

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench

Court – I

Excise Appeal No. 1389 of 2011

(Arising out of Order-in-Original No. 07/2011 (CE)-Commr dt.17.02.2011 passed by
Commissioner of Customs & Central Excise, Hyderabad)

Matrix Laboratories Ltd

IDA Pashamylaram, Medak Dist.,
Hyderabad, AP- 502 139

.....Appellant

VERSUS

**Commissioner of Central Tax
Medchal - GST**

Above SBI Bazarghat Branch,
Lakdikapool, Hyderabad – 500 004

.....Respondent

with

Excise Appeal No. 2249 of 2012

(Arising out of Order-in-Appeal No. 84/2012 (H-I) CE dt.24.05.2012 passed by
Commissioner of Customs, Central Excise & Service Tax, Hyderabad)

Mylan Laboratories Ltd

IDA Pashamylaram, Medak Dist.,
Hyderabad, AP- 502 139

.....Appellant

VERSUS

**Commissioner of Central Tax
Medchal - GST**

Above SBI Bazarghat Branch,
Lakdikapool, Hyderabad – 500 004

.....Respondent

and

Excise Appeal No. 30017 of 2019

(Arising out of Order-in-Appeal No. HYD-EXCUS-MD-AP2-0067-18-19 dt.28.09.2018 passed
by Commissioner, GST & Central Excise, Hyderabad)

**Commissioner of Central Tax
Medchal - GST**

Above SBI Bazarghat Branch,
Lakdikapool, Hyderabad – 500 004

.....Appellant

VERSUS

Mylan Laboratories Ltd

IDA Pashamylaram, Medak Dist.,
Hyderabad, AP- 502 139

.....Respondent

Appearance

Shri Raghav Ramabhadram, Advocate for the Appellant.

Shri V.R. Pavan Kumar, AR for the Respondent.

Coram:

HON'BLE MR. R. MURALIDHAR (JUDICIAL)

HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30149-30151/2023**Date of Hearing: 30.05.2023****Date of Decision: 09.06.2023****[Order per: R. MURALIDHAR]**

The Appellant is manufacturer of various pharma products and is registered as 100% EOU. For the raw materials imported by them, they are availing the benefit of Notification No. 52/2003-CUS dt.31.03.2003 wherein Customs Duty concessions are available to them. Similarly, in respect of indigenously procured raw materials, consumables etc., they are availing the exemption provided under Notification No. 22/2003-CE dt.31.03.2003. While the imported and indigenous goods bought under these Notifications are required to be used in the manufacture and clearance of their exported finished goods, in some cases, they have also cleared such imports of the raw materials to their DTA units on which they have paid appropriate duty while clearing the same. For such clearance of raw materials/ inputs to DTA units, they have been obtaining permission from their jurisdictional Central Excise officials and they are being clearing under proper invoices giving details of duty payment. Such transactions are also recorded in the ER2 Returns. The Department issued Show Cause Notice for the period April, 2005 to September, 2005 involving the extended period and for the normal period October, 2009 to March, 2010 on the ground that when such duty free inputs are cleared from EOU to DTA, the Duty is required to be discharged by way of cash payment, by way of debit in the PLA Account whereas the Appellants have utilized the Cenvat credit which is not legal and proper. After due process, the demands were confirmed. Being aggrieved by the impugned Orders, the Appellants are before the Tribunal.

2. The Department has filed Appeal E/30017/2019 in respect of the dropped demand of Rs.64,86,091/- on the same issue where periodical proceedings were taken up. The period involved is November, 2015 to June, 2017. In this case, the issue is identical to the Appeals filed by the Appellant. The Commissioner (Appeals) has relied on the case law of the Appellant i.e., Matrix Laboratories Ltd [2012 (281) ELT 569 (Tri-Bang.)] and set aside the OIO. Being aggrieved by the impugned OIA, the Department has filed this Appeal before the Tribunal.

