(2011) AIRSCW 757 : (2011) 186 ECR 18 : (2011) 2 JT 53 : (2011) 2 KCCR 101 SN : (2011) 1 RCR(Civil) 888 : (2011) 1 SCALE 480 : (2011) 2 SCC 601 : (2011) 1 SCR 741 : (2011) 1 UJ 298

Supreme Court of India

Case No: Civil Appeal No. 3626 of 2005

Medley Pharmaceuticals Ltd.		APPELLANT
	Vs	
The Commissioner of Central Excise and Customs, Daman		RESPONDENT

Date of Decision: Jan. 14, 2011

Acts Referred:
Central Excise (Valuation) Rules, 1975 â€" Rule 4, 6, 7, 93#Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 â€" Rule 11, 6, 7, 8#Central Excises and Salt Act, 1944 â€" Section 2, 3, 35L, 4(1

Citation: (2011) AIRSCW 757 : (2011) 186 ECR 18 : (2011) 2 JT 53 : (2011) 2 KCCR 101 SN : (2011) 1 RCR(Civil) 888 : (2011) 1 SCALE 480 : (2011) 2 SCC 601 : (2011) 1 SCR 741 : (2011) 1 UJ 298

Hon'ble Judges: H. L. Dattu, J; D. K. Jain, J

Bench: Division Bench

Advocate: S. Ganesh, Pratap Venugopal, Monoj Sanklech, Surekha Raman, Ramdas Gadiyar, Ananjay Singh and Namrata Sood, for K. J. John and Co, for the Appellant; R.P. Bhatt Sunita Rani Singh, Rekha Pandey and B. Krishna Prasad, for the Respondent

Final Decision: Allowed

Judgement

H.L. Dattu, J.
A group of three appeals is filed by the Appellant - Medley Pharmaceuticals Ltd., u/s 35L(b) of the Central Excise Act,

1944 (hereinafter referred to as `the Act"). In Civil Appeal No. 3626 of 2005, the Appellant calls in question the correctness or otherwise of the

order passed by Customs Excise and Service Tax Appellate Tribunal (CESTAT) (in short, ""The Tribunal"") in Appeal No. E/549 to E 551/2003-

Mum, dated 3.12.2004. By the impugned order, the Tribunal has confirmed the order passed by Commissioner of Customs and Central Excise,

Valsad dated 30.12.2002. In this appeal, the Appellant has raised the following question of law for our consideration and decision:

Whether Physician samples manufactured and distributed as free samples have to be assessed on the basis of cost of manufacture plus normal

profits, if any, earned on the sale under Rule 6(b)(ii) of the Central Excise Valuation Rules, 1975 (for short, ""Rules 1975"") upto 1st July, 2000 and

thereafter, on application of Rule 8 of Central Excise Valuation Rules, 2000 (for short, ""Rules 2000"") i.e. on cost of manufacture plus 15% profit

basis and not on pro-rata basis as has been done by the Revenue?

2. The Commissioner, while passing the order in Original No. 01/MP/Valsad/2002 dated 30.12.2002, has held that the value should be

determined under Rule 4 of Rules 1975. In the appeal filed by the Appellant, the Tribunal, following the judgment in the case of Mayo India Ltd.

and Cheryl Laboratories (P) Ltd., held that the value of Physician samples should be determined in accordance with the principle laid down in Rule

6(b)(i) read with Rule 7 of the Rules 2000. After coming to the aforesaid conclusion, the Tribunal has accepted the method of assessable value

adopted by the Commissioner, though it was under Rule 4 of the Rules 1975.

