# IN THE SUPREME COURT OF INDIA
## CIVIL APPELLATE JURISDICTION

**CIVIL APPEAL NO(S). 6612-6613/2012**

**HICURE PHARMACEUTICALS PVT. LTD. APPELLANT(S)**

**VERSUS**

**COMMISSIONER OF CENTRAL EXCISE,**
**KARNATAKA RESPONDENT(S)**

## O R D E R

**1. Heard Mr. Abdul Azeem Kalebudde, learned counsel for the appellant and Mr. Raghavendra P.Shankar, learned Additional Solicitor General for the respondent.**

**2. The present appeals call in question the correctness of the order dated 18.08.2011 in CEA No.30/2008 and order dated 19.11.2011 on I.A.No.1/2011 in CEA No.30/2008 passed by the High Court of Karnataka, Circuit Bench at Dharwad.**

**3. The appellant is a pharmaceutical company situated in Dharwad District, Karnataka. It is engaged in the manufacturing of medicines. After issuance of show cause notice and eliciting a reply, the Assistant Commissioner of Central Excise, Hubli Division (for**

short, 'Assistant Commissioner, Hubli') passed an order dated 30.11.2005 concerning the period from January 2001 to September 2003. According to the said order, the claim of the appellant that certain samples were cleared for both in-house testing and for testing through outside laboratories, was rejected on the ground that no proper records have been maintained. So holding, the Assistant Commissioner, Hubli observed that the value of in-house samples worked out to Rs.2,09,301/- and on that excise duty of Rs.33,488/- was levied. Similarly for samples purportedly sent to outside laboratories, a demand of Rs.6,226/- was confirmed.

4. Aggrieved, the appellant carried the matter in appeal to the Commissioner of Central Excise (Appeals), Mangalore, Karnataka. The Appellate Authority upheld the order of Assistant Commissioner, Hubli. On further appeal, the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench at Bangalore, Karnataka (for short, 'Tribunal') set aside the order of the adjudicating authority and allowed the appeal of the appellant.

**5. The Tribunal found that since it is stated that it was only on scrutiny of records that the respondent came to know that the samples have been cleared, the finding that they have not entered details of the samples is contradictory. The Tribunal further held that the goods attain marketability only after in-house testing and further that even packing was not complete at the stage when samples were drawn.**

**6. Based on the judgment of the Tribunal, the appellant obtained a refund of Rs.1,29,453/- from the respondent-Department. On 25.07.2008, the respondent-Department issued a show cause notice to the appellant for recovery of the amount refunded.**

**7. At this stage, against the order of the Tribunal dated 31.08.2007, the respondent-department filed an appeal under Section 35G of the Central Excise Act, 1944 (for short 'the Excise Act') before the High Court of Karnataka.**

**8. By the impugned order, the High Court allowed the appeal of the respondent principally relying on the judgment of this Court in the case of *<u>ITC Limited</u> vs. <u>Collector of Central Excise, Patna</u>, reported in (2003) 1 SCC 678.* A subsequent application to recall the**

**order on the ground that the appeal before the High Court related to the value of the goods and as such was excluded from the ambit of Section 35G of the Excise Act, was filed.**

**9. The High Court, in the impugned order, had clearly recorded the following findings:-**

> **“11. The material on record would clearly show the fact that samples have been cleared for in-house testing as well as sent for laboratory situated outside the premises is not in dispute. It is clear from the order passed by the First Appellate Authority that no accounts had been maintained regarding the value of the samples sent for in-house testing and also outside the premises or as to the destruction of the samples that are sent for testing and the learned counsel appearing for the respondent/assessee did not dispute the said fact and therefore, under those circumstances, following the judgment of the Hon’ble Supreme Court in ITC’s Case, the First Appellate Authority has confirmed the order passed by the adjudicating authority.**
>
> **12. It was also observed by the First Appellate Authority that *CBEC’s Supplementary Instructions for new Excise Procedure, Chapter 11* dealing with the samples would clearly show that the assessee was required to maintain records for said removal of samples for testing or for such clearance for in-house testing or for testing outside the premises and hence, clearance are to be treated as clearance for house consumption and the said fact is not disputed by the appellants/appellants herein.”**

**10. To support its conclusion that assessee was required to maintain record for the removal of samples for testing or for clearance for in-house testing or for testing outside the premises, the High Court relied upon paragraph 17 & 18 of the *ITC (supra)*, which reads thus:-**

