CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO. 2

EXCISE APPEAL NO: 85010 OF 2014
WITH
EXCISE APPLICATION (MISC) NO: 85613 OF 2023

(on behalf of appellant)

[Arising out of Order-in-Original No: Belapur/96-102/Taloja/R-III/COMMR/KA/ 2013-14 dated 30th September 2013 passed by the Commissioner of Central Excise, Belapur.]

Jindal Drugs Pvt Ltd
D-19 MIDC Taloja, Raigad – 410 208 …***Appellant***

versus

Commissioner of Central Excise
Belapur
CGO Complex, CBD Belapur, Navi Mumbai 400614 ***…Respondent***

WITH

EXCISE APPEAL NO: 85348 OF 2014

[Arising out of Order-in-Original No: Belapur/96-102/Taloja/R-III/COMMR/KA/ 2013-14 dated 30th September 2013 passed by the Commissioner of Central Excise, Belapur.]

Commissioner of Central Excise
Belapur
CGO Complex, CBD Belapur, Navi Mumbai 400614 …***Appellant***

versus

Jindal Drugs Pvt Ltd
D-19 MIDC Taloja, Raigad – 410 208 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the assessee-appellant

Shri Amrendra Kumar Jha, Deputy Commissioner (AR) for the Revenue

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLEMR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85345-85346/2024

DATE OF HEARING: 20/09/2023
DATE OF DECISION: 19/03/2024

PER: C J MATHEW

Miscellaneous application seeking change of cause title is allowed and, accordingly, the appellant and respondent, as the case may be, in their own appeal and that of Revenue respectively stand substituted. The dispute, relating to the period from March 2008 to May 2010 has its origins in a series of developments in procedure stipulated for exports as well as the exemption accorded to some of the goods manufactured by them which have had its impact on recourse to CENVAT Credit Rules, 2004.

2. Among other goods, M/s Jindal Drugs Pvt Ltd manufactured 'menthol crystal', and primarily for export, at their Taloja plant (then an undertaking of M/s Tien Yuan (I) Pvt Ltd) using 'mentha oil' procured from M/s Jindal Drugs Private Ltd at Jammu and was taking credit thereto under rule 12 of CENVAT Credit Rules, 2004 even though the supplier was availing 'area based exemption' in terms of notification no. 56/2002-CE dated 14th November 2002. *Vide* notification no. 4/2008-CE dated 1st March 2008, 'menthol crystal' came to be exempted from duty consequent upon which, the assessee

having cleared goods for export under bond while resorting to default mechanism for discharge of obligation under rule 6 of CENVAT Credit Rules, 2004 on goods cleared domestically, continued to accumulate credit as well as claimed refund thereof in terms of rule 5 of CENVAT Credit Rules, 2004. This, however, was no longer possible after May 2010 with notification no. 24/2010-CE dated 26th May 2010 excluding exempted goods from availing procedure contained in notification no. 42/2001-CE (NT) dated 26th June 2001 for clearance under bond. Seven notices for recovery of credit availed on procurement of 'inputs' used in manufacture of 'menthol crystal' since its exemption from duties of central excise were disposed off in order[1] of Commissioner of Central Excise, Belapur confirming recovery of ₹23,32,699 under section 11A of Central Excise Act, 1944, along with applicable interest under section 11AB of Central Excise Act, 1944, besides imposing penalty of like amount under section 11AC of Central Excise Act, 1944.

3. Learned Counsel for appellant submitted that, in one process, 'mentha oil' is deployed for production of 'menthol crystal' and other products, which are dutiable, emerge therein while, in the other process, no product other than 'menthol crystal' emerges. He contended that the production of such other goods which are not exempted suffices for inclusion of 'mentha oil' in 'inputs' and, hence,

