

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 88692 of 2014

(Arising out of Order-in-Original No. 29-30/MAK(29-30)/COMMR/RGD/14-15 dated 27.05.2014 passed by Commissioner of Central Excise, Raigad)

M/s. Cipla Ltd.

L.D. Building, Mehra Indl. Estate,
Asha Usha Compound, LBS Marg,
Vikhroli (W), Mumbai 400 079.

Appellant

Vs.

Commissioner of Central Excise & ST, Raigad Respondent

4th Floor, Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, Navi Mumbai 410 206.

WITH

Excise Appeal No. 85715 of 2016

(Arising out of Order-in-Original No. 62-63/SHH/PC/RGD/2015-16 dated 30.12.2015 passed by Commissioner of Central Excise, Raigad)

M/s. Cipla Ltd.

L.D. Building, Mehra Indl. Estate,
Asha Usha Compound, LBS Marg,
Vikhroli (W), Mumbai 400 079.

Appellant

Vs.

Commissioner of Central Excise & ST, Raigad Respondent

4th Floor, Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, Navi Mumbai 410 206.

Appearance:

Shri Rajesh Ostwal with Shri Saurabh Bhise, Advocates, for the Appellant

Shri Dharendra Kumar, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

Date of Hearing: 23.11.2022
Date of Decision: 23.11.2022

FINAL ORDER NO. A/86174-86175/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against Order-in-Original No. 29-30/MAK(29-30)/COMMR/RGD/14-15 dated 27.05.2014 and Order-in-Original No. 62-63/SHH/PC/RGD/2015-16 dated

30.12.2015 both passed by Commissioner of Central Excise, Raigad. By the impugned orders, following has been held:-

Order-in-Original No. 29-30/MAK(29-30)/COMMR/RGD/14-15 dated 27.05.2014

"ORDER

(1) Show cause cum demand notice F.No. V/Adi(SCN) 15-337/Red/12- 13/5113 dated 01.05.2013 for Rs 2,16,61,926/-

(i) I hereby confirm the demand of Rs 2,16,61,926/- (Rupees Two Crore Sixteen Lakhs Sixty One Thousand Nine Hundred Twenty Six only) against M/s Cipla Ltd under Section 11A read with proviso appended to sub-section (i) of Section 3 of the Central Excise Act 1944 read with Section 28 of the Customs Act, 1962 and in terms of B-17 Bond they have executed with the Department, for the reasons discussed above.

(ii) I do not impose any fine as proposed under Rule 25 of Central Excise Rules, 2002 read with Section 125 of the Customs Act, 1962 in the impugned Notice, for the reasons discussed above.

(iii) I order recovery of interest under the provisions of Section 11AA/ 11AB of Central Excise Act, 1944 read with Section 28AB/ 28AA of Customs Act, 1962 applicable during the relevant period.

(iv) I impose a penalty of Rs 2,16,61,926/- (Rupees Two Crore Sixteen Lakhs Sixty One Thousand Nine Hundred Twenty Six only) on M/s Cipla Ltd under Section 11AC of Central Excise Act 1944 read with provisions of Section 114A of the Customs Act, 1962.

(2) Show cause cum demand notice F.No. V/Adi(SCN)15-162/Rgd/13-14/13726 dated 02.12.2013 for Rs 1,53,38,611/-

(i) I hereby confirm the demand of Rs 1,53,38,611/- (Rupees One Crore Fifty Three Lakhs Thirty Eight Thousand Six Hundred Eleven only) against M/s Cipla Ltd under Section 11A read with

proviso appended to sub-section (1) of Section 3 of the Central Excise Act 1944 read with Section 28 of the Customs Act, 1962 and in terms of B-17 Bond they have executed with the Department, for the reasons discussed above..

(ii) I do not impose any fine as proposed under Rule 25 of Central Excise Rules, 2002 read with Section, 125 of the Customs Act, 1962 in the impugned Notice, for the reasons discussed above.

(iii) I order recovery of interest under the provisions of Section 11AA/ 11AB of Central Excise Act, 1944 read with Section 28AB/ 28AA of Customs Act, 1962 applicable during the relevant period.