3. In Civil Appeal Nos. 1354-1355 of 2010, the Appellant is aggrieved by the final order passed by the Tribunal, bearing No. A/490/WZB

/AHD/2009 dated 27th February, 2009 and the order No. H/853/WZB/AHD/2009 dated 4th August, 2009 passed on the rectification

application in Appeal No. E/384/2005. By the impugned order, the Tribunal dismissed the Appellant''s appeal and upheld the order passed by the

Commissioner of Central Excise (Appeals) dated 24th November, 2004 holding that for the purpose of payment of Excise duty, Physician samples

have to be valued for the period post 1st July, 2000 upto December, 2001 on pro-rata basis on the value of trade packs under Rule 4 read with

Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000. The Tribunal, while rejecting the application filed

for rectification of the order dated 27th February, 2009, held that merely because a product is statutorily prohibited from being sold, would not

mean that the product is not capable of being sold. In this appeal, the Appellant has raised the following questions of law for our consideration and

decision. They are:

(A) Whether ""Physician Samples"" are excisable goods in view of the fact that they are statutorily prohibited from being sold under the Drugs and

Cosmetics Act, 1940 (in short, ""Drugs Act"") and the Rules made thereunder?

(B) If physician''s samples are held to be excisable, then what is the appropriate method of valuing physician samples for the purpose of excise

duty?

4. Shri S. Ganesh, learned senior counsel for the Appellant, submitted that the Physician Samples of Patent and proprietory medicines come into

existence as a manufactured product only when the same are labeled and packed for the purpose of sale and distribution. Our attention is invited to

Note 5 of Chapter 30 of Central Excise Tariff Act, 1985, wherein it is provided that packing and labeling would amount to manufacture.

Therefore, it is contended that the Physician Samples of Patent and proprietary Medicines become manufactured goods only when the same are

packed and labeled. It is further contended that the physician samples of patent and proprietory medicines, at the time they are manufactured, are

statutorily prohibited from being sold by virtue of Section 18 of the Drugs Act read with Rule 65(18) of the Drug Rules and the breach of the Drug

Rules invites prosecution u/s 27(d) of the Drugs Act, and also invites penalty u/s 27(c) of the Drugs Act. It is further submitted that the two

conditions that require to be satisfied for levy of excise duty are existence of manufacturing process and as a result of such process, goods are

produced which are capable, in the ordinary course, of being taken to the market for being bought and sold. It is further submitted that the word

`excisable goods'' has been construed to mean not only goods specified in the Schedule to the Central Excise Tariff Act, 1985, but also goods

which are capable of being sold i.e. marketable. In the present case, the `Physician Samples'' are statutorily prohibited from being sold and

therefore, do not satisfy the twin test required to make physician samples excisable goods.

5. Shri R. P. Bhatt, learned senior counsel for the Revenue, justifies the reasoning and conclusion reached by the Tribunal.

6. In pith and substance, the submission of learned senior counsel Shri Ganesh is that the physician samples of patent and proprietary medicines are

statutorily prohibited from being sold by virtue of Rule 65(18) and Rule 95 and Rule 96 (1) (ix) of the Drugs Rules. It is contended that every drug

intended for distribution as physicians sample while complying with the labeling provisions under Drugs and Cosmetic Rules further bear on the

label of the container the words ""'Physician''s Sample- Not to be Sold"" requires to be over printed and further, the sale of such Physician samples is

expressly prohibited under Rule 65(18) of the Drug Rules. He contends that patent and proprietory drugs are excisable only after the labeling is

complete. Since these physician samples cannot be sold in the market after the completion of the labeling in view of the statutory prohibition, the

physician samples are not marketable and hence, no excise duty is leviable on their manufacture.

7. The Central Excise Act, apart from others, provides for charging of duty, valuation etc. Section 3 of the Act is the charging provision. It states,

there shall be levied and collected in such a manner as may be prescribed duties on excisable goods which are produced or manufactured in India.

Basic excise duty and special excise duty are levied under the charging provision at the rates specified in First and Second Schedule to Central

Excise Tariff Act, 1985. The duty is on excisable goods which are manufactured or produced in India. This Court in 289419 has held that excise

duty is imposed on goods, and the taxable event for the levy is manufacture or production of the goods. A duty of excise is a tax upon the goods

and not upon sales or proceeds of sale of goods. In terms of Entry 84, List I of Seventh Schedule to the Constitution, taxable event in respect of

excise is manufacture or production (See CCE v. Acer India Ltd. 2004 AIR SCW 5496). The levy is on the manufacture or production of goods.

