

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 86958 OF 2014

[Arising out of Order-in-Original No: 180/MAK(180)COMMR/RGD/13-14 dated 26th February 2014 passed by the Commissioner of Central Excise, Raigad.]

Cipla Limited

A-142 MIDC, Patalganga, Dist: Raigad - 400220

... Appellant

versus

Commissioner of Central Excise

Raigad

Utpad Shulk Bhavan, Plot No.1, Section – 17

Khandeshwar, Navi Mumbai - 410206

...Respondent

APPEARANCE:

Shri Gajendra Jain, Advocate and Mr Saurabh Bhise, Advocate for the appellant

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

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85854/2024

DATE OF HEARING:

07/03/2024

DATE OF DECISION:

05/09/2024

PER: C J MATHEW

The dispute in this appeal, challenging order¹ of Commissioner of

¹ [order-in-original no. 180/MAK(180) COMMR/RGD/13-14 dated 28th February 2014]

Central Excise, Raigad confirming recovery of ₹ 2,27,98,495 towards differential duties of central excise under section 11A of Central Excise Act, 1944, along with applicable interest under section 11AA of Central Excise Act, 1945, and imposing penalty of like amount under section 11AC of Central Excise Act, 1944, is about the scope of expressions deployed in paragraph 6.8 of the Foreign Trade Policy (FTP) when appended to notification under section 5A of Central Excise Act, 1944. The cross-over has occurred as the appellant, M/s Cipla Ltd, is a 'hundred percent export oriented unit (EOU)' issued with Letter of Permission under chapter 6 of the Foreign Trade Policy under the supervisory oversight of the jurisdictional Development Commissioner with jurisdictional central excise authorities concerned with receipt of duty exempt goods as well as clearances for export and into the domestic market. In enforcing the terms of the notification no. 23/2003-CE dated 31st March 2003 issued under section 5A of Central Excise Act, 1944, the adjudicating authority has interpreted 'products' as intended to cover 'Artesunate' and 'Venlafaxine' and having been cleared beyond the ceiling of 90% of value of exports between April 2008 and November 2012 and, owing to being claim for exemption, to strict compliance in accordance with the law laid down by the Hon'ble Supreme Court in *Indian Aluminium Co Ltd v. Thane Municipal Corporation* [1991 (55) ELT 454 (SC)] and in *Mihir Textiles Ltd v. Collector of Customs, Bombay* [1997 (92) ELT 9 (SC)]. The appellant claims to be in

conformity with the said notification as the export product that they are obligated to export is 'bulk drugs' which the two impugned products are. And between these rival stands lies the correctness of the recovery ordered by the adjudicating authority.

2. The appellant, as an approved unit under the scheme in the Foreign Trade Policy (FTP), was entitled to duty free procurement of inputs and capital goods from India or from abroad with the sole obligation to be 'net foreign exchange (NFE) positive' over the period of validity of the Letter of Permission (LoP) effective from date of commencement of operation. Though established with the purpose of export promotion, units that are compliant are privileged with effecting clearances into the domestic market on payment of duties of central excise as set out in section 3 of Central Excise Act, 1944 which, in such instances, are the same as the duties arising had such goods been imported into India and upto half the value of exports. The computation of threshold eligibility for effecting such clearances, and subject to fixation by the Development Commissioner, is 'free on board (FOB)' value of exports being in excess of imported inputs consumed during the year combined with amortized, at 10%, value of imported capital goods. Taking into account the composition of duty liability, notification no. 23/2003-CE dated 31st March 2003 has scaled down the levy by half the 'basic customs duty (BCD)' on the goods so cleared.

3. Entitlement to such clearances is contingent upon compliance with paragraph 6.8 of the Foreign Trade Policy (FTP) being the condition set out in the said notification. The relevant issue in the said policy of 2004-09, and incorporated in 2008, is

‘(a)....Within entitlement...unit may sell...its products similar to goods which are exported.... However, units which are manufacturing and exporting more than one product can sell any of these products into DTA, upto 75% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports of the unit...’

which, in Foreign Trade Policy (FTP) 2009-14, was enhanced to 90% and is cause of controversy in the dispute.

4. On the common ground of export of ‘Artesunate’ and ‘Venlafaxine’ to the extent alleged in the notice, the impugned order has restricted the entitlement of the former to concessional rate of duty to 75% in 2008-09 and 90% in the next two years and denial of the entire clearance of the latter for the three years; subjecting the entire clearance of the latter to differential duty liability was said to be on account of no exports having been effected. The twin pillars of the justification in the impugned order, and reiterated by Learned Authorized Representative, are the said restriction in the Foreign Trade Policy (FTP) of 2008-09, 2009-10, 2010-11 and that privilege, being conferred by an exemption notification, is not amenable to unarticulated intent.

