

**IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH AT MUMBAI**

**Appeal No. E/85984/2018**

(Arising out of Order-in-Original No.  
01/AC/BHD/DEM/CEX/2017 dated 15.02.2017 passed  
by the Asst. Commissioner of Central Excise,  
Customs & Service tax, Bhandara)

Nikita Pharmaceutical Specialities Pvt. Ltd. Appellant

Vs.

CCE Nagpur Respondent

Appearance:

Shri Rajesh Ostwal, Advocate for the appellant  
Shri M.R. Melvin, AC (AR) for the respondent

CORAM:

Hon'ble Dr. Suwendu Kumar Pati, Member (Judicial)

Date of hearing : 12.06.2018

Date of decision : 12.12.2018

O R D E R No: **A/88098 / 2018**

Suo motu availment and utilisation of cenvat credit of ₹22,62,759/- after refusal of rebate claim made under Rule 19 of Central Excise Rules 2002 resulted in the imposition of duty liability and penalty of equivalent amount through adjudication process has brought this appeal to the present forum.

2. Fact of the appellant, in a nutshell, is that it is a company engaged in the manufacture of Neutra

Simenthicone Emulsion and it exports the same under claim of rebate in terms of Rule 18 of Central Excise Rules read with Notification no. 19/2004-CE.(NT) dated 06.09.2004. It claims for refund before the Asstt. Commissioner of Central excise, Nagpur but the same was rejected as time barred and not furnishing of ARE-1 as per para 8.3 of Chapter 8 of the CBEC Excise Manual of the Supplementary Instruction. Appellant had not challenged the same order but subsequently took suo motu recredit vide entry dated 31.07.2015 and 14.09.2015 after applying for permission through letters from the department for such recredit and after waiting for 1-1/2 years. The matter of recredit was subsequently intimated by the appellant to the department but it was communicated vide Asst. Commissioner letter dated 03.12.2016 that Cenvat Credit Rules 2004 does not provide for recredit of central excise duty on export of goods on failure to file rebate claim appropriately and was also put to notice for recovery of the said amount along with proposal for imposition of penalty for contravening the provisions of the Act. Adjudicating authority confirmed the duty demand and penalty and so also the Commissioner (Appeals) for which appellant has filed this appeal.

3. In his memo of appeal and during the course of hearing of appeal Ld. Counsel for the appellant submitted, in citing several judicial decisions, that provisions of Central

Excise Rules 2002 and Cenvat Credit Rules 2004 are not applicable to its case as recredit was taken by the appellant in consequence of the duty paid illegally and as excise duty was not leviable on goods exported out of India and meant for clearance of goods for home consumption. He further submitted that restoration of the credit by the appellant themselves does not contravene any law as rectification of errors and omission in entries is not required to be done in compliance to any provision of law. Further in referring to CBEC circular no. 263/117/96-CX dated 31.12.1996, he pointed out that claim of rebate and export goods bond should be at parity since intention of both the procedure was to make duty incidence nil and it would be a violation of the spirit of the Constitution if incidence of tax has been exported for which he submitted that the order of the Commissioner (Appeals) is required to be set aside.

4. In response to the submissions made on behalf of the appellant, Id. DR for the department, through his written submission and during hearing of the appeal, submitted that when rebate claim was rejected by the adjudicating authority, in spite of filing an appeal before the appropriate authority against adverse order, the appellant has taken recredit in their cenvat account of such amount and as such there is no method available for the appellant to correct the failure or lapse on their part. He also pointed out that

Cenvat Credit Rules 2004 allows availment of cenvat credit only on the basis of document prescribed in Rule 7 of the Cenvat Credit Rules and there is no provision in the Rule to allow a central excise assessee to take suo motu credit. Further, he reiterated and supported the logic and reasoning found in the order of Commissioner (Appeals) and sought for no interference by this Tribunal.

5. Heard from both sides at length and perused the case records, written notes of submissions and relevant case laws including the one reported in 2018-TIOL-586-CESTAT-MAD in the case of Jubilant Engineering vs. CCE. Admittedly, Notification no. 19/2012-CE(NT) dated 06.09.2004 provides for the procedure to be followed in claiming of rebate to central excise authorities or by electronic declaration where no time limit is prescribed. As found from the explanation to Section 11B of the Central Excise Act, refund includes rebate of duty of excise on excisable goods exported out of India and 11(1)(B) restricts such filing of refund before the expiry of one year from the relevant date and relevant date indicates, in the case of appellant, the date of shipment and not the date of payment of duty. No finding is forthcoming in respect of the legality of rejection of refund claim or computation of the period of limitation taking date of shipment into calculation or date of payment shown in AC 1 into calculation.

However, appellant had not challenged the same before appropriate appellate authority for which no opinion can be expressed on that aspect. Having regard to the fact that there is no express provision available by which appellant can have authority to take suo motu cenvat credit and avail the same it would be beyond the jurisdiction of this Court to bring imaginary eventualities and give a finding that such an act of appellant is legal. With reference to the decision cited by the appellant concerning Madras CESTAT's finding, there is a marked distinction between the present case of the appellant and issue before the Tribunal in the sense that the appellant was a 100% EOU and before its rebate application was processed, it had requested the department to cancel the rebate claim accordingly re-credited the amount while in the instant case after rebate was disallowed on grounds of limitation etc., which attained finality as the appellant had not preferred any appeal against it, appellant had utilised the same amount which it could not get as refund against cenvat credit without any support from the legal procedure available in the taxation statute. Hence the appellants conduct cannot get the stamp of approval of this Tribunal.

6. However considering the fact that appellant had expressed its intention to the department, requested in writing to follow the procedure by way of recrediting cenvat

credit account of the disputed account and did wait for one and half years as well as issued two remainders to the department and thereafter taken suo motu credit, it cannot be said that it had intention to contravene any of the provisions of rule or act for which it shall be penalised. It can be recorded as its erroneous understanding of procedural law by the appellant. Moreover, when no provision of Central Excise Act or Cenvat Credit Rules has been expressly followed by the appellant and it had interpreted the finding of Madras Tribunal in Jubilant Engineering case, imposition of penalty can't stand the scrutiny of law for which the same is liable to be set aside.

7. The appeal is accordingly allowed in part setting aside penalty imposed under Section 11AC of Central Excise Act read with Rule 15(2) of Cenvat Credit Rules while confirming the order of Commissioner (Appeals) in upholding the order-in-original in respect of disallowance of cenvat credit of ₹22,62,759/- along with applicable interest only.

(Pronounced in Court on 12.12.2018)

**Dr. Suvendu Kumar Pati**  
**Member (Judicial)**