(iv) I impose a penalty of Rs 1,53,38,611/- (Rupees One Crore Fifty Three Lakhs Thirty Eight Thousand Six Hundred Eleven only) on M/s Cipla Ltd under Section 11AC of Central Excise Act 1944 read with provisions of Section 114A of the Customs Act, 1962."

Order-in-Original No. 62-63/SHH/PC/RGD/2015-16 dated 30.12.2015

"ORDER

(1) Show cause cum demand notice F.No. V/Adi(SCN)15-86/RGD/14-15/11135 dated 21.10.2014 for Rs.1.77.94.094/-

(i) I hereby confirm the demand of Rs. 1,09,59,543/- (Rupees One Crore Nine Lakhs Fifty Nine Thousand Five Hundred Forty Three only) against M/s Cipla Ltd. (100%EOU) under Section 11A read with proviso appended to sub-section (1) of Section 3 of the Central Excise Act 1944, Section 28 of the Customs Act, 1962 and in terms of B-17 Bond they have executed with the Department, for the reasons discussed above. I drop the demand amounting to Rs. 68,34,551/- (Rupees Sixty Eight Lakhs Thirty Four Thousand Five hundred Fifty One only) for the reasons discussed at Para 12.4 above.

(ii) I do not impose any fine as proposed under Section 34 of Central Excise Act 1944 read with Section 125 of the Customs Act, 1962 in the impugned Notice, for the reasons discussed above.

(iii) I order recovery of interest under the provisions of Section 11AA/ 11AB of Central Excise Act, 1944 read with Section 28AB/ 28AA of Customs Act, 1962 applicable during the relevant period.

(iv) I impose a penalty of Rs. 1,09,59,543/- (Rupees One Crore Nine Lakhs Fifty Nine Thousand Five Hundred Forty Three only) on M/s. Cipla Ltd. (100%EOU) under Section 11AC of Central Excise Act 1944 read with Rule 25 of the Central Excise Rules 2002 and provisions of Section 114A of the Customs Act, 1962.

(2) Show cause cum demand notice F.No. V/Adi/SCN/15-32/ROD/15-16/3778 dated 01.05.2015 for Rs 1.44,70.334/-

(i) I hereby confirm the demand of Rs. 86,03,594/- (Rupees Eighty Six Lakhs Three Thousand Five Hundred Ninety Four only) against M/s Cipla Ltd. (100% EOU) under Section 11A read with proviso appended to sub-section (1) of Section 3 of the Central Excise Act 1944, Section 28 of the Customs Act, 1962 and in terms of B-17 Bond they have executed with the Department, for the reasons discussed above. I drop the demand amounting to Rs. 58,66,740/- (Rupees Fifty Eight Lakhs Sixty Six Thousand Seven Hundred Forty only) for the reasons discussed at Para 12.4 above.

(ii) I do not impose any fine as proposed under Section 34 of Central Excise Act 1944 read with Section 125 of the Customs Act, 1962 in the impugned Notice, for the reasons discussed above.

(iii) I order recovery of interest under the provisions of Section 11AA/ 11AB of Central Excise Act, 1944 read with Section 28AB/ 28AA of Customs Act, 1962 applicable during the relevant period.

(iv) I impose a penalty of Rs. 86,03,594/- (Rupees Eighty Six Lakhs Three Thousand Five Hundred Ninety Four only) on M/s Cipla Ltd. (100%EOU) under Section 11AC of Central Excise Act 1944 read with Rule 25 of the Central Excise Rules 2002 and provisions of Section 114A of the Customs Act, 1962.

2.1 Appellant is an EOU engaged in manufacture of goods viz. organic chemicals falling under Chapter Heading 29 and pharmaceutical products falling under Chapter 30 of the Central Excise Tariff Act.

2.2 During the course of audit of records, it was observed that the appellant had cleared the goods to DTA by paying CVD at 4% by availing the benefit of Central Excise Notification No.4/2006 dated 01.03.2006 as amended. This notification has been issued under Section 5A(1) of the Central Excise Act, 1944. This notification provides that no exemption therein shall apply to excisable goods produced or manufactured by a 100% EOU and brought to any place in India.