The collection is shifted to stage of removal. Since excise is a duty on manufacture, duty is payable whether or not goods are sold. Therefore, sale

is not necessary condition for charging excise duty. This Court in the case of 281274 , has referred to the distinction made by the Federal Court

between the duty of excise and a tax on sale in Province of Madras v. Boddu Paidanna and Sons (1942) FCR 90, wherein it is observed:

Plainly, a tax levied on the first sale must, in the nature of things, be a tax on the sale by the manufacturer or producer; but it is levied upon him qua

seller and not qua manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit... If the taxpayer who pays

sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be overlapping in one sense,

but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is, in

theory, nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence no matter

what happens to it afterwards, whether it be sold consumed, destroyed, or given away... It is the fact of manufacture which attracts the duty even

though it may be collected later. In the case of a sales tax, the liability to tax arises on the occasion of a sale and a sale has no necessary connection

with manufacture or production.

(emphasis supplied)

8. The consistent view of this Court is that for the purpose of levy of excise duty, an article must satisfy two requirements to be `Goods'' i.e. (a) it

must be movable and (b) it must be marketable. In these appeals, we are primarily concerned whether the `Goods'' namely Physician samples of

patent and proprietory medicines intended for distribution to the medical practitioner as free samples, satisfies the test of `Marketability''.

Marketability is an essential criteria for charging duty. The test of marketability is that the product which is made liable to duty must be marketable

in the condition in which it emerges. The word `Marketable'' means saleable or suitable for sale. It need not in fact be marketed. The article should

be capable of being sold to consumers, as it is without anything more. The essence of marketability of goods is neither in the form nor in the shape

or condition in which the manufactured article is found. It is the commercial identity of the article known to the market for being bought and sold.

The fact that the product in question is generally not being bought or sold or has no demand in the market, would be irrelevant. [See 282088 We

will now refer to some of the decisions of this Court, which have explained the concept of `Marketability'' for the purpose of the Act.

9. The Constitution Bench of this Court, in the case of 284724 after referring to definition of `excisable goods'', stated:

These definitions makes it clear that to become goods an article must be something which can ordinarily come to the market to be bought or sold.

10. A three Judge Bench of this Court in the case of 290134 has discussed the concept of `marketability'' in order for the Revenue to impose

excise duty as under:

6. It does seem to us that in order to attract excise duty the article manufactured must be capable of sale to a consumer. Entry 84 of List I of

Schedule VII to the Constitution specifically speaks of ""duties of excise on tobacco and other goods manufactured or produced in India...."", and it

is now well accepted that excise duty is an indirect tax, in which the burden of the imposition is passed on to the ultimate consumer. In that context,

the expression ""goods manufactured or produced"" must refer to articles which are capable of being sold to a consumer. In 288644 this Court

considered the meaning of the expression ""goods"" for the purposes of the Central Excises and Salt Act, 1944 and observed that ""to become

`goods'' an article must be something which can ordinarily come to the market to be brought and sold"", a definition which was reiterated by this

Court in 284724

11. In 279973 it was held:

Excise is a duty on goods as specified in the Schedule. The taxable event in the case of excise duties is the manufacture of goods. Under the

Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry, it was essential that as a result manufacture goods

must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market

as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the articles must be capable of being

sold in the market or known in the market as goods. It is, therefore, necessary to find out whether there are goods, that is to say, articles as known

in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Simply because

a certain article falls within the Schedule it would not be dutiable under excise law if the said article is not `goods'' known to the market.

Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff Act, 1985.

12. In 289430 , this Court observed:

11. Excise duty is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles

which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It

is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must

come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or are being

sold in the market as such. In order, therefore, to be manufacture, there must be activity which brings transformation to the article in such a manner

that different and distinct article comes into being which is known as such in the market.