5. Before advertizing to the averments on behalf of the appellant, a legal aspect deserves consideration in the context of strict interpretation espoused in the impugned order. Doubtlessly, the exemption has drawn upon section 5A of Central Excise Act, 1944 as authority. The peculiarity therein is that exemptions, in the ordinary course and unless specifically stated, are not available to units such as that of the appellant. Furthermore, such units are subjected to higher duty liability than manufacturers of the same goods elsewhere. It would, thus, appear that, within the Central Excise Act, 1944, a special place and special law has been carved out for such units as well as, and formerly till carved out as a separate enactment, 'export processing zone (EPZ)' unit. It is, therefore, moot if, indeed, the principle enunciated in *re Indian Aluminium Co Ltd* and in *re Mihir Textiles Ltd* find application here. We are parking this aspect for the nonce and may have to revert thereto should our findings below require further elucidation.

6. According to Learned Counsel for appellant, they have complied with both threshold eligibility, as well as the restrictions stipulated, in the notification as the Letter of Permission (LoP) had been issued to them for export of 'bulk drugs and formulations' which the impugned goods, undeniably, are. It was also submitted that the approval for such clearances was granted by the competent authority, viz., the jurisdictional Development Commissioner. He placed reliance on the decision of the Hon'ble Supreme Court in *Collector of Central Excise, Shillong v. Wood*

Craft Products Ltd [1995 (77) ELT 23 (SC)] on the intent of the expression ‘similar’ and of the Tribunal in *Commissioner of Central Excise, Salem v. Hindustan Lever Ltd [2011 (263) ELT 697 (Tri-Chennai)]*, in *Commissioner of Central Excise, Salem v. Hindustan Lever Ltd [2011 (268) ELT 252 (Tri-Chennai)]* and in *Hindustan Zinc Ltd v. Commissioner of Central Excise & Service Tax, Udaipur [2018 (2) TMI 1386 – CESTAT NEW DELHI]*. Several decisions of the Hon’ble Supreme Court and of the Tribunal on exclusive jurisdictional competence of the Development Commissioner were also cited.

7. The decision of the Tribunal in *Ginni International Ltd v. Commissioner of Central Excise, Jaipur [2002 (139) ELT 172 (Tri-Del)]* pertains to computation of sale entitlement which is not in dispute here. In the decisions of the Tribunal, there is certainly passing reference to approval granted by Development Commissioner while according approval to the submission on behalf of respective assesseees that they had been in compliance with the stipulations in the respective notifications. We are also conscious that our appellate jurisdiction, while statutorily endowed, is framed within orders of jurisdictional Commissioners of Customs and of jurisdictional Commissioners of Customs (Appeals) acting under the authority of law; a plea of lack of jurisdiction vested in customs authorities for a particular excludes our jurisdiction, too, which is inconsistent with seeking our appellate jurisdiction.

8. The issue is simple enough when viewed through the prism of ‘cross-jurisdictional’ lexicon. Customs authorities, empowered to deal with ‘goods’ in their statutory enactment, are unfamiliar with ‘products’ employed in the language of the Director General of Foreign Trade (DGFT). They have no assistance either from the Foreign Trade Policy (FTP), the notification concerned or any other authority. Indeed, that was not in the ken of the adjudicating authority as it should have been. Customs authorities, though not unfamiliar with ‘similar’, are permitted to draw upon that within the restricted framework set out for the purposes of section 14 of Customs Act, 1962. In the absence of any discussion by the adjudicating authority in the impugned order, we can only speculate that the singular approach of customs authorities to ‘goods’ has been transposed on ‘products’ which, in the context of the description deployed in the Letter of Permission (LoP) issued to the appellant and plea of assessee, should have been.

9. We take note that the eligibility intended by the notification has two aspects: the goods covered and the condition. The latter restricts the scope of the former but does not elaborate the intent in such restriction; it is only by contextual reference to another statutory instrument issued by another agency that the stipulation comes into play. In the absence of any guide to interpretation of the unfamiliar, the adjudicating authority may, at best, have slight such authoritative clarification instead of arrogating that task to itself. In saying so, we are guided by the

observation of the Tribunal in *re Ginni International Ltd* that

‘7. We find force in the submission of the learned Counsel for the Appellants that once the Development Commissioner has allowed them the permission to sell the goods up to a fixed value in the DTA, the Revenue cannot disallow the clearance and demand Central Excise duty on the ground that the entitlement was required to be restricted to 50% of the FOB value of Physical Exports. If the Revenue is of the view that the value of deemed export should not have been taken into consideration for arriving at the value of goods to be allowed to be sold in the DTA, the matter should have been taken up with the Development Commissioner who had initially accorded the permission to the Appellants. This has been the consistent view of the Appellate Tribunal wherever the permission under the Central Excise Act/Rules or Notification is accorded by an authority outside the Department.’

10. For the above reasons, we set aside the impugned order to remand the matter back to adjudicating authority for a fresh decision based on such reference.

(Order pronounced in the open court on 05/09/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)