3. Learned Counsel appearing on behalf of the Appellants submits that there is no dispute that the inputs/ raw materials were cleared on payment of the required duties only. Both the Notifications No. 52/2003-CUS dt.31.03.2003 & 22/2003-CE dt.31.03.2003 speak of "duties" only. Therefore, when the "duties" are to be paid, the Appellant has not committed any error in paying such duties by utilizing their Cenvat credit Account for such payments. The learned Counsel relies on their own case decided by the Bangalore Tribunal i.e., Matrix Laboratories Ltd vs CCE, Hyderabad [2012 (281) ELT 569 (Tri-Bang.)], in which it was held that when the imported duty free goods were cleared to DTA unit by the EOU, the Appellant is eligible to pay the duty by debiting in their Cenvat Account. He also relies in the case of CC & CE, Hyderabad-IV vs Hetero Labs [2017 (5) TMI 1338 (CESTAT-Hyd)] wherein the same issue was before the Tribunal. It was held that the Assessee (EOU unit) can clear the inputs/ raw materials to DTA by paying the duty by debiting the Cenvat Account. Therefore, he submits that the Appellant is not in error in utilizing the Cenvat credit for clearance of their input/ raw materials to the DTA units wherein appropriate duty was paid by debiting Cenvat credit Account.

4. Further, he submits that in respect of Appeal E/1389/2011 and E/30017/2019 (Department Appeal), the Department has invoked the provisions of Proviso to Section 11A(1) of Central Excise Act, 1944 and Proviso to Section 28 of the Customs Act, 1962 to demand the duty for the extended period. He submits that in their case, the Department could not have invoked the extended period to confirm the demand. He submits that the clearances were made after taking due permission from the jurisdictional Authorities. The ER2 Returns filed by them reflected the quantity of goods cleared and the duty thereon. The Department has taken the stand that the duty involved in such clearances was not shown properly in the ER2 Returns because of which it has amounted to suppression. He submits that as all these details were already given in the ER2 Returns, mere non-mentioning of the duty particulars in a particular column by itself will not amount to any suppression. There is no dispute that the duty involved has been paid and also reflected in the Cenvat availed column in the ER2 Return. Only where the entire duty is not paid nor reflected anywhere, the Department can take a stand that there is some suppression involved. Further he submits that the SCN did not invoke provisions of B17 Bond. Therefore, the Department

cannot take a stand that the SCN can be issued at any later date without any concern for the limitation on account of time bar. He further submits that the demand is revenue neutral. The amounts have been paid by way of Cenvat credit. If the Department's contention is held as correct, then the Appellant should have paid the same by way of PLA debit. In both the cases, it is not disputed that the Appellant has blocked the money. Therefore, the Appellant does not stand to gain anything by making the payment by way of Cenvat credit. Therefore, even on this count the Department's allegation that there is suppression with an intent to evade does not legally sustain. Further as the cited case laws including the case law in their own case i.e., Matrix Laboratories Ltd vs CCE, Hyderabad (cited supra) has held that the Appellant is eligible to utilize Cenvat credit for such payments, the Appellant can be said to entertain a bonafide belief that they are correctly following the system. Therefore, even in such case, the extended period could not have been invoked. He also submits that even in cases where export obligations were not fulfilled and provisions of B17 Bonds were invoked, the Tribunals and Hon'ble High Courts have held that the extended period demand is not legally sustainable. He relies on the case law of CCE, Pune-I vs Emcure Pharmaceuticals Ltd [2014 (307) ELT 180 & 2016 (342) ELT 172 (Bom.)]. In view of the foregoing, he submits that the demand towards the extended period is liable to be set aside even on account of time bar.

5. Learned AR reiterates the findings of the Lower Authorities. He further relies on the case law of Divis Laboratories vs CCE, Visakhapatnam [2019 (2) TM 180 (Tri-Hyd)] wherein it has been held that when the goods imported in terms of Notification No. 52/2003-CUS dt.31.03.2003 are cleared to DTA as such, the payment is required to be done is that of Customs Duty and hence the payment is required to be done by way of PLA only. It has been clearly held that in such cases Cenvat credit cannot be utilized. Therefore, relying on this case law learned AR submits that the present Appeals of the Appellant are required to be dismissed.

