CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 58106 Of 2013

[Arising out of Order-in-Original No.24&25/CE/CHD-II dated 08.03.2013 passed by the Commissioner of Central Excise, Chandigarh-II]

M/s Fresenius Kabi Oncology Ltd. **: Appellant**
Plot No.19, HPSIDC, Industrial Area,
Baddi, Solan, HP-173205

VERSUS

The Commissioner of Central Excise
Goods & Service Tax, Shimla **: Respondent**
Ground & First Floor, Commercial Parking Complex,
Chhota Shimla, Himachal Pradesh-171002

WITH

2. Excise Appeal No.60735 of 2018
[Arising out of Order-in-Appeal No.CHD-EXCUS-001-APP-105-17-18 dated 30.11.2017 passed by the Commissioner (Appeals), CGST, Chandigarh]

3. Excise Appeal No.61271 of 2018
[Arising out of Order-in-Appeal No.CHD-EXCUS-001-APP-36-41-18-19 dated 25.04.2018 passed by the Commissioner (Appeals), Central Excise, Chandigarh]

4. Excise Appeal No.61751 of 2018
[Arising out of Order-in-Appeal No.CHD-EXCUS-001-APP-152-2018-19 dated 17.07.2018 passed by the Commissioner (Appeals), Central Excise Chandigarh]

5. Excise Appeal No.61996 of 2018
[Arising out of Order-in-Appeal No.CHD-EXCUS-001-APP-182-2018-19 dated 20.09.2018 passed by the Commissioner of Central Excise, Chandigarh]

6. Excise Appeal No.60011 of 2020
[Arising out of Order-in-Appeal No.CHD-EXCUS-001-APP-152-2019-20 dated 10.10.2019 passed by the Commissioner (Appeals), CGST, Chandigarh]

APPEARANCE:
Ms. Krati Singh and Ms. Shreya Khunteta, Advocates for the Appellant
Shri Pawan Kumar and Shri Shivam Syal, Authorised Representatives for the Respondent

CORAM: HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER Nos.60492-60497/2024

DATE OF HEARING: 20.08.2024
DATE OF DECISION: 27.08.2024
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PER: P. ANJANI KUMAR

M/s Fresenius Kabi Oncology Ltd. have filed these appeals, against the impugned orders passed by lower authorities, as shown below:

Sl No.	**Appeal No.**	**Impugned order No. and Date**
1.	ST/58106/2013	OIO No.24&25/CE/CHD-II/2013 dated 08.03.2013
2.	ST/60735/2018	OIA No.CHD-EXCUS-001-APP-105-17-18 dated 30.11.2017
3.	ST/61271/2018	OIA No.CHD-EXCUS-001-APP-36-41-18-19 dated 25.04.2018
4.	ST/61751/2018	OIA No.CHD-EXCUS-001-APP-152-2018-19 dated 17.07.2018
5.	ST/61996/2018	OIA No.CHD-EXCUS-001-APP-182-2018-19 dated 20.09.2018
6.	ST/60011/2020	OIA No.CHD-EXCUS-001-APP-152-2019-20 dated 10.10.2019

2. Brief facts of the case are that the appellants are engaged in the manufacture of medicaments, injections and capsules; the appellants retain certain samples in pursuant of Drugs and Cosmetics Act, 1940 and Drugs and Cosmetics Rules, 1945 for the purpose of testing; the appellants also retain certain samples for control purposes. On conduct of an audit, Revenue was of the opinion that the appellants have failed to

discharge applicable duty on the samples drawn for internal testing and control purposes. Show Cause Notices were issued periodically and were confirmed/ upheld by the above cited orders. Hence, these appeals.

3. Ms. Krati Singh, assisted by Ms. Shreya Khunteta, learned Counsels for the appellant, submits that drawing of samples for in-house testing involves small quantities of unlabeled solutions at the stage of processing; such drawl of samples, as per the statutory provisions contained in Drugs and Cosmetics Act, 1940 and Drugs and Cosmetics Rules, 1945,is duly recorded in RG-1; the appellants record the drawl and destruction of samples in their private record also; Department relies on provisions contained in Para 3.2 of Chapter 11 of the CBEC Manual of Supplementary Instructions. She submits that no excise duty payable on the samples drawn for in-house testing; it has been wrongly alleged that the appellants were not maintaining any records for the drawl and destruction of the samples.

