IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT NO. – III

Excise Appeal No. 40805 of 2013

(Arising out of Order-in-Original No.14/2012 dated 20.12.2012 passed by the Commissioner of Central Excise, Chennai – IV)

M/s. Shasun Pharmaceuticals Ltd. Appellant
3 & 4, Batra Centre, No. 28
Sardar Patel Road, Guindy
Chennai – 600 032.

Vs.

Commissioner of GST & Central Excise Respondent
MH Complex
5th Floor, 692, Anna Salai
Chennai – 600 035.

APPEARANCE:

Shri M. Karthikeyan, Advocate for the Appellant
Shri B. Balamurugan, AC (AR) for the Respondent

CORAM

Hon'ble Mrs. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Venkata Subba Rao, Member (Technical)

Final Order No. **40833 / 2019**

Date of Hearing: 12.06.2019
Date of Decision: 12.06.2019

MRS. SULEKHA BEEVI C.S.

Brief facts are that the appellants are engaged in the manufacture and clearance of "Streptokinase" and are availing the facility of CENVAT credit on capital goods, inputs and input services. The appellant has been licensed to manufacture the product Lifokinase (Streptokinase bulk solutions) by the Director of Drug Controls. The appellant classified this product under Tariff sub-heading 35079061 and paid duty on the basis of the specific Tariff Heading for “Streptokinase” for the period from June 2009 to December 2009. They started clearing the product in June 2009. There was no clearance of the product during January 2010 to March 2010. However for clearances from April 2010 onwards, the appellant classified the product under Tariff sub-heading 30049084 and claimed full exemption from payment of Central Excise duty in terms of Notification No. 4/2006-CE dated 1.3.2006 r/w Notification 21/2002-Cus. dated 1.3.2002 as amended. In terms of Notification No. 4/2006-CE, drugs or medicines specified in List 3 or List 4 appended to Notification No. 21/2002-Cus. dated 1.3.2002 attract nil rate of duty. The department was of the view that the product “Streptokinase” manufactured by the appellant is correctly classifiable under Heading 30049084 and attracting nil rate of duty in terms of Notifications.

2. As per Section 5A(1A) of Central Excise Act, 1944, as amended, where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods. Thus, the appellants were not liable to pay any duty on the said product namely “Streptokinase” for the period June 2009 to December 2009.

3. As per Rule 6(1) of CENVAT Credit Rules, 2004, no CENVAT credit is liable to be taken on the inputs or input services which are used in the manufacture of exempted goods. Since the goods are exempt from payment of duty, the appellants are not eligible to avail

the credit of CENVAT on inputs / input services. Thus, the department was of the view that the appellants have wrongly availed credit on inputs and input services which are used in the final product namely "Streptokinase" which is exempt from payment of central excise duty.

4. Further, though no duty is payable, on the said products as per the Notification 4/2006 dated 1.3.2006, the appellants had collected an amount of Rs.46,49,379/- towards excise duty along with education cess and secondary higher education cess in respect of the exempted goods namely "Streptokinase" by them.

5. Show Cause Notice was issued raising the above allegations and proposing to recover the wrongly availed credit of duty on capital goods, inputs and input services to the tune of Rs.65,56,978/- along with interest and also to recover an amount of Rs.46,49,379/- being the amount of excise duty collected from the buyers and to be deposited with the Central Government under section 11D of Central Excise Act, 1944 along with interest on the above amount besides penalties. After due process of law, the original authority dropped the proposal for demand of excise duty of Rs.46,49,379/- under section 11D of Central Excise Act, 1944 as well as to impose penalty under Rule 15(1) of CENVAT Credit Rules, 2004. However, the demand of Rs.65,56,978/- being the wrongly availed credit was confirmed along with interest and equal penalty was imposed under Rule 15(2) of CENVAT Credit Rules, 2004 r/w section 11AC of Central Excise Act, 1944. Aggrieved by the above confirmation of demand in respect of the CENVAT credit availed as well as penalty imposed, the appellant is now before the Tribunal.

