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

Excise Appeal No. 89675 of 2013

(Arising out of Order-in-Original No. Belapur/93/Taloja/R-I/Commr/KA/2013-14 dated 30.09.2013 passed by the Commissioner of Central Excise, Belapur)

M/s. Jindal Drugs Ltd. **Appellant**
Plot No.111, New Chemical Zone,
MIDC – Taloja, Raigad 410 208.

Vs.

Commissioner of Central Excise, Belapur **Respondent**
1st floor, CGO Complex,
CBD Belapur, Navi Mumbai 400 614.

WITH

Excise Appeal No. 88467 of 2014

(Arising out of Order-in-Original No. Belapur/03/Taloja/R-I/Commr/KA/2013-14 dated 15.05.2014 passed by the Commissioner of Central Excise, Belapur)

M/s. Jindal Drugs Ltd. **Appellant**
Plot No.111, New Chemical Zone,
MIDC – Taloja, Raigad 410 208.

Vs.

Commissioner of Central Excise, Belapur **Respondent**
1st floor, CGO Complex,
CBD Belapur, Navi Mumbai 400 614.

AND

Excise Appeal No. 88468 of 2014

(Arising out of Order-in-Original No. Belapur/02/Taloja/R-I/Commr/KA/2013-14 dated 15.05.2014 passed by the Commissioner of Central Excise, Belapur)

M/s. Jindal Drugs Ltd. **Appellant**
Plot No.111, New Chemical Zone,
MIDC – Taloja, Raigad 410 208.

Vs.

Commissioner of Central Excise, Belapur **Respondent**
1st floor, CGO Complex,
CBD Belapur, Navi Mumbai 400 614.

Appearance:

Shri Prakash Shah, Advocate, for the Appellant
Shri S.K. Mathur, Special Counsel, for the Respondent

CORAM:

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

FINAL ORDER NO. **A/86883-86885/2021**

Date of Hearing: 17.08.2021
Date of Decision: 17.08.2021

PER: SANJIV SRIVASTAVA

These appeals are directed against Order-in-Original No. Belapur/93/Taloja/R-I/Commr/KA/2013-14 dated 30.09.2013, Order-in-Original No. Belapur/03/Taloja/R-I/Commr/KA/2013-14 dated 15.05.2014 and Order-in-Original No. Belapur/02/Taloja/R-I/Commr/KA/2013-14 dated 15.05.2014 passed by the Commissioner of Central Excise, Belapur.

1.2 In Order-in-Original No. Belapur/93/Taloja/R-I/Commr/KA/2013-14 dated 30.09.2013, the Commissioner has held as follows:

"ORDER

1. I hold that the activity of labeling undertaken by the assessee in their factory at Taloja does not amount to manufacture.

2. I demand the wrongly availed credit of Rs.6,33,22,839/- (Rupees Six Crores Thirty Three Lakhs Twenty Two Thousand Eight Hundred Thirty Nine Only) under provisions of Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(10) of the Central Excise Act, 1944.

3. I demand interest at the appropriate rate under Rule 14 of Cenvat Credit Rules, 2004 read with section 11AA of the Central Excise Act, 1944, which shall be collected on the amount of Rs.3,39,465/- being the amount of credit availed and utilized by the assessee.

4. I impose a penalty of Rs.6,33,22,839/- (Rupees Six Crores Thirty Three Lakhs Twenty Two Thousand Eight Hundred Thirty Nine Only) under the provisions of Rule 15(2) of Cenvat Crdit Rules, 2004 read with section 11AC(1)(a) of the Central Excise Act, 1944. However, the penalty will be reduced to 25% of the above amount if the assessee pays the duty determined along with interest within 30 days of receipt of this order. The reduced penalty 25% of the amount of duty so determined is available to the assessee only if the 25% of the penalty is also paid within the period of thirty days of receipt of this order. Otherwise the penalty imposed under Section 11AC(1)(a), equal to the duty amount will remain."

1.3 In Order-in-Original No. Belapur/03/Taloja/R-I/Commr/KA/2013-14 dated 15.05.2014, the Commissioner has held as follows:-

"ORDER

1. I hold that the activity of labeling undertaken by the assessee in their factory at Taloja does not amount to manufacture.

2. I demand the wrongly availed credit of Rs.11,36,63,112/- (Rupees Eleven Crores Thirty Six Lakhs Sixty Three Thousand One Hundred and Twelve Only) under provisions of Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(10) of the Central Excise Act, 1944.

3. I demand interest at the appropriate rate under Rule 14 of CENVAT Credit Rules, 2004 read with section 11AA of the Central Excise Act, 1944, which shall be collected on the amount of Rs.75,65,604/- being the amount of credit availed and utilized by the assessee.