2.3 Accordingly Revenue was of the opinion that the benefit of this notification could not be available to the appellant accordingly they have short paid the differential duty to the tune of Rs.2,16,61,926/- for the period April 2008 to November 2012. Accordingly the appellant was issued a show cause notice dated 01.05.2013 asking them to show cause as to why:-

"(i) The benefit of Notification 04/ 2006 CE dated 01-3-2006 should not be denied.

(ii) The differential duty between the tariff rate payable and the concessional rate paid should not be recovered from them.

(iii) The total Central excise duty equivalent to differential duty of aggregate duties of Customs of Rs. 2.16.61.926/-(Rupees Two Crore Sixteen Lakh Sixty One Thousand Nine Hundred Twenty Six Only), short paid on finished goods cleared by them to their own unit located in the DTA during the period from 2008-09 TO 2012- 13 (upto November 2012) should not be demanded and recovered from them under section 11A read with proviso appended to sub- section (1) of Section 3 of the Central Excise

Act, 1944 read with section 28 of the Customs Act, 1962 and in term of B-17 Bond they have executed with the Department.

(iv) Since, the goods were removed in contravention of the provisions of Notification 04/ 2006 CE dated: 01-3-2006 as well as the provisions of Central Excise Rules, 2002, the goods were liable for confiscation. Since the goods are not available for confiscation, why fine should not be imposed under Rule 25 of the Central Excise Rules, 2002 read with section 125 of the Customs Act, 1962 and notifications referred to above.

(v) Interest, at the appropriate rates and as applicable, in force, under Section 11AA/11AB of the Central Excise Act, 1944 read with section 28AB/28AA should not be charged and recovered from them.

(vi) Penalty should not be imposed on them, under the provisions of Section 11AC of the Central Excise Act, 1944 and Rule 25 of the Central Excise Rules, 2002, read with provisions of section 114A of the Customs Act, 1962."

Subsequently, another show cause notice dated 02.12.2013 issued on the same lines demanding duty of Rs.1.53,38,611/- for the period December 2012 to September 2013.

2.4 Another show cause notice dated 21.10.2014 for the differential duty of Rs.1,77,94,094/- for the period 01.10.2013 to 31.03.2014 in the same lines was issued to the appellant and a subsequent show cause notice dated 01.05.2015 demanding duty of Rs.1,44,70,334/- for the period 01.04.2014 to 31.01.2015 was also issued to the appellant.

3.1 We have heard Shri Rajesh Ostwal with Shri Saurabh Bhise, Advocates for the appellant and Shri Dharendra Kumar, Joint Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant learned counsel submits that:-

- Finished goods of the appellants if manufactured in India by a DTA unit are eligible for concessional/nil rate of excise duty in terms of Sr. Nos. 47(A), 54 & 62C of Notification No.

4/2006-CE dated 01.03.2006 and Sr. Nos. 108(A), 114 and 120 of Notification No. 12/2012-CE dated 17.03.2012. Therefore duty under proviso to Section 3(1) of the Excise Act must be calculated by taking concessional/nil rate of CVD.

- It is settled legal position that CVD must be computed by taking effective rate of excise duty and not the tariff rate. Reliance is placed on the following decisions:-
 - Shanta Biotechnics Ltd. [2010 (259) ELT 447 (T)]
 - Crystal Granite and Marble Pvt. Ltd. [2015-TIOL-2618-CESTAT-MUM]
 - Ratnagiri Textiles Ltd. [2003 (161) ELT 975 (T)]
 - Sarita Software & Indus. Ltd. [2009 (237) ELT 350 (T)]
 - Satya Metals [2013 (290) ELT 514 (HP)]
 - Paras Fab International [2014 (307) ELT 177 (T)]
 - Srivastsa International Ltd. [2015 (326) ELT 699 (T)]
 - Sri Gugan Mills and Saradha Terry Towels Ltd. [2018 (6) TMI 908 – CESTAT Chennai]
 - Blue Mont Textiles [2018 (8) TMI 315 – CESTAT Chennai]
 - Triumph International India Pvt. Ltd. [2018 (8) TMI 1166 – CESTAT Chennai].

