

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,  
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

**EXCISE Appeal No. 852 OF 2011-DB**

[Arising out of Order-in-Original/Appeal No COMMR-A-147-VDR-II-2011 dated 19.04.2011 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II]

**Astral Pharmaceuticals Industries**

**.... Appellant**

911, GIDC, Makarpura, VADODARA  
GUJARAT-390010

*VERSUS*

**Commissioner of Central Excise & ST, Vadodara-ii**

**.... Respondent**

1st Floor, Room No.101, New Central Excise Building,  
Vadodara, Gujarat-390023

**AND**

**EXCISE Appeal No. 1424 OF 2011-DB**

[Arising out of Order-in-Original/Appeal No COMMR-A-147-VDR-II-2011 dated 19.04.2011 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II]

**Astral Pharmaceuticals Industries**

**.... Appellant**

911, GIDC, Makarpura, VADODARA  
GUJARAT-390010

*VERSUS*

**Commissioner of Central Excise & ST, Vadodara-ii**

**.... Respondent**

1st Floor, Room No.101, New Central Excise Building,  
Vadodara, Gujarat-390023

**APPEARANCE :**

None for the Appellant

Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)  
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 17.04.2023

DATE OF DECISION: 26.07.2023

**FINAL ORDER NO. 11610-11611/2023**

**C.L. MAHAR :**

The brief facts of the case are that appellants were issued show cause notice dated 04.05.2009 on the ground that they have taken excess Cenvat credit of Rs. 14,59,024/- during the period from 01.04.2004 to 28.02.2009 on inputs supplied to 100% EOU by not following the formula prescribed

under Rule 3(7)(a) of Cenvat Credit Rules, 2004. It was also alleged that in the show cause notice that appellant had not paid excise duty of Rs. 54,796/- on the removal of samples of medicines taken out for the purpose of testing/ chemical examination.

2. During the course of enquiry, the appellant voluntarily paid an amount of Rs. 7,49,664/- and another amount of Rs. 54,976/-. The matter got decided vide Order-in-Original No.06/VDR-II/MP/ADC/09-10 dated 07.01.2010 as follows:-

“(i) that the Cenvat credit has been availed correctly by the appellant as per the formula of rule 3(7)(a), upto 29.2.2008;

(ii) the amendment in the formula by notification dated 05.12.2008 cannot be given retrospective effect from 01.03.2008;

(iii) Excise duty is payable on the samples of medicaments taken outside the factory;

(iv) Wrong credit taken is demanded invoking extended period because source of credit is not known to the department but for the investigation done;

(v) Rs.1,60,002 held as wrong Cenvat credit taken ordered for appropriation out of the amount paid during investigation;

(vi) Rs.54,976 demanded on samples and to be appropriated from the duty already paid;

(vii) Penalty of Rs. 2,14,978 imposed under Rule 15 read with section 11AC.”

The abovementioned order-in-original of the Additional Commissioner has been challenged by the appellant before the Commissioner (Appeals). The

appeal filed by the appellant against order-in-original dated 07.01.2010 was rejected by Commissioner (Appeals).

3. Since the majority of the demand was dropped by the Additional Commissioner vide order-in-original dated 07.01.2010, the appellant has preferred a refund of Rs. 7,49,664/- by filing a refund application before the Commissioner of Central Excise. The Assistant Commissioner, while processing the refund claim of appellant has given the following order:-

“8.1 The Ld. Assistant Commissioner of Central Excise & Customs has passed the impugned order-in-original No. Ref/06/Astral/10 dated 09.06.2010 holding:

(i) Appellant is entitled to the refund of Rs.3,74,684 by way of giving re-credit to Cenvat credit account only after deducting the confirmed demand of Rs. 1,60,002 towards wrong availment of Cenvat credit and imposition of penalty of Rs. ordered in the order-in-original dated 07.01.2010, out of the total eligible refund of Rs. 7,49,664/-.

(ii) Time bar and doctrine of unjust enrichment are not applicable.”

Against the above mentioned order of the Assistant Commissioner, the appellant has appealed before Commissioner (Appeals) on the ground that principles of natural justice has not been followed as they have not issued any show cause notice regarding appropriation of an amount of Rs. 1,60,002/- and adjustment of penalty of Rs. 2,11,978.

4. Against the above mentioned order dated 09.06.2010, the appellants have preferred appeals before Commissioner (Appeals) which were decided by order dated 20.09.2011 whereunder the Commissioner (Appeals) rejected the appellant's appeals. The appellant is therefore before us against the above mentioned orders-in-appeal.

5. We have heard both the sides.

6. The only question needs to be answered is whether the original adjudicating authority of the refund claim was required to issue a show cause notice before appropriation of the confirmed dues or not. We find that it is a matter on record that amount of duty and penalty which has been confirmed by the Additional Commissioner vide his order dated 07.01.2010 has already attained finality. The appeal filed by appellant against this order has already been rejected by the Commissioner (Appeals). We do not find any order of this Tribunal on the confirmed dues as per the order of Additional Commissioner dated 07.01.2010. It is a matter on record that Assistant Commissioner processed the refund claim of the appellant and thereafter the entire amount which was deposited by them amounting to Rs. 7,49,664/- has been sanctioned and as per the provisions of Section 11 of Central Excise Act, 1944, the confirmed dues amounting to Rs. 5,89,662/- has been appropriated from the refund amount due to the appellant.

7. Therefore, we do not find any legal short-coming in the order of the Adjudicating Authority. As we do not find any stay on the confirmed dues and as per the provisions of Central Excise Act, 1944, the officer sanctioning the refund is authorised to make deductions of any tax dues which are recoverable from the appellant. While holding this view, we also take shelter of the following decisions:-

(i) In the case of CCE, Indore vs. Gahoi Foods Pvt. Limited – 2005 (180) ELT 186 (Tri. Del.), the Tribunal has passed the following order:-

**“3.** Section 11 of the Central Excise Act contains the provisions for the recovery of sums due to Government. Section 11 empowers the officer to deduct the amount payable by any person from any money owing to the said person. In this matter, it has not been disputed that the demand of duty has been confirmed against the respondents

under Order-in-Original dated 24-12-2001 and which has not been paid by them. In view of these facts, the Department was legally empowered to adjust the amount of refund against the pending demand. This was the view expressed by the Tribunal in the case of *Pyarelal Rameshwar Prasad* (supra). Accordingly, I hold that the Deputy Commissioner was justified in adjusting the amount of refund against the pending demand. Thus, the impugned order to this extent is set aside and the appeal is allowed.”

(b) In the case of *Mahavir Steel Rolling Mills vs. CCE, Hyderabad – 2010 (251) ELT 69 (Tri. Bang.)*, the Tribunal has passed the following order:-

“3. There is nothing to compromise with the law for the reason that when any amount is recoverable, Section 11 operates for adjustment. A litigant is not allowed to be unjustly enriched, when any amount is realizable from him. If any amount is due to an assessee by way of refund that shall be adjusted against the said arrear demand. Accordingly, the order passed by the learned Commissioner (Appeals) is upheld.”

8. In view of our entire above discussion, we hold that appeals are without any merit and deserve to be dismissed. Accordingly, we dismiss the same.

*(Pronounced in the open court on 26.07.2023)*

**(Ramesh Nair)**  
**Member (Judicial)**

**(C L Mahar)**  
**Member (Technical)**