IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 75702 of 2022

(Arising out of Order-in-Original No. 02-06/COMM/CE/SLG/22-23 dated 10.06.2022 passed by Commissioner of CGST & Central Excise, Siliguri.)

M/s Zydus Healthcare Ltd.,
Bhagheykhola, Majitar, East Sikkim-737132.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Siliguri.
C. R. Building, Hakimpara, Haren Mukherjee Road, Siliguri-734001.

. ..**Respondent(s)**

APPERANCE :
Shri Rahul Tangri & Ms. Udita Saraf, both Advocates for the Appellant
Shri S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.....75946/2023

DATE OF HEARING : 15.05.2023

DATE OF PRONOUNCEMENT: 28.06.2023

PER K. Anpazhakan :

The Appellant's unit in the state of Sikkim was an eligible unit under Notification No. 20/2007-CE dated 25.04.2007 to claim area-based exemption benefit. Accordingly, the appellant was claiming refund of 100% excise duty paid through PLA. The said notification was amended vide Notification No. 20/2008-CE dated 27.03.2008, effective from 01.04.2008 and Notification No. 38/2008 dated 10.06.2008 (hereinafter collectively referred to as referred to as 'amended notifications) whereby refund of excise duty payable on value addition was restricted to 56% of the total duty payable on clearance of final products falling under Chapter 30.

2. During the period April 2009 to February 2012, five Show Cause Notices were issued to the Appellant alleging that they had contravened Notification No. 20/2007,as amended, inasmuch as the they had (i) irregular availment and utilization of credit of tax paid on clearance of waste and scrap (viz. SCNs at S. No. 1 and 2 in table below) (ii) availment of self-credit in excess of 56% of value addition rate as prescribed in the amended notification (viz. SCNs at S. No. 3, 4 and 5 in table below). Details of the five SCNs are mentioned herein below:-

S. N.	Show Cause Notice No. and date	Duty Demand	Period
1.	V(19)15/CE/Adj/ADC/Slg/2010/26449 dated 22.12.2010	Rs.13,79,096/-	April 2009 to December 2009
2.	V(19)03/CE/ZYDUS/SCN/GTK-DIVN/2011/150 dated 20.01.2011	Rs.40,485/-	January 2009 to May 2009
3.	C.No.V(15)03/ADJ/CE/Comm/Slg/2011/18049 dated 26.09.2011	Rs.2,46,95,456/-	April 2010 to April 2011
4.	C.No.V(15)03/Adj/CE/Comm/Slg/12/8842 dated 17.05.2012	Rs.4,14,52,725/-	May 2011 to February 2012
5.	C.No.V(15)03/Adj/CE/Comm/Slg/12/25607 dated 23.01.2023	Rs.2,51,53,058/-	March 2012 to September2012

3. However, adjudication to the aforesaid impugned SCNs was kept in abeyance since the issue was pending before the Hon'ble Supreme Court in SLP No. 15481-89. Subsequently, the Hon'ble Supreme Court in the case of Union of India v. VVF Ltd, & Another 2020-VIL-14-SC-CE, upheld the constitutional validity of the said amended notifications and thus, has the effect of reinstating subsequent notifications which had been originally quashed by the Hon'ble High Courts. In light of the said decision, all the pending matters are to be decided as per amended notifications. Accordingly, the appellant vide their letter dated 24.08.2020 requested for fixation of special value addition rate for FYs

2010-11, 2011-12 and 2012-13 in terms of the workings already submitted by them vide letters dated 22.09.2010, 09.09.2011 and 16.07.2012.

4. The above mentioned five SCNs and application for fixation for special value addition rate was adjudicated by the Ld. Commissioner, vide Order-in-Original dated 10.06.2022 wherein the (i) demand in respect of SCNs 1 & 2 has been confirmed along with penalty (ii) With respect to SCNs 3 to 5, demand of Central Excise duty has been confirmed along with interest. Further, the special value addition applications filed by the Appellant were rejected. The Appellant has filed the present appeal against the impugned order.

5. In their submissions, the Appellant stated that in the impugned order, the Ld. Commissioner had rejected the Appellant's special value addition rate and confirmed the demand, as proposed in SCN No. 3 to 5, on the basis that the Appellant had foregone the option to seek special value addition and thus, they are only eligible for refund upto 56% of the value addition rate as mentioned in para 2A of the Notification No. 20/2007-CE (as amended). Hence, re-credit of duty in excess of 56% value addition is liable to be recovered from the Appellant.

6. In this regard, the Appellant submitted that it is a settled position of law that once a notification is quashed, it is quashed for all purposes and ceases to have any operative or legal effect. Reliance is placed on the decision of Asian Food Industries V. Union of India, 2018 (223) ELT 565 (Guj.). Thus, the Appellant contended that when the amended notification No. 20/2008 was struck down by the Hon'ble Gauhati High

Court in the case of Herbo Foundation, there was no cause to file applications for fixation of special value addition rate. The Appellant submitted the working of special value addition rates in terms of the amended notification vide its letter dated 22.09.2010, 09.09.2011 and 16.07.2012, as a precautionary measure, intimating the department that in view of the striking down of the amending notification, it would be claiming 100% re-credit of duty paid through PLA.