6. The ld. counsel Shri M. Karthikeyan opened his argument explaining the events prior to the issuance of the Show Cause Notice. He submitted that the appellant started manufacture of "Streptokinase" in June 2009. Earlier to that, the appellant was manufacturing other products and was registered with the Central Excise Department. On 1.6.2009, they filed an application for additional incorporation of finished goods ("Streptokinase") in their Central Excise registration. In the said letter, the appellant had specifically stated that they intend to manufacture "Streptokinase" falling under Chapter Heading 35079061 for export as well as domestic sale. The license to manufacture for sale or distribution of the said product was also granted by the Director of Drugs Control, which was in force from 12.5.2009 to 11.5.2014. The appellant thereafter manufactured and cleared "Streptokinase" classifying the said goods under 35079061 and paying excise duty @4%. The appellant had classified the finished goods under 35079061 for the reason that there was specific entry for "Streptokinase" under the said Tariff heading.

7. Later, a letter dated 7.1.2010 was issued to the appellant informing that no effective rate of 4% is available to Chapter sub-heading 35079061 and the effective rate is 8% and accordingly the appellant was required to pay the differential duty of Rs.39,28,631/-. In response to the said letter, the appellant vide letter dated 22.1.2010 submitted in detail that they had wrongly adopted the classification under the above Heading and the product "Streptokinase" manufactured and cleared by them merits to be

classified under 30049084 as a lifesaving drug and it attracts nil rate of duty in terms of exemption Notification No.4/2006-CE r/w Notification No. 21/2002-Cus. According to them, no differential duty is payable and all clearances from January 2010 was made claiming full exemption under the above notification. Thus from January 2010 onwards the appellant has been clearing the product "Streptokinase" availing full exemption and the appellant had not availed CENVAT credit on the capital goods / inputs / input services received from January 2010 onwards.

8. Later Show Cause Notice dated 18.7.2012 was issued to the appellant which is the genesis for the present proceedings. It is now the case of the department that the duty that has been collected and paid by the appellant during the period June 2009 to December 2009 @4% on the product "Streptokinase" cleared by the appellant ought not to be collected and that the same cannot be considered as excise duty. That therefore the appellant is liable to pay an amount along with interest as provided under section11D of the Central Excise Act, 1944. The adjudicating authority has rightly set aside the demand made under section 11D of Central Excise Act, 1944.

9. However, the adjudicating authority proceeded to confirm the demand raised alleging wrong availment of credit on capital goods, inputs and input services. It is argued by him that the department was all along aware that the appellant was classifying the goods under 35079061 and clearing the goods by payment of central excise duty @4%. They even issued a letter in January 2010 requiring the

appellant to discharge the duty @ 8%. Thereafter, on taking legal opinion, the appellant has informed the department that they are not liable to pay duty since the produce is exempt from duty as per Notification No. 4/2006 r/w Notification 21/2002. This being the fact, the allegation that the appellant has wrongly availed the credit and suppressed the facts with intent to evade payment of duty cannot sustain. The Show Cause Notice for the period June 2009 to December 2009 has been issued only on 18.7.2012 invoking the extended period of limitation alleging suppression of facts with intent to evade payment of duty. In para 11 of the Show Cause Notice, it is alleged that the appellants willfully misstated in their returns that the product "Streptokinase" is chargeable to excise duty under Chapter 35 and that this was done with an intention to encash the credit on the capital goods / inputs / input services by way of collecting excise duty from their customers. The appellant was initially under the bonafide belief that the product would fall under Chapter Heading 35079061 because there was a specific entry for "Streptokinase". Only later, on receiving the letter issued by the department requiring the appellant to discharge higher rate of duty @ 8%, the appellant, on seeking legal opinion, came to know that there is no liability to pay duty at all. The Show Cause Notice issued invoking the extended period cannot sustain and he pleaded that the impugned order may be set aside.