13. In 294864 this Court stated:

Marketability is an essential ingredient in order to be dutiable under the Schedule to the Act.... The `marketability'' is thus essentially a question of

fact to be decided in the facts of each case. There can be no generalization. The fact that the goods are not in fact marketed is of no relevance. So

long as the goods were marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be

generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as

they are available for purchasers..... The marketability of articles does not depend upon the number of purchasers nor is the market confined to the

territorial limits of this country.

14. In 282088 this Court has stated:

Marketability is a decisive test for dutiability. It only means `saleable'' or ""suitable for sale"". It need not be in fact `marketed''. The article should be

capable of being sold or being sold, to consumers in the market, as it is ---- without anything more.

15. In 289500 this Court, while demonstrating the attributes of excisable goods under the excise law, has observed that:

13. ...The article in question should be capable of being brought and sold in the market -- a test which is too well established by a series of

decisions of this Court to be elaborated here.

16. In 259796 , this Court has held:

9. ...It is difficult to lay down a precise test to determine marketability of articles. Marketability of goods has certain attributes. The essence of

marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of

the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no

demand in the market would be irrelevant.

17. In the case of 264399 this Court while applying the test of marketability for the purpose of levy of excise duty on the manufacture of the

cigarette, has observed:

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"" u/s 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. In the case of 268890 , this Court has held:

9. Thus the law is that in order to be excisable, not only goods must be manufactured i.e. some new product brought into existence, but the goods

must be marketable. By marketable it does not mean that the goods must be actually bought and sold in the market. But the goods must be

capable of being bought or sold in the market. The law also is that goods which are in the crude or unstable form and which require a further

processing before they can be marketed, cannot be considered to be marketable goods merely because they fall within the Schedule to the Excise

Act.

19. In 285598 this Court observed:

5. Excise duty is levied u/s 3 on goods manufactured or produced in India. Thus, before excise duty is levied on an item, even if it is mentioned in

the tariff, two conditions have to be cumulatively satisfied, namely, that the process by which an item is obtained is a process of manufacture and

that the item so obtained is commercially marketable and bought and sold in the market or known to be so in the market.

20. In 274210 , it was held by this Court:

18. ...Marketability is an attribute of manufacture. It is an essential criteria for charging duty. Identity of the product and marketability are the twin

aspects to decide chargeability. Dutiability of the product depends on whether the product is known to the market. The test of marketability is that

the product which is made liable to duty must be marketable in the condition in which it emerges. Marketable means saleable. The test of

classification is, how are the goods known in the market. These tests have been laid down by this Court in a number of judgments including

295035 294321 and 268890

21. In Gujarat Narmada Valley Fertilizer Co. Ltd. v. Collector of Excise and Customs, (2005) 7 SCC 94, it was held that unless the product is

capable of being marketed and is known to those who are in the market, as having an identity as a distinct and identifiable commodity, that the

article is subject to excise duty. Simply because certain articles fall within the Schedule does not make them marketable. Actual sale in market is

not necessary, but the articles must be capable of being sold in the market or known in the market as goods.

22. In 302281 it was observed that excise duty is a levy on a taxable event of `manufacture''. Liability under excise law is event based on

manufacture and irrespective of whether the goods are sold or captively consumed. Excise duty is not concerned with ownership or sale.

23. Having said so in so far as exciseability of Goods for the purpose of duty under the Act, we may notice the purpose and object of Drugs Act.

In our opinion, the main object or real purpose of the Drugs Act, 1940 and Rules made thereunder, is to regulate the manufacture of drugs in order

to maintain the standard or quality of drugs for sale and distribution as a drug. This Court in 281142 , has held:

14. ...The object of the Drugs Act is to maintain the quality of drugs as drugs. Its use as any other commodity in the hands of the consumer is not

regulated. Hence, the Drugs Act is relatable to Entry 19 of List III, which deals with drugs and poisons, subject to Entry 59 of List I regarding

opium. Lastly, the said Act regulates the manufacture of drug for sale and distribution as a drug.