4. Learned Counsel further submits that in terms of Section 3 of the Act, excise duty is leviable on the manufacture of excisable goods; the samples do not conform to be final products ready for clearance; manufacturing process involving bottling and labeling is not complete at the time of drawl of sample and therefore, the samples cannot be held to be excisable goods. The appellants draw samples for each batch of the drugs; during testing the samples either get consumed or minor remnant, if any, is destroyed; the samples not being cleared outside the factory are not liable to excise duty. She relies on the following cases:

- BBF Industries, Unit // vs. CCE, Jammu & Kashmir-Fina/ Order No. 63051/2018 dated 06.09.2018, CESTAT Chandigarh
- Hindustan Unilever Ltd. vs. Commissioner Of C. Ex., Pune-ll, 2017 (350) E.L.T. 283 (Tri. - Mumbai) [this case was appealed in the Supreme Court, but the appeal was dismissed due to Monetary Limit]
- Commissioner Of C. Ex., Nagpur Versus Economic Explosives Ltd. 2007 (8) TMI 128 - CESTAT, Mumbai [upheld in Commissioner Versus Economic Explosives Ltd. 2008 (11) TMI 713 - Bombay High Court]
- M/S Hindustan Coca-Cola Beverages Pvt. Ltd Versus Commissioner Of Central Excise, Thane-1 2020 (4) TMI 501CESTAT Mumbai
- Commissioner Of C. Ex., Belapur vs. RPG Life Sciences Ltd., 2011 (264) E.L.T. 346 (Bom.)
- Macleods Pharmaceuticals Ltd. Versus Commissioner Of Central Excise, Thane-II 2018 (12) TMI 1473-CESTAT Mumbai
- Alembic Pharmaceuticals Limited Api Division Versus Commissioner Of Central Excise & St, Vadodara 2019 (7) TMI-457-CESTAT Ahmedabad
- Commissioner Of Central Excise Versus Central Cables Ltd. 2016 (7) TMI 78 - CESTAT Mumbai International Tobacco Company Ltd. Versus C.C.E. -Ghaziabad 2016 (10) TMI 451 - CESTAT Allahabad
- TC. LTD. Versus Collector Of Central Excise, Patna 2002 (12) TMI 85 - Supreme Court
- Alkem Laboratories Ltd. Versus C.C.E. & S.T. Daman 2022 (10) TMI 797 - CESTAT Ahmedabad
- JK. Industries Ltd . Versus Commissioner Of C. EX., Jaipur-II 2003 (6) TMI 66 - CESTAT, New Delhi
- Thermax Culligan Water Technologies Ltd. vs. Commr. OF C. E., Belapur, 2013 (12) TMI 977 - CESTAT Mumbai
- DR. Reddy's Laboratories Ltd. Versus Commr. Of C. Ex., Visakhapatnam 2007 (7) TMI 145 - CESTAT, Bangalore

5. Learned Counsel for the appellants further submits that the allegation of the Department that the appellants are following the procedure prescribed under Para 3.2 of the Supplementary Instructions is not correct; the said instructions are in respect of fully manufactured excisable goods and are not applicable to the samples which are drawn before the goods have become marketable; in terms of Para 3.3.1 of the Instructions, no duty is leviable on the samples until they are cleared from the factory; in the instant case, the samples have never left the factory and therefore, there is no requirement for an invoice under Rule 11 of Central Excise Rules, 2002. She submits without prejudice to the above the allegation that the accounts have not been maintained is not valid as RG-1 Register meant for excisable goods removed from the factory and not for samples as held in Malcom Pharmaceuticals- 2008 (225) ELT 428 (P&H); the samples have been taken in pursuance of the statutory requirement and as such, substantial benefit cannot be taken away due to non-compliance of procedures.

