid on the physician samples, which were cleared by the appellant as job worker, it is seen from the records and undisputed that the appellant has cleared the physician samples on payment of duty and subsequently claimed the said amount from the principal manufacturer.

The principal manufacturer has also reimbursed the entire amount of duty paid on such physician's sample. If that be so, the contention of the Id. Advocate that they are only collecting the duty and paying to the Revenue does not arise. Since the principal manufacturer has not filed any refund claim, the claim of the appellant for refund of excess duty does not arise. As such, I find that the impugned order to the extent it rejects refund claim of the duty paid on physician samples cleared by the appellant as a loan licensee is correct and does not require any interference.

6. As regards the penalty imposed on the appellant by the adjudicating authority for claiming the erroneous refund, it can be noticed that refund claim was sanctioned by the lower authorities on the findings of the higher judicial forum. If that be so, the erroneous claim cannot be faulted with, as being of malafide intention. To my mind, no penalty can be imposed for such erroneous sanction of refund claim. The penalty if at all, is to be imposed only on the contumacious behavior, if there is total disregard of the law. It is not so in this case. The penalty imposed upon the appellant is liable to be set aside and I do so.

Accordingly, the impugned order is modified as indicated in the above terms and the appeal is allowed partly as indicated above.

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