24. Therefore, any requirement or condition imposed by the Drugs Act and Rules made thereunder, is in furtherance of its above stated object of

regulating and maintaining the quality of Drugs.

25. The primary object of the Act is to raise revenue by imposing duty on goods that are manufactured as mentioned above (see 281460 . In other

words, the scope of the Act extends to the event of manufacture of goods, for the levy of excise duty. These two Statutes and the Rules made

thereunder, operate in entirely two different fields having different objects, purposes and schemes. The conditions or restrictions contemplated by

one statute should not be lightly and mechanically imported and applied to fiscal statue for non levy of excise duty, thereby causing a loss of

revenue. This Court in 285878 has held:

55. True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines ''Ayurvedic'' siddha or unani drug"" but that definition is not necessary

to be imported in the new Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to

another statute. As stated above, the object of the Excise Act is to raise revenue for which various products are differently classified in the new

Tariff Act.

26. Therefore, the prohibition on the sale of Physician Samples intended for distribution to medical practitioners as free samples by Rule 65(18) of

the Drugs Rules shall have no bearing or effect upon the levy of excise duty under the Act, since excise is a duty on manufacture, duty is payable

whether or not goods are sold. Excise duty is payable even in case of free supply, since sale is not a necessary condition for charging duty under

the Act.

27. Even assuming that Shri. Ganesh is correct, when he contends that physician samples are not allowed to be sold in the open market in view of

the statutory prohibition on their sale, and hence are not marketable; the Revenue is only concerned with the manufacture of the goods and the

possibility of marketability of the goods. When the product is manufactured by a Pharmaceutical Company, it is for the purpose of sale i.e., every

such product including Physician Sample is capable of being sold in the open market, but the pharmaceutical company makes the choice to

distribute the same as a free sample. In other words, it is not mandatory for the pharmaceutical company to distribute free physician samples of

every drug they manufacture. This choice made by the pharmaceutical companies in terms of Rule 96(1) (ix) of the Drugs Rules by overprinting

words `Physician''s sample-Not to be sold'' on the label of the drugs will not come in the way of the Revenue from levying excise duty on the drugs

so manufactured.

28. We agree with Shri Ganesh, learned senior counsel for the Appellant, that the manufacture of patent and proprietary drugs is completed only

after the labelling is completed, for the purpose of levy of excise duty. However, on a perusal of the labelling provisions in the Drug Rules, we find

that they deal with the name of drug, contents of the drug, name and address of manufacturer, a distinctive batch number (details of manufacture of

drug is recorded and available for inspection as a particular batch), preparation of drug, date of manufacture and date of expiry of drug, its storage

conditions, etc., which are in aid of the object of the Act, viz. promoting the use of good quality drugs, and ensuring that drugs that do not live upto

quality do not find their way into the market. Rule 96(1) (ix) of the Drug Rules on which Shri Ganesh heavily relies in support of his submission,

states that while complying with the labelling provisions under Clauses (i) to (viii) of Rule 96(1), the manufacturer must further overprint on the label

`Physician''s Sample - Not to be Sold'', in case they are to be distributed free of cost as physicians samples. Further, the bare perusal of Rule 96

shows that its heading bears `Manner of Labelling'' and Clause 1 of this Rule contemplates or govern the manner of labelling in a way that the

particulars on the label of the container of a drug shall be either printed or written in indelible ink and shall appear in conspicuous manner. This

gives ample clarification that the process of labelling is distinct or different from the overprinting on the label of a physician''s sample, and hence we

are unable to agree with him that the manufacture for the purpose of the Central Excise Tariff Act is not completed until `Physicians Sample - Not

to be Sold'' is printed on the label.

29. The primary reason of distributing free physician samples by the manufacturer of pharmaceutical drugs to us appears to be only for the purpose

of advertising of the product and thereby enhancing the sale of the product in the open market. It has been shown by research that the market of a

pharmaceutical company is enhanced substantially by the distribution of free physician samples. In other words, the distribution of such physician

samples serves as a marketing tool in the hands of the pharmaceutical companies [See Sarah L. Cutrona et al., Characteristics of Recipients of

Free Prescription Drug Samples:

A Nationally Representative Analysis, 98 Am. J. Pub. Health 284 (2008).

