

CASE NO.:
Appeal (civil) 5793 of 2002

PETITIONER:
M/s. Cipla Ltd

RESPONDENT:
Commissioner of Central Excise, Bangalore

DATE OF JUDGMENT: 26/03/2008

BENCH:
ASHOK BHAN & DALVEER BHANDARI

JUDGMENT:
JUDGMENT
O R D E R

CIVIL APPEAL NO.5793 OF 2002

This is a statutory appeal filed by the assessee under Section 35L(b) of the Central Excise Act, 1944 (for short, 'the Act') against the final order No.698/2002 dated 31st May 2002 in Appeal No.E/906/99 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, South Zonal Bench at Bangalore (for short 'the Tribunal'). By this order the Tribunal has rejected the appeal filed by the appellant and has held that Benzyl Methyl Salicylate (for short 'BMS') is marketable and therefore liable to excise duty.

The appellant-company is engaged in the manufacture of patent and proprietary medicines and organic chemicals (bulk drugs and intermediate) falling under Chapters 29 & 30 of the Central Excise Tariff Act, 1985 (for short 'Tariff Act') in their factory at Virgonagar, Old Madras Road, Bangalore. Appellant filed classification lists with effect from 5.6.1986 and 1.3.1987 in which they declared that one of the items, viz., BMS prepared in their factory was a non-excisable item.

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The Revenue issued two separate show cause notices both dated 25th August 1987 wherein it was proposed that BMS was an item liable to duty under sub-heading 2913.00 of the Tariff Act prior to 9.2.1987 and under sub-heading 2942.00 after 9.2.1987. The appellant submitted its reply to the show cause notices on 14th October 1987. It was stated

in the reply that BMS was not an excisable commodity since the same was neither sold by it nor was it being purchased by any other party. It was also pointed out that the show cause notices did not give any ground based on which the proposal was made to levy duty on BMS.

The Assistant Collector, by the order in original dated 28th February 1988, held that BMS was an excisable product and is classifiable under Chapter Heading 2913.00 upto 9.2.1987 and under Chapter Heading 2942.00 from 10.2.1987 onwards.

The appellant filed a writ petition in the High Court challenging the aforesaid order in original. The High Court, by its order dated 27th July 1988, quashed the said order and directed the Assistant Collector to decide the issue afresh. In another round of litigation, the product in question was held to be excisable and on appeal before a Division Bench of the High Court, the matter was remanded back to the Assistant Collector for passing a detailed order on the question whether the goods were excisable or not after affording due opportunity to the parties to lead their evidence. Pursuant to the said order, the

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appellant submitted detailed letters dated 16.3.1992 and 3.4.1992.

The Assistant Collector passed a fresh order dated 21.4.1992/23.4.1992 wherein he examined the issue in detail and after referring to the various decisions of this Court on the issue of marketability held that the enquiries made by the Revenue to ascertain the marketability of BMS had not yielded any tangible results and that the Assistant Drug Controller of India at Custom House, Bombay, had also stated that there had been no import or export of BMS at the port of Bombay. The Assistant Collector also referred to the evidence produced by the appellant by way of affidavits and letters from bulk drug dealers to hold that BMS manufactured was not marketed. It was also held that the Department had not been able to furnish any documents regarding the marketability of the goods in question. Following the decision of this Court in the case of Bhore Industries Ltd.

v. C.C.E. 1989(40) ELT 280 (SC) = 1989(1) SCC 602 the Assistant Collector held that BMS was not excisable product under the Tariff Act.

The aforesaid order of the Assistant Collector was reviewed by the Collector of Central Excise, Bangalore, under Section 35E(2) of the Act and in pursuance to the said review, an appeal was filed before the Commissioner of Customs & Central Excise (Appeals) against the order in original.

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The Commissioner (Appeals), by order dated 1.3.1999, held that BMS was marketable and, therefore, liable to central excise duty. The only reason given by the appellate authority for holding the product in question to be marketable was that BMS, being drug intermediate was being transported by the appellant from its factory at Bangalore to its Patalganga manufacturing facility after being packed in drums. It was held that as the product was packed and had a shelf life, it was capable of being marketed.

The appellant, dissatisfied by the aforesaid order, filed an appeal before the Tribunal.

The case came up for hearing before a two-member Bench of the Tribunal. There was a difference of opinion between the two members. Member (Technical) upheld the view taken by the Commissioner (Appeals) and held that the product in question was marketable whereas the Member (Judicial) took a contrary view and held that the goods were not marketable. It was also held by the Member (Judicial) that the Revenue had failed to adduce any evidence to show that the product in question was marketed or marketable. In view of the difference of opinion, the matter was referred to a third member to resolve the issue. The third member agreed with the view taken by the Member (Technical). As a consequence of the majority view, the appeal filed by the appellant was dismissed.

On a question put to Mr. Radhakrishnan, learned senior

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counsel appearing for the Revenue, it was fairly stated by him that no evidence was adduced by the Revenue to show that the product was marketable or was capable of being marketed. He simply relied upon Chemical Weekly Drug Directory wherein BMS was shown as an intermediate product. This Court in a number of decisions such as, Union of India v. Delhi Cloth & Chemicals Mills Co. Ltd. AIR 1963 SC 791; South Bihar Sugar Mills v. Union of India AIR 1968 SC 928 = 1968 (3) SCR 21; Bhore Industries v. Collector 1989(40) ELT 280 (SC) = 1989(1) SCC 602; Hindustan Polymers v. Collector 1989(43) ELT 165 (SC); Collector of Central Excise v. Ambalal Sarabhai JT 1989(3) SC 341 = 1989 (43) ELT 214; Union Carbide v. Union of India 1986(24) ELT 169; and A.P. Electricity Board v. Collector of Central Excise 1994(70) ELT 3 SC = JT 1994(1) SC 545 has held that marketability is an essential ingredient to hold that an article is dutiable or exigible to duty of excise. It is well

established principle of law that the burden is on the Revenue to prove that the goods are marketable or are exigible. Simply because a product is mentioned in the Chemical Weekly Drug Directory as intermediate product does not mean that the product is marketable. The Judicial Member was, therefore, right in observing that BMS being used in the manufacture of final product, i.e., Salbutamol Sulphate was neither marketed nor marketable and was only an intermediate product.

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Since marketability is an essential ingredient to hold that a product is dutiable or exigible, it was for the Revenue to prove that the product was marketable or was capable of being marketed. Manufacturing activity, by itself, does not prove the marketability. The product produced must be a distinct commodity known in the common parlance to the commercial community for the purpose of buying and selling. Since there is no evidence of either buying or selling in the present case, it cannot be held that the product in question was marketable or was capable of being marketed. Mere transfer of BMS by the appellant from its factory at Bangalore to its own unit at Patalganga for manufacture of final product does not show that the product was either marketed or was marketable.

Since the Revenue has failed to lead any evidence to show that the product in question was marketable or was capable of being marketed and that the product in question was a distinct product for being sold in the market, it has to be held that the product in question was not marketable. Accordingly, the appeal is accepted. The order of the Tribunal is set aside with consequential effect. No costs.