> **"17. From a conspectus of the aforesaid decisions, it would be clear that for the purposes of levy of excise duty, the test to be applied is whether the goods manufactured are marketable or not. In the present case, the cigarette, which is the end product of tobacco, is fit for consumption before the same is removed for test. Packing of the cigarettes cannot be said to be incidental or ancillary to the manufacturing process, but the same may be incidental or ancillary to its sale only. In case it is laid down that packing of cigarettes is incidental or ancillary to the completion of manufactured products, the same may result in evasion of excise duty as before packing the cigarettes the same may be regularly supplied to each and every employee for his consumption without payment of excise duty thereon. The definition of "manufacture" under Section 2(f) very clearly includes process which is incidental or ancillary to the completion of manufactured product. Manufacture of cigarette is completed when the same emerges in the form of sticks of cigarettes which are sent to the laboratory for quality control test. Sticks of cigarettes can be consumed and manufacture of the end product i.e. cigarette, which is commercially known in the market as such, is completed before its removal for test and after testing only packing of the same, which is the requirement of Rule 93 of the Rules, is done.**

**Thus, we hold that sticks of cigarettes which are removed for the purpose of test in the quality control laboratory located within the factory premises of the appellant Company are liable to excise duty.**

**18. Coming now to the second question, it may be stated that learned counsel appearing on behalf of the Revenue could not dispute the proposition that the quantity of cigarette sticks that is destroyed in the course of quality control test is not liable to excise duty. He, however, submitted that no evidence whatsoever was adduced on behalf of the appellant Company either before the Assessing Authorities or the Tribunal to show that any cigarette stick was destroyed in the process of quality control test, much less cigarette sticks of any particular quantity inasmuch as, undisputedly, for a major period no account at all was maintained and for some period, though account was maintained in relation to the quantity of cigarette sticks sent to the laboratory for testing, but no account was maintained as to how much quantity was destroyed during the process of testing. It was pointed out by learned Additional Solicitor-General that though in the show-cause notice the appellant Company was specifically called upon to show cause for non-maintenance of account in relation to the sticks of cigarettes sent for quality control test, but in spite of that it failed to produce any account whatsoever to show as to how much quantity of cigarette sticks was sent for quality control test during different periods, much less producing any account in relation to the destruction of the cigarette sticks during the course of testing. At this stage, Shri Ganesh submitted that the matter should be remitted either to the Tribunal or the Assessing Authority for affording an opportunity to the appellant to produce the accounts and then record a finding as to how many cigarette sticks**

> were destroyed during the course of testing. In our view, no useful purpose will be served by remitting the matter on this question, firstly, because even according to the show-cause reply filed by the appellant Company before the Assessing Authorities, it had not maintained any account in relation to the destruction of cigarette sticks during the course of quality control test and, secondly, no reason was assigned for not producing any account either before the Assessing Authority or before the Tribunal in spite of the fact that it was clearly stated in the show-cause notice that the appellant Company was not maintaining any such account. In view of the non-maintenance and non-production of accounts in relation to the destruction of cigarette sticks during the course of testing, we are of the opinion that excise duty was leviable on the entire stock of cigarette sticks sent to the laboratory for quality control test."

11. As would be clear from the finding of the High Court, the samples were, in fact, cleared for in-house testing as well as for testing from outside laboratories and this was the undisputed position. It is also not disputed that no records were maintained regarding the value of the samples.

12. In the absence of records, the samples will have to be considered as goods being removed for home consumption. Hence, the finding of the Tribunal that goods attained marketability only after in-house testing really begs the question. The findings of the

**Order-in-Original were as follows: -**

> **"15. I observe that during the course of scrutiny of records maintained by the assessee by the Department it was noticed that the assessee was manufacturing medicines (injection) on job work basis. The verification of the records by the Department had revealed that the assessee has drawn samples from all the products manufactured by them for in-house testing purposes. The value of the said samples worked out by the Department is Rs.2,09,301/-. The samples cleared for in-house testing purposes were not entered in the records maintained by the assessee and that the Central Excise duty of Rs.33,488/- was not paid by the assessee."**

**13. Further, the Order-in-Original, while dealing with the Supplementary Instructions for new Excise procedure, as on 01.01.2011, Chapter 11 issued by the Central Board of Excise and Customs held as under: -**

> **"16. As per the CBEC's Supplementary Instructions for new Excise procedure as on 1-9-2001, Chapter 11 deals with the subject of samples. Para 2 (2.1) categorises the samples into five categories and at S1. No. (ii), the samples for test purposes are mentioned. At Para 3.2.1 the samples for test purposes are listed out under different sub-categories which are as follows:-**
>
> **I) Samples drawn by in-house laboratory for testing quality and adherence to product specification.**
>
> **II) Samples drawn for preservation for investigation of complaints.**
>
> **III) Samples drawn for test at other concerns and independent testing agencies**
>
> **IV) Samples required to be sent to Govt. test centers**

