CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 85347 of 2020

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/123/19-20 dated 19.11.2019 passed by the Commissioner (Appeals), Customs, Central Excise and GST, Nagpur)

Mylan Laboratories Limited **.... Appellant**
Plot No.F-4& F-12, MIDC,
Malegaon, Taluk Sinnar
Nashik – 422113.

Versus

Commissioner of Customs **.... Respondent**
Customs Commissionerate
GST Bhavan, Civil Lines
Nagpur – 422 001.

Appearance:

Shri C.S. Srinivas, Consultant for the Appellant

Shri Ram Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85536/2024

Date of Hearing: 01.02.2024
Date of Decision: 03.06.2024

Per: M.M. Parthiban

This appeal has been filed by M/s Mylan Laboratories Limited, Nashik (herein after referred to as "the appellant") assailing Order-in-Appeal No.NGP/EXCUS/000/APPL/123/19-20 dated 19.11.2019 (hereinafter referred to as "the impugned order") passed by the Commissioner (Appeals), Customs, Central Excise and GST, Nagpur.

2.1 Brief facts of the case are that the appellant is an Export Oriented Unit (EOU) manufacturing certain pharmaceutical products. In manufacture of such final products they have imported goods during the period March, 2013 to February, 2015 by availing the customs duty exemption under Notification No.52/2003-Cus. dated 31.03.2003, as amended. The final products are mainly exported and wherever the final products are required to be cleared to Domestic Tariff Area (DTA) necessary permission from the Development Commissioner was obtained before such clearance. Similarly, whenever the inputs are procured locally the appellant had also availed Central Excise duty exemption under Notification No.22/2003-C.E. dated 31.03.2003, as amended.

2.2 During the verification of the periodical returns filed by the Range Officer of the jurisdictional Commissionerate, he pointed out that in respect of certain inputs which are used in the finished goods which are also exempted from duty, the availment of customs duty exemption is incorrect. Accordingly, the appellant had paid the duty of Rs.24,13,416/- being duty foregone on the inputs which have entered into the manufacture of exempted final products during the said period. The said amount was paid partly from PLA account for Rs.6,21,721/- and the balance of Rs.17,91,695/- from Cenvat credit. The Department objected to the payment of duty through Cenvat credit and proceeded with issue of Show Cause Notice (SCN) dated 25.10.2017. The said SCN was adjudicated by the original authority in confirmation of the customs duty of Rs.17,91,695/- along with interest to be recovered in cash under Section 28(4) of the Customs Act, 1962. Besides the above, the adjudicating authority imposed penalty on the appellant for an amount equal to duty under Section 114A ibid by issue of an Order-in-Original dated 21.02.2019. Feeling aggrieved with the order the original authority, the appellant had preferred an appeal before the Commissioner (Appeals) who had upheld the Order-in-Original dated 21.02.2019 and rejected the appeal filed by the appellant. Being aggrieved with the impugned order passed by the Commissioner (Appeals), the appellant had preferred this appeal before the Tribunal.

3.1 Learned Consultant has submitted that the appellant has rightly paid the entire duty foregone in respect of inputs used in the finished goods on which no duty was payable. Subsequent to the payment of duty, the appellant’s records were audited by the Department twice but no objection was raised in respect of the payment made through Cenvat credit. Further, in the case of appellant himself, such payment of duty through the Cenvat credit was allowed in the past by the Tribunal. Hence he pleaded that on the basis of such order of this

Tribunal, this case should also be considered and the appeal filed by them should be allowed.

3.2 Learned Consultant has relied upon the Final Order No. A/30149-30151 dated 30.05.2023 of the Tribunal passed in their own case.

4. Learned Authorised Representative (AR) appearing for the department, on the other hand, had submitted that the appellant was not eligible to pay the duty foregone through Cenvat credit as the duty to be paid are duties of Customs. Therefore, he prayed that the instant appeal filed by the appellant may be dismissed.

5. Heard both sides and perused the records of the case. I have examined the submissions advanced by the learned Consultant appearing for the appellant and the learned Authorized Representative of the Department. Further, I have also perused the additional written submissions in the form of paper books submitted by both sides along with citation of case laws which both sides have mentioned in support of their case.

6.1 The issue involved in this appeal is to decide whether the demand of duty on import of inputs used for final products which are exempted from payment of duty, in terms of proviso to paragraph 3 of the Notification No.52/2003-Cus. dated 31.03.2003is legally sustainable under Section 28(4) of the Customs Act, 1962.