6. Heard both sides.

7. After going through the case laws cited by both the sides, we see that initially in the case of Matrix Laboratories Ltd (cited supra), the Tribunal has held as under:

"5. I have given careful consideration to the submissions. It appears from the records that the respondent was a DTA unit prior to December 2007. In this case, they had procured inputs and capital goods by way of import and also from indigenous sources and had taken CENVAT credit of CVD/Central Excise duty paid thereon. Apparently, it was out of such accumulated credit that the respondent made part-payment of duty on the inputs (imported duty-free under Notification No. 52/2003-Cus.) cleared 'as such' to the DTA unit. It is not deniable that such DTA clearances were made on payment of duty of excise which was calculated in terms of the proviso to Section 3(1) of the Central Excise Act. There is no dispute regarding the amount of duty so paid. According to the appellant, it was customs duty which was paid by the respondent on the DTA clearances. The show-cause notices were issued on this premise. It is settled law that what is paid by a 100% EOU on DTA clearances is duty of excise (for the period of dispute in this case) which is calculated as aggregate of duties of customs which would have been leviable if the same goods had been imported at the relevant time. In other words, the duties of customs constitute just a measure of the duty of excise to be paid on the DTA clearance. This legal position was settled by this Tribunal and appellate courts long ago. No overriding decision of any competent court to the contra has been cited before me.

6. The respondent paid duty of excise on the imported inputs cleared 'as such' to their sister concern in DTA. It was paid under appropriate account head. The respondent was entitled to pay such duty either wholly from PLA or partly from PLA and partly from CENVAT account. There is no law denying this right to a 100% EOU. The appeals filed by the department are ill-conceived and the same are rejected." [Emphasis supplied]

8. In the case of Hetero Labs (cited supra), the Tribunal has held as under:

"7. I find that the first appellate authority while setting aside the demands raised by the adjudicating authority has recorded the following findings:-

"5.1. The lower authority held that the appellant cleared the subject goods in violation of Rule 17 of CER, 2002, whereas, the duty demanded in the show cause notice is for violation of Rule 3(4) of CCR, 2004. I find that there is no allegation in the show cause notice regarding violation of Rule 17 of CER, 2002. Therefore, I find that the lower authority has traversed beyond the show cause notice."

The first appellate authority has recorded a very clear finding on this point and are inconsonance with the law. Firstly, I find that the show-cause notice which has been issued to the respondents are demanding the duty from them under the provisions of Section 11A(1) / Section 11A(4) of the Central Excise Act, 1944 which would mean that there are demand of Central Excise duty; the said provisions of the Central Excise Act having been invoked in the show-cause notice, the utilisation of the CENVAT credit lying in balance cannot be called in question, as provisions of Rule 3(4) clearly indicate that the CENVAT credit balance can be used for discharge of any duty of excise on any final product or an amount equal to CENVAT credit taken on inputs for such inputs are removed as such or after being partially processed. Be that as it may, since there is a demand of Central Excise duty, CENVAT credit availed by the appellant

lying in balance for utilisation of discharge of applicable duties cannot be questioned is the law which has been settled by the judgment of the Tribunal in the case of CCE&C, Visakhapatnam-I Vs. Matrix Laboratories Ltd. in Final Order No.932&933/2011 dt. 23/12/2011. The ratio of the said decision is in paragraph No.5 which I reproduce.