**including the chemical examination for test.**

**17. Para 3.2.2 of the CBEC's Supplementary Instructions for new Excise procedure as on 1-9- 2001, states that assessee is required to maintain a proper account of receipt and the utilization of samples in the test conducted in the laboratory. The removal shall be in the same manner as the goods are removed for home consumptions. The manufacturer shall prepare invoice under Rule 11 of the said Rules and make issue entries for the goods (samples) in the daily stock account. Appropriate duty shall be paid by the assessee on these samples before their removal for test purposes, unless otherwise exempted by a duty exemption notification.**

**18. Para 3.3.1 of CBEC's Supplementary Instructions for new Excise procedure as on 1.9.2001, under heading 3.3, states that where samples are required for other purposes specified at (iii) (iv) & (v) of paragraph 2.1, the procedure specified at paragraph 3.2 shall be followed. However, it is clarified that when a manufacturer preserves the sample of their product for some period for investigation of complaints, if any, no duty shall be charged on these samples considering that the goods remain within the factory, duty shall be charged, unless exempted by a notification, once the samples are cleared from the factory, if at any time the manufacturer desires to destroy these samples, procedure specified in Rule 21 of the said Rules shall be followed.”**

**14. In view of the above, the Order in Original and the appellate authority concluded that since the goods**

**cleared for samples were nor properly accounted for in the registers maintained by the assessee as per instructions, those will have to be considered as goods being removed for home consumption illicitly without payment of duty.**

**15. The High Court has also relied upon Chapter 11 the aforesaid CBEC's Supplementary Instructions for New Excise Procedure, which set out the procedure for the assessee to maintain records for the removal of samples for testing.**

**16. It is clear from *ITC (supra),* that in case of non-maintenance of records in relation to removal of samples, the Department was justified in levying excise duty. For this very reason, on facts, we find that the further question that the goods were not marketable also cannot arise since the assessee defaulted in maintenance of records. The cases of the Tribunal, referred to by the counsel for the appellant, are distinguishable since records were maintained in the said cases.**

**17. We repeatedly asked the learned counsel for the appellant as to whether any records were maintained in accordance with the prescribed procedure for**

**substantiating the claim that the goods and the products were in fact sent for sampling. Learned counsel for the appellant was not able to show any shred of evidence. We also find no merit in the argument that the department’s appeal was not maintainable under Section 35G of the Act. The appeal fell within the parameters of the said Section and was not hit by the exclusion clause.**

**18. For the reasons stated above, we find no good ground to interfere with the impugned orders dated 18.08.2011 and 19.11.2011.**

**19. The Appeals are, accordingly, dismissed. No order as to costs.**

**20. Pending application(s), if any, shall stand disposed of.**

**……………………………………………………….J.**
**[K.V. VISWANATHAN]**

**…………………………………………………...J.**
**[ARUN PALLI]**

**NEW DELHI;**
**JULY 16, 2026.**

**ITEM NO.102 COURT NO.14 SECTION XII-B**

**S U P R E M E C O U R T O F I N D I A**
**RECORD OF PROCEEDINGS**

**CIVIL APPEAL NO(S). 6612-6613/2012**

**HICURE PHARMACEUTICALS PVT. LTD. APPELLANT(S)**

**VERSUS**

**COMMISSIONER OF CENTRAL EXCISE,**
**KARNATAKA RESPONDENT(S)**

**Date : 16-07-2026 These appeals were called on for hearing today.**

**CORAM :**
**HON'BLE MR. JUSTICE K.V. VISWANATHAN**
**HON'BLE MR. JUSTICE ARUN PALLI**

**For Appellant(s) Mr. Abdul Azeem Kalebudde, Adv.**
**Mr. P. R. Ramasesh, AOR**

**For Respondent(s) Mr. Raghvendra P Shankar, A.S.G.**
**Mr. Gurmeet Singh Makker, AOR**
**Ms. Pallavi Mishra, Adv.**
**Mr. Nikhil Aradhe, Adv.**
**Mr. Padmesh Mishra, Adv.**
**Mr. Raman Yadav, Adv.**

**UPON hearing the counsel the Court made the following**
**O R D E R**

**1. The appeals are dismissed in terms of the signed order, which is placed on the file.**

**2. Pending application(s), if any, shall stand disposed of.**

**(NIRMALA NEGI) (MANOJ KUMAR)**
**ASTT. REGISTRAR-cum-PS COURT MASTER (NSH)**