6.2 The relevant portion of the said Notification No.52/2003-Cus. dated 31.03.2003 is reproduced below:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the said Customs Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts, -

(a) all goods as specified in the Annexure–I to this notification, when imported or procured from a Public Warehouse or a Private Warehouse appointed or licensed, as the case may be, under section 57 or section 58 of the said Customs Act or from international exhibition held in India for the purposes of –

i) manufacture of articles for export or for being used in connection with the production or packaging or job work for export of goods or services by export-oriented undertaking (hereinafter referred to as the unit) other than those referred to in clauses (b), (c) and (e), or *ii) manufacture or development of software, data entry and conversion, data processing, data analysis and control data management or call center services for export by Software Technology Park (STP) unit, or a unit in Software Technology Park Complex under the export-oriented scheme (hereinafter referred to as the unit); or*

iii) manufacture and development of electronics hardware or electronics hardware and software in an integrated manner for export by an Electronic Hardware Technology Park (EHTP) unit or a unit in Electronic Hardware Technology Park Complex under the export-oriented scheme (hereinafter referred to as the unit); or…..

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3. Notwithstanding anything contained in this notification, the exemption from the whole of duty of Customs leviable thereon under First Schedule to the Customs Tariff Act, 1975 (51 of 1975), shall not apply to inputs which on importation into India or procurement, are used for the purpose of manufacture of finished goods [other than falling under Fourth Schedule of Central Excise Act, 1944 (1 of 1944)] or services and such finished goods and services, (including by-products, rejects, waste and scrap arising in the course of production, manufacture, processing or packaging of such goods) are supplied in Domestic Tariff Area in accordance with the Foreign Trade Policy, on payment of applicable Goods and Services Tax leviable thereon, or are in stock at the time of exit from the scheme in accordance with the Foreign Trade Policy and in case of waste and scrap within SION or within norms fixed by the Norms Committee or norms as approved by the Board of Approval the exemption in respect of goods imported or procured under this notification would continue to be admissible :

xx xx xx xx

***Provided further** that where finished goods (including rejects, waste, scrap, remnants and by-products) are either non-excisable or such finished goods (including rejects, waste, scrap, remnants and by-products) other than goods falling under heading/tariff item 8901, 8902 00 10, 8905 10 00 or 8906 if imported, are leviable to nil rate of duty of customs specified under First Schedule to the Customs Tariff Act, 1975 and nil additional duty leviable under section 3 of the said Customs Tariff Act, read with exemption notification in this regard, if any, no exemption in respect of inputs utilised for the purpose of manufacture of such finished goods (including rejects, waste, scrap, remnants and by-products) shall be available under this notification :…"*

A plain reading of the above proviso clause to paragraph 3 of the above Notification, indicate that there is a restriction in availing the duty exemption, when the imported inputs are intended for use in the finished goods, which are non-excisable or exempted or attracting NIL rate of duty. In this case, it is not clear that whether the appellant was aware that the imported inputs may be used in the life-saving drugs which are exempted from payment of duty. Further, the Department had not produced any evidence or the fact that the appellant had taken the exemption with an intention to evade duty. In the above factual matrix of the case, demand of duty under Section 28(4) of the Customs Act, 1962 invoking extended period is not sustainable.

6.2 I further find that the above issue for consideration before me is no more open to debate as the issue has been discussed at length and was decided by the Co-ordinate Bench of the Tribunal in the appellant's own case in Excise Appeals No. 1389 of 2011, No. 2249 of 2012 and No.30017 of 2019. The relevant paragraphs of the said order is extracted and given below:

> *"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.*
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> *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*
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> *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.*
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> *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."*
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> *[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."

7.1 In view of the foregoing discussions and analysis, and in terms of the Order of the Tribunal in the appellant's very own case having determined that the demand normal period alone is sustainable and that too in respect of duty involved on imported inputs for which the amount of customs duty foregone is required to be paid in cash and not to debit entry in PLA account. Accordingly, the impugned order dated 19.11.2019 in upholding the original order demanding customs duty under Section 28(4) ibid and imposition of penalty under Section 114A ibid is not legally sustainable.

7.2 In the result, by setting aside the impugned order dated 19.11.2019, the appeal filed by the appellant is allowed in their favour, with consequential relief, if any.

(Order pronounced in open court on 03.06.2024)

(M.M. Parthiban)
Member (Technical)

Sinha