[1] [order-in-original no. Belapur/96-102/Taloja/R-III/COMMR/KA/ 2013-14 dated 30th September 2013]

entitled for availing duty thereon as credit. He drew attention to the acknowledgement of the fitment of their manufacturing process within that factual matrix as also the entitlement to neutralization of duties inhering in the goods exported. Reliance was placed on the decision of the Hon'ble High Court of Bombay in *Union of India v. Sharp Menthol India Ltd [2011 (270) ELT 212 (Bom)]* and in *Repro India Ltd v. Union of India [2009 (235) ELT 614 (Bom)]*, of the Hon'ble High Court of Himachal Pradesh in *Commissioner of Central Excise v. Drish Shoes Ltd [2010 (254) ELT 417 (HP)]* and of the Hon'ble Supreme Court in *Commissioner of Sales Tax, Bombay v. Bharat Petroleum Corporation Ltd [1995 (77) ELT 790 (SC)]* in support of claim for rightful availment and for rejection of appeal of Revenue. It was further argued that the appeal of Revenue for the period from March 2010 to May 2010 has raised a new plea which was not in the notice.

4. Learned Authorized Representative submitted that ineligibility of 'inputs' used in manufacture of 'exempted' goods, in terms of rule 6(1) of CENVAT Credit Rules, 2004, did not seem to have been appreciated by the adjudicating authority. According to him, the impugned order should have disallowed the credit of duty on 'mentha oil' and packaging material attributable to deployment in production of 'menthol crystal' from 1st March 2008 and of all goods after 1st March 2010. It was also contended that the *Explanation II* below rule

6(3) of CENVAT Credit Rules, 2004, inserted by notification no. 3/2011-CE dated 1st March 2011 for excluding credit of inputs used in manufacture of 'exempted goods', had retrospective effect.

5. In the context of dual production processes in which one alone, and of limited resort at that, generated products other than 'menthol crystal' and the introduction of exemptions, in sequence, that commenced in March 2008 as well as erasure of option of removal of exempted goods on bond in May 2010, the stage was set for denial of credit of ₹ 31,82,91,357 availed from March 2008 on 'inputs', including ₹ 29,11,72,734 on 'mentha oil', procured by them, and packing materials attributable to process that did not yield any other products which was proposed in notice dated 2nd April 2009. Thereafter, four notices dated 22nd December 2009, 29th September 2010, 17th January 2011 and 5th April 2011 were issued for recovery of ₹ 9,85,96,256, ₹ 5,29,07,035, ₹ 4,64,16,404 and ₹ 50,08,438, totaling ₹ 30,15,24,389, availed as credit for the period from January 2009 to September 2009, October 2009 to December 2009, January 2010 to May 2010 and March 2010 to May 2010. Further, founded on resort to rule 11 of CENVAT Credit Rules, 2004, credit of ₹ 8,21,95,386 pertaining to 'inputs' used in finished, and semi-processed, 'menthol crystals' as on 1st March 2008 and credit of ₹ 13,27,920, pertaining to 'inputs' used in finished, and semi-processed goods, that were exempted with effect from 27th February 2010 were

also proposed for recovery in two other notices.

6. The impugned order has held that, to the extent that excisable goods are manufactured using the ‘inputs’, there is no breach of entitlement to credit implying thereto that denial after 1st March 2010 is not questionable. Placing reliance on the decision in *re Sharp Menthol India Ltd*, in *re Repro India Ltd* and in *re Drish Shoes Ltd,* it was held that the availing of credit of duty paid on ‘inputs’ used in common for dutiable and exempted goods is not incorrect especially as exports are not required to be subject to that test at all and that discharge of neutralization available in rule 6(3) of CENVAT Credit Rules, 2004 for domestic clearances bars recovery of credit even if such inputs have been deployed for manufacture of exempted goods. However, in relation to credit of ₹ 24,07,878 on packing materials deployed till 1st March 2010, it was held that ₹ 69,347, corresponding to deployment for exempted goods as proportion of domestic clearances in total turnover, was recoverable owing to operation of rule 6(1) of CENVAT Credit Rules, 2004. Likewise for the period after 1st March 2010, it was held that credit on all ‘inputs’ used in production of good for domestic clearance, irrespective of discharge of obligation in rule 6(3) of CENVAT Credit Rules, 2004, was recoverable and, by reference to proportion as before, was crystallized at ₹ 20,86,496. As far as the stock lying with assessee on the two days on which exemptions came into force was concerned, ₹ 4757 and ₹

1,72,098 were held as recoverable by application of proportion as before to credit of ₹ 1,65,169 pertaining to packaging material and to credit of ₹13,27,920.

