

# PARADOXICAL DRUGS

**( By S. Jaikumar & A.P.Ravi, Advocates, Swamy Associates)**

The Central Government vide its Notification No. 2/2005-Central Excise (N.T), DATED : January 7, 2005, brought P or P Medicaments under Section 4A of the Central Excise Act, 1944 (CEA for short). As per the said Notification, the P or P medicaments are assessed to Central Excise duty based on their "retail sale price" as the Explanation to the said notification stated that ," retail sale price" means the retail price displayed by the manufacturer under the provisions of the Drugs (Prices Control) Order, 1995 ( DPCO for short).

PHYSICIAN'S SAMPLES are medicines given by the manufacturers to the doctors as free samples to promote their product. Now it has to be seen that as to whether such PHYSICIAN'S SAMPLES are required to be assessed under Section 4A of the CEA read with the above Notification.

As per Section 4 A (2) of CEA, (2), where the goods specified under sub-section (1) of Section 4A of CEA are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in Section 4 of CEA, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.

As per Section 4A(2) of CEA, there are three requirements for any goods to be assessed under Section 4A of CEA. They are:

1. The goods are to be excisable goods,
2. Such goods are chargeable to duty of excise based on their value, and
3. Such goods are specified under Section 4A (1) of CEA.

In the instant case, the impugned goods, namely PHYSICIAN'S SAMPLES, are excisable goods and are assessed to Central Excise duty based on their value and hence answer the first two requirements, *supra*.

Coming to the third requirement, it can be seen that, as per the DPCO, PHYSICIAN'S SAMPLES are not required to be affixed with the "retail sale price" and hence fail in the third and vital requirement under Section 4A (2) of CEA. Thus, *per se*, PHYSICIAN'S SAMPLES are not required to be assessed under Section 4A of CEA.

Having ruled out Section 4A of CEA, the impugned goods, namely PHYSICIAN'S SAMPLES, are thus to be valued and assessed to Central Excise duty as per Section 4 of CEA. As the PHYSICIAN'S SAMPLES are for free distribution and as there is no sale in respect of the PHYSICIAN'S SAMPLES, Section 4(1)(a) of CEA is ruled out and recourse has to be sought to the Valuation Rules (VR for short) as per Section 4(1)(b) of CEA.

It is now been settled that Rule 4 of VR read with Rule 11 of VR would be the appropriate Rule for the PHYSICIAN'S SAMPLES, in terms of the decision of the Hon'ble High Court of Bombay in the case of IDMA - **2008 (222) E.L.T. 22 (Bom.)**

As per Rule 4 of the VR, the value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable to the proper officer.

In other words, the value of the PHYSICIAN'S SAMPLES shall be the value of similar or identical goods, after giving necessary adjustments to the quantity etc, has to be the value of the PHYSICIAN'S SAMPLES. Further as per Rule 2(c) of the VR, the value mentioned in Rule 4 of VR is the value as per Section 4 of CEA, which is "transaction value" as contained in Section 4 (d) of CEA. Thus, it is clear that, for the PHYSICIAN'S SAMPLES, the "transaction value" of identical goods, after necessary adjustments to factors like quantity etc, has to be adopted for the payment of Central Excise duty.

In this context, the larger bench of the Tribunal in the case of Cadila Pharmaceuticals - **2008 (232) E.L.T. 245 (Tri. - LB)** has come to a conclusion that, for the PHYSICIAN'S SAMPLES, the value of the identical goods as determined under Section 4A(2) of CEA ( i.e retail sale price minus the abatement) shall be the value and not the "transaction value" of the identical goods, based on the reasoning that Section 4A(2) of CEA has a legal fiction of deeming the RSP minus abatement as "value" instead of the "transaction value" under Section 4 of CEA.

The decision of the larger bench in the case of Cadila *supra* appears to be *per incurium* for the following reasons:

1. There is no dispute, whatsoever, that PHYSICIAN'S SAMPLES are to be valued as per Rule 4 of VR.
2. As per Rule 4 of VR, the value of such goods sold has to be adopted for PHYSICIAN'S SAMPLES.
3. As per the decision of the Hon'ble High Court in the case of IDMA *supra*, the PHYSICIAN'S SAMPLES are to be valued in terms of Rule 4 of VR read with Rule 11 of VR.
4. As per Rule 2 (c ) of VR, the "value" for the purposes of VR shall be the value as per Section 4 CEA, which is "transaction value" as per Section 4(d) of CEA.
5. Even as per Rue 11 of VR, the value shall be in consistence with Section 4(1) of CEA.
6. Thus, the PHYSICIAN'S SAMPLES have to be valued as per the "Transaction Value" of such goods, as per Section 4 of CEA.
7. For such goods, there is a "transaction value" available under Section 4 of CEA.
8. When the identical goods has a "transaction value" under Section 4 of CEA and when Rule 4 read with Rue 11 of VR also contemplate adoption of value as per Section 4 of CEA of such goods, there is no rhyme or reason to get out of Section 4 of CEA to determine "Value" under Section 4A of CEA.
9. Further, Section 4A of CEA is a special provision of valuation, whereby, only for the goods specified under Section 4 A (1) of CEA the value is deemed to be Retail Sale Price minus abatement.

10. In the instant case, admittedly, PHYSICIAN'S SAMPLES are not specified under Section 4A (1) of CEA.
11. Further, there is no deeming provision under Section 4 of CEA, whereby, the value determined under Section 4 would be deemed as the value contemplated under Section 4A (2) of CEA.
12. In other words, as the goods in question, namely the PHYSICIAN'S SAMPLES, been mandated to be valued as per Section 4 of the CEA vide Rule 4 read with Rule 11 of VR, cannot depart from being valued from Section 4 of CEA, in the absence of any deeming provision under Section 4 of CEA and also for the reason that such goods have "value" under Section 4 of the CEA.

### **Before Parting ...**

Notwithstanding the above, it is well settled legal principle that, what has been expressly exempted cannot be imposed indirectly. In this connection, reference is drawn to the decision of the Larger Bench of the Apex Court in the case of Commissioner of Central Excise Vs. M/s. Acer India Ltd., as report in 2004 (172) E.L.T. 289 (S.C.), wherein it has been held as under:

*"When an exemption has been granted from the levy of any excise duty on software whether it is operating software or application software in terms of Heading 8524, no excise duty can be levied thereupon indirectly **as it was impermissible to levy tax indirectly**".*

Towing the same analogy, by no stretch of imagination, the PHYSICIAN'S SAMPLES, which are excluded from the purview of Section 4A (1) of CEA and from payment of Excise Duty under Section 4 A (2) of CEA, cannot be taxed based on MRP valuation indirectly.