"5. I have given careful consideration to the submissions. It appears from the records that the respondent was a DTA unit prior to December 2007. In this case, they had procured inputs and capital goods by way of import and also from indigenous sources and had taken CENVAT credit of CVD/Central Excise duty paid thereon. Apparently, it was out of such accumulated credit that the respondent made part-payment of duty on the inputs (imported duty-free under Notification No. 52/2003-Cus.) cleared as such to the DTA unit. It is not deniable that such DTA clearances were made on payment of duty of excise which was calculated in terms of the proviso to Section 3(1) of the Central Excise Act. There is no dispute regarding the amount of duty so paid. According to the appellant, it was customs duty which was paid by the respondent on the DTA clearances. The show-cause notices were issued on this premise. It is settled law that what is paid by a 100% EOU on DTA clearances is duty of excise (for the period of dispute in this case) which is calculated as aggregate of duties of customs which would have been leviable if the same goods had been imported at the relevant time. In other words, the duties of customs constitute just a measure of the duty of excise to be paid on the DTA clearance. This legal position was settled by this Tribunal and appellate courts long ago. No overriding decision of any competent court to the contra has been cited before me."

Respectfully following the same, I find that these Department's appeals are liable to be rejected.

8. Reliance by the Departmental representative on the Division Bench decision in Stay Order dt. 28/12/2011 will not carry the case of the Revenue any further inasmuch as it is settled law that the Stay Order which is passed by the Tribunal is a prima facie view which needs further confirmation in form of a Final Order. On a specific query from the Bench, it was informed that appeal No.E/1389/2011 is still pending for final disposal. It was also informed by the party that the Final Order of the Tribunal dt. 23/12/2011 has also not been upset by any higher judicial forum. On perusal of the final order dt. 23/12/2011, I find the Bench of the Tribunal in the case of Matrix Laboratories Ltd. [Final order dt. 23/12/2011] was dealing with an identical situation as is in this case and held in favour of the assessee therein, and the same needs to be followed by me as there is no contrary view brought to my notice." [Emphasis supplied]

9. As per the above two decisions, it has been held that the EOU Assessee is eligible to utilize Cenvat credit when they clear inputs/ raw materials to DTA unit. However, the Hyderabad Tribunal in the case of Divis Laboratories Ltd (cited supra) has held as under:

"4. On a careful consideration of the submissions made by both sides, we find that the issue is that whether appellant herein can utilise balance in CENVAT credit account for discharge of customs duty like basic customs duty, additional

customs duty (CVD) and special customs duty on the inputs which have been used for manufacturing finished goods and these finished goods are cleared to DTA claiming exemption.

5. There is no dispute as to the fact that the inputs were imported and customs duty was foregone as the appellant being EOU, that the finished goods are manufactured in the EOU and exported as also cleared locally i.e. into DTA and claiming exemption from payment of duty; that appellant is required to pay customs duty as calculated by the authorities on the inputs consumed for manufacturing of final products which were cleared locally into DTA.

6. In our considered view, the arguments put forth by the learned counsel do not carry their case any further. The provisions of Rule 3(4) of the CENVAT Credit Rules 2004 specifically states that CENVAT credit may be utilised for payment of

- (a) Any duty of excise on any final product; or*
- (b) Any amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or*
- (c) An amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or*
- (d) An amount under sub-rule (2) of Rule 16 of Central Excise Rules, 2002; or*
- (e) Service tax on any output service;*

It can be seen from the relevant portions of the CENVAT credit Rules clearly indicate that the CENVAT credit cannot be utilised for payment of customs duty.

7. In the case in hand, Revenue authorities are correct in demanding the amount of customs duty, in cash, on the raw materials consumed for manufacture of finished goods which are cleared to DTA by claiming exemption. In our view, no provisions in the CENVAT Credit Rules permit the appellant herein to use the balance for discharging the customs duty on the imported goods

8. At the same time, learned counsel was correct in stating that if all the amounts which are due from the appellants if paid in cash, the CENVAT credit which has been debited should be restored. We do find strong force in these contentions. We direct that the appellant should discharge all the customs duty in cash, calculated by the Revenue authorities, on the imported goods consumed in manufacturing of final products cleared to DTA claiming exemption, on that occurrence of event CENVAT credit which has been used for debiting the said amount should be recredited by the jurisdictional authorities.