7. From the above, the facts that emerge are that ‘menthol crystal’ was exempted from duties of central excise with effect from 1st March 2008 though other products emerging from the process continued to be dutiable till February 2010. The manufacturing process for ‘menthol crystal’ and others were stated to be one but it is alleged that a second process did not yield the other products by which the assessee sought to claim inseparability of ‘inputs’ used in the process. There is no dispute on eligibility for availment of credit under rule 3 of CENVAT Credit Rules, 2004 on both ‘mentha oil’ and packaging material though it is contended that commonality of use of ‘inputs’ between dutiable and non-dutiable streams was no longer relevant from 1st March 2010. The appellant – assessee has contended that, in view of exports and discharge of default obligation on the remaining production, eligibility for credit, or its retention, was not in dispute. At this stage, we may posit that the dispute is only about retention of credit that enabled obtaining of refund under rule 5 of CENVAT Credit Rules, 2004.

8. That the appellant was exporting almost 98% of turnover for the period upto March 2010 and about 87% thereafter is a finding in

the impugned order that has not been controverted in appeal of Revenue. That such exports should not have to bear the burden of duties inhering in the goods is undeniable and, therefore, if not refund under rule 5 of CENVAT Credit Rules, 2004, rebate was allowable under Central Excise Rules, 2002 with option left to assessee. The denial of credit was not enforced immediately upon grant of exemption; instead resort was had to section 11A of Central Excise Act, 1944 and, consequently, rebate was not an available option. This militates against the contention of Learned Authorized Representative that the cited *Explanation* has retrospective effect. We, therefore, examine the entitlement in terms of operation under the CENVAT credit scheme. As we have premised, this is a dispute about eligibility for retention of credit availed validly under rule 3 of CENVAT Credit Rules, 2004. It is only upon deployment of such goods in the production of 'exempted goods', which 'menthol crystal' was since 1st March 2008, that rule 6(1) of CENVAT Credit Rules, 2004 is brought to bear. Likewise, it is only upon deployment of such goods in the production of 'exempted goods', which other products were was since 1st March 2010, that rule 6(1) of CENVAT Credit Rules, 2004 is brought to bear. The operation of the said exclusion is subject to rule 6(6) of CENVAT Credit Rules, 2004 which, in conjunction with rule 5 of CENVAT Credit Rules, 2004, has been designed to neutralize duties that inhere in export goods. Therefore, to the extent that 'inputs' were deployed in goods that have been exported, availment of credit is not faulted. Even if exempted goods were removed on bond for export after March 2010, that procedural lapse, with its own attendant consequence, has no bearing on eligibility for retention of credit. Therefore, only the availment of credit in relation to 'inputs' used in production of domestically cleared goods remain.

9. There can be no dispute on availment of credit of duty paid on attributable goods till March 2010 as these were cleared on payment of duty. For the period thereafter, it is on record that the default provision in rule 6(3) of CENVAT Credit Rules, 2004 for payment of 10% of value of exempted goods cleared domestically would entitle retention of credit. The impugned order, and appeal of Revenue, appear to have, in their respective contentions which do not relate to the same 'input', misconstrued the meaning of 'common' and the bar on 'retention' which are applicable to both categories of inputs – raw materials and consumables – that are used in production. Hence, 'raw materials' are subject to the bar in rule 6(1) of CENVAT Credit Rules, 2004 upon utilization in non-dutiable streams because they cease to be common by the very nature of the product. Only consumables remain as 'common' thereafter for applicability of provision for separate accounts or neutralization methods. None of the goods in the dispute are consumables and, owing to export as well discharge of duty liability or liability of 10% on value of domestically cleared goods,

there is no scope for recovery under rule 14 of CENVAT Credit Rules, 2004 or section 11A of Central Excise Act, 1944. Other consequences too fail.

10. Accordingly, the appeal of Revenue is dismissed. The demand fastened on assessee in the impugned order does not sustain. Appeal of assesse is allowed.

(Order pronounced in the open court on 19/03/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*