6. Learned Counsel submits that the issue is already decided in their favour in their own case by the Larger Bench in the case of Dabur Pharma Ltd. (earlier name of the appellant) – 2005 (182) ELT 185 (LB); it was categorically held that no excise duty would be leviable as long as the samples are kept in the factory for testing and not cleared from there; the view taken by the Tribunal has been affirmed by the Hon’ble High Court of Himachal Pradesh – 2010-TIOL-831-HC-HP-CX; it has been held in S.S. Engineers -2023 (7) TMI 717 (SC) and Carrier Airconditioning and Refrigeration Ltd. – 2023 (4) TMI 870 (Tri. Chd.). She further

submits that in respect of Appeal No. E/61271/2018, the Adjudicating Authority has dropped the demand in respect of control samples relying on the decision of the Larger Bench in their own case supra.

7. Learned Counsel submits in addition that there was no suppression of facts by the appellants and they have been filing the Returns regularly; the entire exercise is revenue neutral as the appellants would have been eligible for CENVAT credit even if the duty was paid on samples; the issue involves legal interpretation which came to be settled by the Larger Bench in their own case; for these reasons, extended period cannot be invoked and no interest and penalty is also payable. She relies on the following cases:

- Mahanager Telephone Nigam Ltd. -2023-TIOL-407-HC-DEL-ST.
- Reliance Industries Ltd. – 202-TIOL-94-SC-CX.

8. Shri Pawan Kumar, assisted by Shri Shivam Syal, learned Authorized Representatives for the Department, reiterates the findings of the impugned orders; he takes us through the provisions of Para 3 under Chapter 11 of CBEC Supplementary Instructions and submits that as the appellants failed to maintain proper account as per Para 3.2.2 of the Instructions, they are liable to pay duty on the samples. He relies on ITC Ltd. – 2003 (151) ELT 246 (SC) and submits that as the appellants are not maintaining proper accounts for the samples, they are liable to pay appropriate excise duty.

9. Heard both sides and perused the records of the case. The case of the Department is that the appellants have not maintained proper records to account for the samples drawn for internal testing purposes and for control purposes and as such in terms of the Supplementary Instructions and as per the Hon'ble Apex Court's decision in the case of ITC Ltd. (supra), the appellants are liable to pay duty on the samples removed by them. The appellants, on the other hand, contend that the samples have not achieved the stage of manufactured products and hence, cannot be accounted for in the RG-1 Register; since they have not been cleared from the factory, no excised duty is payable as per the ratio of the various judgments relied upon by them. We find that the Revenue argues strongly on the point that the appellants have not maintained any records. We find that as far as the control samples are concerned, learned Counsel shows us copies of Excise Returns wherein the destruction of control samples is recorded; moreover, the learned Adjudicating Authority himself has dropped the demand in respect of the control samples, relying on the judgment of the Larger Bench in appellant's own case. Department has not appealed against the said order. We find that Larger Bench in the appellant's own case observed that:

> **6.** We have carefully considered the submissions made by both sides. We find that the Basic Excise Manual issued by the C.B.E. & C's and the Supplementary Instructions to the Excise Manual from 1-9-2001 clarifies the position that the samples required for laboratory test in the factory and for preservation for investigation of complaints may be allowed to be drawn provided that a proper account of receipts and utilisation in the test in the laboratory is maintained. Manufacturer can preserves the samples of their product for some period for investigation of complaints, if any. No duty

> should be charged on these samples but an account of such samples should be maintained in the prescribed form. If at any time the manufacturer desires to clear these samples then these should be assessed to duty as applicable. Therefore, the control samples as long as these are kept in the factory and not cleared from there, these will not be chargeable to duty if proper account is maintained. When these samples are cleared for test or for destruction at that time assessment should be made for duty, if any, leviable as per law.

10. Coming to the samples drawn for internal purposes, we find on going through the SOPs that it is mentioned at Para 3.2 that after completion and review of the batch, the samples shall be discarded; a clear procedure for the destruction of samples drawn is given at Para 3.2.1. It is clear from the internal records maintained by the appellants that samples drawn are destroyed and therefore, the same would not have been cleared outside the factory. As per the ratio of the cases relied upon by the appellants, as long as the samples are not cleared outside the factory premises, no duty is payable by them. We find that this Bench in the case of BBF Industries, Unit-II –Final Order No.63051/2018 dated 06.09.2018 held that:

> 4. Considering the fact that in this case, the appellant are sending goods for testing in their own factory and the goods has not been cleared for the sale, moreover, without testing, the goods cannot be removed from the factory. In these circumstances, the goods are in-complete before the testing is done, therefore, no duty can be demanded on the samples which has been destroyed during the course of testing.