30. Before we conclude, in our view, the issue raised in these appeals is no more res-integra. This issue came up for consideration before this

Court in the case of Ranbaxy Laboratories Ltd. v. Commissioner of Central Excise, Pune (2003) 9 SCC 199, wherein it was held:

1. In these appeals, the question is whether free medical samples supplied to the doctors are liable to excise duty. In our view, this question is

answered by a decision of this Court rendered today in Civil Appeal No. 3643-44 of 1999.

2. However, in these matters one further question arises i.e. how are the samples to be valued. The question arises as to whether the price of

physician samples are to be worked out on pro-rata basis for the samples as per Section 4(1)(b) of the Central Excise Act read with Rules 7 and

6(b) of the Central Excise (Valuation) Rules, 1975 or on some other basis. The Tribunal has not decided this question even after holding that the

goods were excisable. We, therefore, remit these matters back to the Tribunal for a decision on this point. The appeals stand disposed of

accordingly. No order as to costs.

31. This Court, while passing the aforementioned order, has relied on the judgment and order passed in the case of 271783 [referred to as Civil

Appeal No. 3643-44 of 1999], in which this Court held:

4. It is next submitted that the value of an assessable goods can be zero. It is submitted that when a part is replaced under a warranty to the

Assessee the value is zero. It is submitted that as the value is zero, no excise duty should be payable on that part. We are unable to accept this

submission also. In order to promote sales manufacturers and dealers very often offer incentives e.g. supply of free TV or some other equipment or

goods. One of the incentives offered, is a warranty to replace a part within a particular period. Merely because manufacturers and dealers choose

to offer such incentives does not mean that goods which are otherwise excisable, should be exempted from paying excise duty. When offering the

incentive, the manufacturer or dealer is choosing to take upon himself the cost of those goods. So far as the Revenue is concerned, those goods

remain excisable.

32. This Court has consistently held that the medical supplies supplied to the Doctors are liable to excise duty. Elaborate consideration may not be

forthcoming in these judgments, but, in our view, the issue stands concluded. We say so for the reason that this Court, in catena of cases, has

opined that in case, the appeal has been dismissed in the absence of detailed reasons or without reasons, such order will entail the application of

the doctrine of merger, wherein the superior court upholds the decision of the lower court from which the appeal has arisen. In the case of 265266

this Court held:

8. Different considerations apply when a SLP under Article 136 of the Constitution is simply dismissed by saying ""dismissed"" and an appeal

provided under Article 133 is dismissed also with the words ""the appeal is dismissed"". In the former case it has been laid by this Court that when a

SLP is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. But what the

Court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could

not be so when an appeal is dismissed though by a non-speaking order. Here the doctrine of merger applies. In that case, the Supreme Court

upholds the decision of the High Court or of the Tribunal from which the appeal is provided under Clause (3) of Article 133. This doctrine of

merger does not apply in the case of dismissal of a SLP under Article 136.

33. In the case of 271311 it was held:

41. Once a SLP has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before

the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the

applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming

the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt

inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court

to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting

leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows

the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. ""To merge"" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger

in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased;

an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)

34. It is settled law that this Court should follow an earlier decision that has withstood the changes in time, irrespective of the rationale of the view

taken. It was held by a Constitution Bench in the case of 279266

40. It is also true to say that for the application of the rule of stare decisis, it is not necessary that the earlier decision or decisions of longstanding

should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous

decisions could more easily be treated as binding by applying the law of precedent and it will be unnecessary to take resort to the principle of stare

decisis. It is, therefore, sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose or was

argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, for the purpose of applying the rule of

stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which is said to operate as stare

decisis....