10. The ld. AR Shri B. Balamurugan appeared on behalf of the department. He much emphasized on para 11 of the Show Cause Notice to argue that the appellant is manufacturing other products

apart from "Streptokinase". The CENVAT credit availed by them on the goods manufactured for the period June 2009 to December 2009 has been utilized by the appellant to discharge duty on other dutiable products. Thus, the intention to encash the credit portion of the capital goods / inputs / input services is very much clear. Though the product is exempt fully from payment of duty, the appellant has willfully misstated the classification of the goods and discharged the duty in order to avail the wrong credit. He therefore pleaded that the impugned order may not be interfered with.

11. Heard both sides.

12. The main contention put forward by the ld. counsel for the appellant is that on limitation. On perusal of the records, we find that the appellant has issued a letter dated 1.6.2009 to the department requesting for additional incorporation of finished goods namely "Streptokinase" in their central excise registration. The relevant part of the said letter is reproduced as under:-

> *"Sub: Central Excise – Filing of Application for additional incorporation of finished goods in the Central Excise Registration – Reg.*
>
> *It is to kindly inform you that we M/s. Shasun Chemicals and Drugs Ltd., located at No. 60, Velacherry Main Road, Velachery, Chennai – 600 042 are already registrant before Central Excise with Registration No. AAACS5031LXM001. Subsequent to the above, we now intend to manufacture "Streptokinase" falling under Chapter Heading No. 35079061 for both export and domestic sales.*
>
> *We are enclosing herewith the Registration Certificate in original with other relevant documents for your kind perusal and for necessary incorporation of the new product as referred above."*

13. The appellant thereafter had been clearing the goods under the above Chapter Heading and discharging duty @ 4%. On 7.1.2010, the department has issued a letter requiring the appellant to pay

higher duty @ 8% along with an annexure calculating the rate of duty for the period April 2009 to November 2009. The relevant part of the letter issued by the department is reproduced as under:-

> *"Scrutiny of returns filed by you reveal that you have paid 4% of duty on the products manufactured by you. As per your returns you have classified the goods viz. STREPTOKINASE under 35079061. As per the Central Excise Tariff Act, 1985 the no effective rate of 4% is available to the Chapter Sub-Heading 35079061 and the effective rate applicable is 8% (ED) + 2% (Ed. Cess) + 1% (SHE) on ED.*
>
> *Hence you are hereby directed to pay the differential duty as detailed in the annexure along with interest immediately."*

14. From the above two letters, it is very much clear that the department was fully aware that the appellant was classifying the goods under 35079061. While issuing the letter dated 7.1.2010 also, the department did not doubt the classification adopted by the appellant. Only later when the appellant issued a letter dated 22.1.2010 explaining that there is no liability to pay duty on the said product, since they would be eligible for the notification benefit, as the goods are correctly classified under Chapter Heading 30049084, the demands have been made to deny the credit availed. After receiving letter dated 22.1.2010, the department has accepted the said classification of the goods under Heading 30049084 and the exemption from payment of duty. Much later, on 18.7.2012, the department has issued the present Show Cause Notice alleging that the appellant has willfully misstated the facts with intention to evade payment of duty. We do not find that the appellant has suppressed or willfully misstated any facts. The documents show that the appellants have informed all the details with regard to classification and the rate of duty adopted by them in the letters issued by them to the

department. When the department itself has earlier accepted the classification adopted by the appellant and demanded higher rate of duty @ 8% from the appellant, the allegation that the appellant has wrongly paid duty without availing the exemption and thus intended to avail wrong credit can at no stretch of imagination be accepted. We do not find any iota of evidence to establish the ingredients under section 11AC of the Central Excise Act, 1944. The Show Cause Notice therefore is time-barred and cannot sustain.

15. The impugned order is set aside and the appeal is allowed on the ground of limitation with consequential benefit if any, as per law.

(Dictated and pronounced in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. VENKATA SUBBA RAO**)
Member (Technical)

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