3.3 Arguing for the Revenue, learned AR reiterates the findings recorded in the impugned orders.

4.1 Since the issue involved in these two appeals is common, we are referring to appeal No. E/88692/2014 for consideration.

4.2 For confirming the demand, Commissioner has in the impugned order recorded as follows:-

"13. I find that on this issue, the CBEC, vide F. NO: 305/17/86-FTT dated 11.07.1990 has already clarified that when goods manufactured by 100% EOU are cleared to DTA, they will only be eligible to the benefit of unconditional Customs exemption notification which reduce duty generally issued under Section 25 of the Customs Act. The unconditional exemption notification issued under Section 25 of the Customs Act to particular cases

etc. shall not be applicable on such clearance. For the sake of convenience, the content of CBEC's F.NO: 305/14/86-FTT dated 11.07.1990 is reproduced below:

*Government of India Ministry of Finance
Department of Revenue
Central Board of Excise & Customs, New Delhi*

Subject: - 100% EOU and FTZS - Levy of Central Excise duty equal to duty of Customs on goods manufactured and cleared by units in FTZS and 100% EOUS into DTA- Question whether benefit of exemption notifications will be available - Regarding.

The undersigned is directed to say that the question whether the goods manufactured and cleared by units in FTZS & 100% in the DTA are liable to pay excise duty equal to the aggregate of customs duty at the concessional rate of duty allowed under the customs exemption notification or whether the aggregate customs duty at the tariff rate is payable has been re-examined.

2. In terms of the provisions of Section 3 of the Central Excise and Salt Act, 1944, goods manufactured in FTZS and 100% EOUS when cleared to DTA are chargeable to duty of excise under Section 12 of the Customs Act on like goods produced or manufactured outside India if imported into India. It is further provided in "Explanation I" of Section 3 aforesaid that where in respect of any like such goods, any duty of customs leviable under the said Section 12 is leviable at different rates, then such duty shall deemed to be leviable under the said Section 12 at the highest of those rates. In view of the aforesaid stipulation, the question had arisen for examination whether in the case of goods manufactured in FTZs or a 100% EOU and cleared to DTA, they shall be chargeable to duty of excise equal to aggregate duties of Customs leviable under Section 12 of the Customs Act on like goods produced or manufactured outside India if imported into India at the tariff rate in force or whether the concessional rates of duty under Customs Act could be applicable in such cases as laid down in Board's letter F. NO. 305/17/86-FTT, dated 26.02.1986.

3. The point was taken up for discussion in the Tariff Conference held in Madras in July, 1989. The Collectors in conference were of the view that for computing additional duty (CV duty) on imported goods in terms of Section 3(1) of the Customs Tariff Act where also a similar "Explanation" occurs, excise exemptions which are conditional and which cannot be satisfied by imported goods are not to be applied, but unconditional ones are to be applied. On the same analogy, they held that in the case of 100% EOU's exemption of Customs, such as for example those which apply only to particular cases such as defence,

diplomats etc may not, in view of the Explanation in Section 3 of the Central Excise and Salt Act, apply to clearances from 100% EOUS to the DTA.

4. In view of the above, it has been decided that when goods manufactured by units in FTZS or 100% EOUS are cleared to DTA, they will only be eligible to the benefit of unconditional customs exemption notification which reduce duty generally issued under Section 25 of the Customs Act. The conditional exemption notifications issued under Section 25 of the Customs Act to particular cases etc. shall not be applicable on such clearance.

5. The above instructions are in supersession of Ministry's instructions issued under F.No. 305/17/86-FTT, dated the 26th February, 1986.

6. The Collectors of Customs & Collectors of Central Excise may review past cases in the light of the above instructions and necessary demand notices for short collection of duty may be issued forth-with.