7. The Appellant stated that in the said applications they have clearly indicated that they would have applied for fixation of special value addition rate, if the relevant Notification was in place at that point of time. Therefore, in terms of the Hon'ble Supreme Court order dated 22.04.2020, which had an effect of reinstating the amended notification, the Appellant vide its letter dated 24.08.2020 requested for fixation of special value addition rate for the FYs 2010-11, 2011-12 and 2012-13 in terms of the workings submitted earlier. The Appellant contended that the Ld. Commissioner ought to have considered and decided their application for fixation of special value addition rates on merits.

8. The Appellant stated that in various cases, deciding the same issue, it has been held that any recovery of excess refund/ self-credit pursuant to the order of the Hon'ble Supreme Court in the case of VVF Ltd, is subjected to the fixation of special value addition rate applications, even if such value addition applications are filed after the said judgment of the Hon'ble Supreme Court. In this regard, reliance is placed on the following decisions:-

*** M/s Jyothi Labs Ltd., V. Union of India reported at 2021-VIL-591-GAU-CE**

***Ferra Tech V. Union of India 2022 (8) TMI 60-Gauhati High Court**
*** Greenply Industries V. CCE & ST 2022-VIL-357-CESTAT-KOL-CE**

9. The Appellant stated that their case is on a better footing as compared to the aforesaid decisions inasmuch as they vide their letters dated 22.09.2010, 09.09.2011 and 16.07.2012 had already placed the workings for fixation of special value addition rate on record and expressed their intention, to avail such option, if amended notifications were operative as applicable. The Appellant requested the Commissioner to consider the said workings and fix value addition rates, after the VVF Ltd., judgment by the Hon'ble Apex Court upheld the constitutional validity of the notifications. However, the Ld Commissioner confirmed the demands made in the Notices, without considering their request for fixation of the Special Value Addition Rates first. Thus, they submitted that impugned order confirming recovery credit in excess of 56% of value addition rate, without deciding their applications for fixation of special value addition rate on merits is grossly unjustifiable and against the settled judicial decisions. Hence, they prayed for setting aside the demands made in the impugned order.

10. In the impugned order, the Ld. Commissioner has confirmed penalty amounting to Rs.14,19,581/- under Section 11AC of the Excise Act in respect of SCN No. 1 & 2 for the period April 2009 to May 2010. The Appellant stated that the present demand has been ascertained by the department from the refund application and supporting documents submitted by the Appellant. Hence, there cannot be any allegation of fraud and suppression, when all the relevant evidence was placed before the department by the Appellant themselves. Thus, it cannot be alleged that there is any fraud or suppression on the part of the

Appellant, with an intention to avail self-credit on duty paid on inputs as such and waste and scrap, when the Appellant was discharging much higher tax liability. Hence, penalty under Section 11AC ought to be set aside. In this regard, they placed their reliance on the decisions of Sudhir Paper Ltd., V. CCE, Bangalore 2010 (259) ELT 289 (Tri.-Bang.) and CCE, Chennai V. Premier Mills Ltd., 2008 (231) ELT 105 (Tri.-Chennai).

11. The Ld. A.R. reiterated the findings in the impugned order.

12. Heard both sides and perused the appeal records.

13. We observe that the Ld. Commissioner had rejected the Appellant's application for fixation of special value addition rate and confirmed the demands, on the basis that the Appellant had foregone the option to seek special value addition and thus, they are only eligible for refund upto 56% of the value addition rate as mentioned in para 2A of the Notification No. 20/2007-CE (as amended). Hence, re-credit of duty in excess of 56% of value addition is liable to be recovered from them. The Appellant stated that in the said applications they have clearly indicated that they would have applied for fixation of special value addition rate, if the relevant Notification was in place at that point of time. Therefore, in terms of the Hon'ble Supreme Court order dated 22.04.2020, which had an effect of reinstating the amended notification, the Appellant vide its letter dated 24.08.2020 requested for fixation of special value addition rate for the FYs 2010-11, 2011-12 and 2012-13 in terms of the workings submitted earlier. The Appellant contended that the Ld. Commissioner ought to have considered and decided their application for fixation of special value addition rates on merits. We find merit in the contention of the Appellant. The Ld.

Commissioner ought to have considered and decided their application for fixation of special value addition rates on merits. We find that the Ld. Commissioner's observation that the Appellant had foregone the option to seek special value addition and thus, they are only eligible for refund upto 56% of the value addition rate as mentioned in para 2A of the Notification No. 20/2007-CE (as amended), is factually not correct. The Appellant, vide their letters dated 22.09.2010, 09.09.2011 and 16.07.2012 had already placed the workings for fixation of special value addition rate on record and expressed their intention, to avail such option, if the amended notifications were operative as applicable. Hence, we observe that the rejection of the Applications filed by the Appellant for Special rate fixation on the ground that they have foregone such option, is legally not tenable. Accordingly, we hold that the impugned order is liable to be set aside and the matter is remanded back to the Commissioner to decide the request for special rate fixation applications of the Appellant on merit.

14. In view of the above discussion, we set aside the impugned order and remand the matter back to the Commissioner to decide the request for special rate fixation applications of the Appellant on merit. The Appeal of the Appellant is decided on the above terms.

(Pronounced in the open court on.28.06.2023…)

Sd/-
(P. K. Choudhary)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

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