11. We further find that Hon'ble Bombay High Court in the case of RPG Lifesciences Ltd. (supra) held that:

> 4. In the present case, the specific case of the assessee is that samples drawn for testing were not cleared out of the factory but were cleared within the

> factory for testing and that the said samples were consumed in the process of testing. These facts have not been controverted by the revenue. It is not the case of the revenue that the assessee has failed to maintain the books/accounts as required under the Rules relating to the samples drawn for testing. Where the goods are not cleared out of the factory premises but were drawn for testing within the factory and in fact were consumed within the factory during the process of testing, the question of demanding any duty on those samples does not arise. We draw support for this view from the decision of the Apex Court in the case of ITC Ltd. v. Collector of Central Excise, Patna reported in 2003 (151) E.L.T. 246 (S.C.), particularly para 11 thereof.
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> 5. Decision of the Tribunal in the case of Positive Packaging Industries Ltd. (supra) relied upon by the counsel for the revenue is distinguishable on facts. In that case the samples were cleared out of the factory and sold as scrap, whereas, in the present case, the samples are consumed/destroyed within the factory during the process of testing. Therefore, the decision of the Tribunal in the case of Positive Packaging Industries Ltd. (supra) has no relevance to the facts of the present case.

12. We find that Department's contention that the appellants have not maintained appropriate records and therefore, in terms of Para 3 of Chapter 11 of Supplementary Instructions, duty requires to be paid, is not acceptable. Understandably, there are no records prescribed for this purpose. The internal records maintained by the appellants have to be taken into consideration. On the basis of the records available, we find that the appellants have maintained records as far as the control samples are concerned and as far as internal samples are concerned, it can be gleaned from the Standard Operating Procedures adopted by the appellants that the samples are either consumed in the course of testing or destroyed. In the absence of any contrary proof put forth by the Revenue, the claim of the appellants cannot be brushed aside. We find

that Department relies heavily on the ratio of the Hon'ble Apex Court's decision in the case of ITC Ltd. (supra). However, we find that the facts of the case are different for the reason that the item before the Hon'ble Supreme Court was cigarettes and the samples therein were being drawn for their own purposes and not as per the requirement of any other statute and moreover, cigarettes were under physical control for a considerable period. We find that Tribunal has been consistently holding that no duty is payable on the samples if they are not cleared outside the factory. We do not find any reason as to deviate from the stand taken by the Tribunal in other cases. We find further that Department did not show any evidence of clearance of the samples outside the factory. Following the ratio of the above cases, we find that as long as the samples are not cleared outside the factory, no duty is payable.

13. We further find that Show Cause Notices have been issued periodically invoking the extended period of limitation. This is not permissible as the Department cannot invoke extended period in the subsequent Show Cause Notices as held by the Hon'ble Apex Court in the case of Nizam Sugars Factory- 2006 (197) E.L.T. 465 (S.C.). Moreover, considering the fact that the appellants have been filing the Returns regularly, the issue being that of legal interpretation and no evidence of suppression etc. being shown, we find that Revenue has not made out any case for invocation of extended period. We find that the Principal Bench in the case of Shyam Spectra Private Limited – Final Order No.56196/2024 dated 31.07.2024 held, following the decision of the Hon'ble Calcutta High Court, in the case of Infinity Infotech Parks2014

(36) S.T.R. 37 (Cal.) decided on 30.04.2014, held that when a notice is issued in support of transactions spread over a period of time and it is found that the extended period of invocation has been invoked, the notice cannot be treated as within limitation for some of the same transaction, once it is found that the extended period of limitation is not invocable. On this count also, we find that the impugned orders cannot be sustained to the extent that the appeals are made and the appeals succeed.

14. In view of the above, all the appeals are allowed.

(Order pronounced in the open court on 27/08/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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