35. Now we may notice the decisions on which reliance placed by learned senior counsel Shri Ganesh. In Delhi Cloth and General Mills v. Joint

Secretary, 1978 (2) ELT (J121) (Delhi High Court), the question before the court was whether calcium carbide, which does not comply with

regard to purity and packaging with statutory rules answers the test of `Marketability''. The Court on facts has found that the calcium carbide

manufactured by the company was for further utilization in the production of acetylene gas was not of purity that rendered it marketable nor was it

packed in such a way as to make it marketable that is to say, in air tight containers. The Court has further noticed that the commodity in question

would require further processing to make it marketable and therefore, the commodity in question is not marketable and hence, not excisable.

36. Reliance is placed on the decision of CESTAT in 2004 (172) ELT 466 . That was a case where Assessee manufactured a new drug for trial

which were supplied for clinical trials. In view of the Drugs Control Act and the Rules framed thereunder, any drug could be marketed only after

successful clinical trials and after approval and licence from Drugs Controller. Hence, the Tribunal held that the drug supplied free for clinical trials

is not excisable Goods as it cannot be bought and sold at that stage.

37. In 2003 (106) ECR 670 , the question before the Tribunal was, whether excise duty is leviable on `Sugar syrup'' manufactured by the

Assessee for use in the manufacture by it for cough syrup. The Tribunal, while answering the issue, has stated that since the sale of Sugar Syrup

containing artificial sweetener sodium saccharin would contravene the provisions of Prevention of Food Adulteration Rules, the Goods cannot be

considered as marketable.

38. In 2007 (210) ELT 407 it was a case where Assessee manufactured `diesel stem'' by refining the sour crude for captive consumption and sale

in the market. The sale of `diesel stem'' containing high sulphur content was prohibited by Ministry of Petroleum and Natural Gas in the light of the

notification issued by Ministry of Environment and Forest for preventing environmental pollution caused by emission due to burning of sulphur along

with fuel. In the light of the notification issued by Ministry of Environment & Forest, the `diesel stem'' in its high content of sulphur is incapacitated

from being sold in the market. In other words, this inherent incapability in the ingredients of the Goods, from being sold in the market makes it non-

marketable and hence not excisable.

39. In 2005 (128) ECR 446 the question before the Tribunal was, whether the excise duty is leviable on `vegetable extracts'' manufactured by the

Assessee for use in the manufacture of Ayurvedic, Unani or Siddha Medicines. The Tribunal, while answering the issue, concluded that such

vegetable extracts, unless subjected to preservative process, are not liable to be considered as Goods attracting excise duty and such Goods

should be considered as only intermediary Goods. Further, in view of the fact that the licence issued by the Drug Controller prohibits Assessee

from selling such semi finished products. Therefore, the Tribunal concluded that such intermediary or semi finished Goods manufactured by

Assessee cannot be compared with the products manufactured by others for sale, for the purpose of `marketability''.

40. In our considered view, the reliance placed by the learned senior counsel for the Appellant on some of the decisions of the Tribunal would not

assist him in support of his submission for the reason that the goods therein were not marketable and hence, excise duty was not leviable, not

because of any statutory prohibition for the sale of the goods, but because they had not reached the stage of satisfying the test of marketability of

the goods.

41. Now coming to the valuation of the physician samples for the purpose of levy of excise duty, in our view, this issue need not detain us long in

view of the decision of this Court in the case of Commissioner of Central Excise v. Bal Pharma Civil Appeal No. 1697 of 2006. This Court has

upheld the conclusion of the Tribunal that the physician''s samples have to be valued on pro-rata basis. The Tribunal, while arriving at the aforesaid

conclusion, had relied upon its earlier decision in the case of 2005 (126) ECR 210 which has been accepted by the department. Therefore, we

hold that physician samples have to be valued on pro-rata basis for the relevant period.

42. In view of the above discussion, we pass the following order:

a) Civil Appeal No. 3626 of 2005 is allowed and the matter is remitted to the Adjudicating Authority with a direction to value the goods in

question on pro-rata basis for the relevant period.

b) We dismiss Civil Appeal Nos. 1354-1355 of 2010. Parties to bear their own costs.