13.1 The CBEC's instructions are binding on me. The Apex Court in its judgement in Collector of Central Excise, Patna Vs. Usha Martin Industries [1997 (94) ELT 460]' held;

Through a Catena of decisions this Court has pronounced that Revenue cannot be permitted to take a stand contrary to the instructions issued by the Board. It is a different matter that an assessee can contest the validity or legality of a departmental instruction. But that right cannot be conceded to the department, more so when others have acted according to such instructions, [vide Collector of Central Excise, Bombay Vs. Collector of Central Excise [1996 (88) ELT 638], Ranadey Micronutrients Vs. Collector of Central Excise [1996 (87) ELT 19], Poulouse and Mathen Vs. Collector of Central Excise [1997 (90) ELT 264, British Machinery Supplies Co. Vs. Union of India [1996 (86) ELT 449]. Of course the appellate authority is also not bound by the interpretation given by the Board but the assessing officer cannot take a view contrary to the Board's interpretation.

In the case of Ranadey Micronutrients Vs. Collector of Central Excise (1996 (87) ELT 19], the Apex Court held that the whole objective of such Circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. The Court also held that it does not lie in the mouth of the Revenue to repudiate a Circular

issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are, according to this Court, of far greater importance than the winning or losing of court proceedings. Therefore, following the above stated CBEC's instructions, the impugned demands are liable to be confirmed."

4.3 We find that the Hon'ble Delhi High Court in the case of Plastic Processors [2002 (143) ELT 521 (Del.)] disposed of writ petitions challenging the legality of Circular No. 38/2000-Cus. Dated 10.05.2000 clarifying as follows:-

"3. In so far as levy of additional duty of customs (CVD) on imports of reprocessed plastic materials (viz. plastic granules/agglomerates) is concerned, condition (i) above will not be satisfied because, the reprocessing has not been done in India. Thus, in case of normal imports of reprocessed plastic materials, the importers/domestic manufacturers are liable to pay, among other duties, additional duty of customs (CVD). It, therefore, follows that no CVD exemption will be available when reprocessed plastic materials are cleared in Domestic Tariff Area (DTA) by EOUs and EPZ units. In other words, the plastic processor EOUs/EPZ units are liable to pay, among other duties, excise duty equivalent to CVD payable on imported reprocessed plastic materials (e.g. plastic granules/agglomerates) in respect of their DTA clearances of such materials/goods."

Relying upon the decision of Hon'ble Supreme Court in the case of Hyderabad Industries [1999 (108) ELT 321 (SC)] and Thermax Pvt. Ltd. [1992 (61) ELT 352 (SC)], Hon'ble Delhi High Court held as follows:-

"8. As observed in the aforesaid quoted portions by the Apex Court, for the purpose of attracting additional duty under Section 3 of the Tariff Act, on the import of a manufactured or produced article, the actual manufacture or production of a like article in India is not necessary. Said provision specifically mandates that CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. This position was also elaborated in Thermax Private Limited case (supra).

9. *In essence, what has to be imagined is that importer had manufactured the goods in India and then the amount of excise duty that he would have called upon to pay in that event has to be determined.*

10. *In view of the above discussion, the inevitable conclusion is that the impugned circular is not in accordance with law, direction contained in it to make assessment in a particular fashion only is indefensible. In the result, impugned Circular No. 38/2000-Cus., dated 10th May, 2000" is quashed to the extent it imposes the liability of CVD."*

This decision has been upheld by Hon'ble Supreme Court as reported in [2005 (186) ELT A27 (SC)].

4.4 In the case of Maiden Trading Co. Pvt. Ltd. [2001 (132) ELT 431 (T)] the Tribunal relying on the decisions in the case of Hyderabad Industries and Thermax Ltd., held the same view.

4.5 Principal Commissioner of CGST, Pune-I had vide her order-in-original No. PUN-CGST&CX-002-COM-015-18-19 dated 31.01.2019 dropped the demand made for the subsequent period in the same matter and similar view has been taken again by the Commissioner of Central Excise, Raigad in order-in-original No. 21/NVK/COMMR/RGD/2016-17 dated 28.10.2016.

4.6 Hence we find the issue is squarely covered by the above decisions in favour of the appellant.

5.1 We do not find any merits in the impugned orders.

5.2 Appeals are allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)