9. In view of the foregoing we find no reason to interfere in the orders of the lower authorities except for recredit as ordered above. Accordingly, the appeals are disposed of." [Emphasis supplied]

10. From this Final Order it emerges that if the raw materials/ inputs cleared pertain to procuring the inputs by getting the benefit of Notification No. 52/2003-CUS, the EOU is required to pay the duty only by way of cash and Cenvat credit cannot be utilized since the inputs were imported by claiming Customs Duty exemption.

11. The present demand is required to be bifurcated under the following headings:

- (i) Duty involved in respect of imported inputs cleared – The amount involved pertains to Customs Duty foregone. The Show Cause

Notice was issued seeking to recover the Customs Duty under Section 28 of the Customs Act, 1962. Hence the case law of Hetero Labs cited above will be applicable.

- (ii) Duty involved in indigenous goods cleared to DTA – The amount involved pertains to Excise Duty foregone initially and Show Cause Notice has been issued to recover Excise Duty in terms of Section 11A of the Central Excise Act, 1944. Hence Matrix Laboratories Ltd (cited supra) would be applicable.

12. Therefore, we hold as under:

- a) In respect of (i) above, the Appellant is required to pay the duty only by way of cash debit (PLA debit). They are not eligible to utilize Cenvat credit for such clearances.
- b) In respect of (ii) above, since the Appellant has procured the goods indigenously, the clearances can be made by debiting Cenvat credit account.

13. Coming to the time bar issue raised by the Appellant, it is seen that the Appellants have kept the Department informed about their clearances by seeking permission for clearance of imported/ indigenous raw materials/ inputs. Further, they have paid the requisite duty by way of Cenvat debit. It is not the case of the Department that the Appellant has evaded the payment of duty by not paying the same either by way of cash payment (PLA debit) or by way of Cenvat debit. In both the cases, the Appellant blocks his money. Therefore, by utilizing Cenvat credit for such payment which is also part of his liquid assets, the Appellant does not stand to gain any monetary benefit. Further in their own case in Matrix Laboratories Ltd vs CCE, Hyderabad (cited supra) and CC & CE, Hyderabad-IV vs Hetero Labs (cited supra), the Tribunal has held that the clearances can be made by utilizing the Cenvat credit. Therefore, we can assume that the Appellant could be holding bonafide belief that they are eligible to utilize Cenvat credit for only clearances. Further as there are Tribunal decisions in their favour during the period under dispute, the issue would be that of interpretation only. Taking all these facts into account, we feel that the Department cannot allege any suppression on part of the Appellant. Therefore, we hold that the demand pertaining to the extended period is liable to be set aside in all the

Appeals, wherever the demand has been confirmed for the extended period. We allow the Appeal to this extent.

14. The Appellant is required to pay the duty involved for the normal period. Since the duty was already paid by way of Cenvat credit, there being no revenue loss to the Department, interest and penalties are set aside.

15. Since the Appellant is making good the payment by way of cash, the Appellant would be entitled to get the relief for the Cenvat debits already made by them. For this they will be free to approach the appropriate forum for getting the relief.

16. To summarize:

- (i) The confirmed demands have to be arrived at for the normal period in respect of all the Appeals.
- (ii) The confirmed demands for the normal period are to be bifurcated with separate amounts on account of imported items cleared and indigenous items cleared.
- (iii) In respect of input items cleared (ii) above, the Appellants are required to pay the amount in question by way of cash (PLA/ GAR-7 Challans) payment, when imported items are involved.
- (iv) In respect of indigenous items (ii) above, where indigenous items are involved and where the Appellants have utilized the Cenvat credit, no demand sustains.
- (v) For the cash payments done in respect of (iii) above, the Appellants would be entitled to get appropriate relief, by approaching the relevant forum.

17. The Appeals are disposed of thus.

(Pronounced in the Open Court on 09.06.2023)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)