4. I impose a penalty of Rs.11,36,63,112/- under the provisions of Rule 15(2) of Cenvat Crdit Rules, 2004 read with section 11AC(1)(a) of the Central Excise Act, 1944. However, the penalty will be reduced to 25% of the above amount if the *assessee pays the duty determined along with interest within 30 days of receipt of this order. The reduced penalty 25% of the amount of duty so determined is available to the assessee only if the 25% of the penalty is also paid within the period of thirty days of receipt of this order. Otherwise the penalty imposed under Section 11AC(1)(a), equal to the duty amount will remain."*

1.4 In Order-in-Original No. Belapur/02/Taloja/R-I/Commr/KA/2013-14 dated 15.05.2014, the Commissioner has held as follows:-

"ORDER

1. I hold that the activity of labeling undertaken by the assessee in their factory at Taloja does not amount to manufacture.

2. I demand the wrongly availed credit of Rs.5,28,28,266/- (Rupees Five Crores Twenty Eight Lakhs Twenty Eight Thousand Two Hundred Sixty Six Only) under provisions of Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(10) of the Central Excise Act, 1944.

3. I demand interest at the appropriate rate under Rule 14 of CENVAT Credit Rules, 2004 read with section 11AA of the Central Excise Act, 1944, which shall be collected on the amount of Rs.8,79,455/- being the amount of credit availed and utilized by the assessee.

4. I impose a penalty of Rs.5,28,28,266/- under the provisions of Rule 15(2) of CENVAT Crdit Rules, 2004 read with section 11AC(1)(a) of the Central Excise Act, 1944. However, the penalty will be reduced to 25% of the above amount if the assessee pays the duty determined along with interest within 30 days of receipt of this order. The reduced penalty 25% of the amount of duty so determined is available to the assessee only if the 25% of the penalty is also paid within the period of thirty days of receipt of this order. Otherwise the penalty imposed *under Section 11AC(1)(a), equal to the duty amount will remain."*

2.1 We have heard Shri Prakash Shah, Advocate, for the appellants and Shri S.K. Mathur, Special Counsel, for the Revenue.

2.2 Learned counsel for the appellants submits that

- the issue involved in this case is in respect of deemed manufacture whereby the process of labeling, relabeling, packing and repacking has been held to be amounting to manufacture.
- The appellants in their unit in Taloja were undertaking these activities on the Coco Butter and Coco Powder cleared from their factory located in Jammu & Kashmir and also in respect of the goods imported by them from Malaysia and China.
- They were availing CENVAT credit of duty paid on these goods.
- Thereafter these goods were cleared for export on payment duty under claim of rebate as per rule 18 of the Central Excise Rules, 2002
- Revenue had objected to this for the reason that separate marketable commodity has emerged at the time of clearance of these goods from Jammu & Kashmir unit. Hence Revenue sought to deny this CENVAT credit and the rebate claim sanctioned to the appellant along with interest and penalty.
- issue has been considered by the Tribunal in favour of the appellants in their own case for the past period, reported at 2015-TIOL-857-CESTAT-Mumbai.

2.3 Learned Special Counsel appearing for Revenue submits that the order of the Tribunal in favour of the appellants has been appealed against before the Hon'ble Supreme Court. However, no stay in the matter has been given. He requests that the matter may be kept pending till the disposal of the appeal in the Hon'ble Supreme Court, in view of the decision of the Hon'ble Apex Court in case of Cargill India Pvt Ltd. [2019 (366) ELT 194 (SC)]

3.1 We have considered the impugned order along with the submissions made in appeals and during the course of argument.

3.2 We find that the issue is squarely covered by the decision referred to by the learned counsel for the appellant. The relevant paras of the said judgment are reproduced below:-

"6.8 In my view, the contention of the revenue does not merit acceptance as to that labelling must enhance the marketability. The argument of the revenue that labelling or relabeling must enhance the marketability is contrary to the plain reading of note 3 to Chapter 18. In my view, the contention raised on behalf of the revenue would render the amendment to various chapter notes including note 3 to Chapter 18 substituting the word "and" with "or". The amendment is made with a view of separate each of the activities covered by note 3 to Chapter 18 to be independent activities and each of them deem to be manufacture.

6.9 In my view, labelling per se will amount to manufacture in view of the first part of note 3 of Chapter 18. There is no requirement in said note 3 that the labelling should enhance the marketability. It only the last part of note 3 that provides for adoption of any other treatment to render the product marketable. The note 3 is deeming provisions. It deems three of the specified activities as deemed manufacture.

6.10 In view of admitted position both in the show cause notice and in the impugned order that the Appellant have undertaken the activity of labelling, I agree with Member (Judicial) that that the activity of the appellant is covered by note 3 to Chapter 18 and the activity of the Appellant of labelling the goods received from Jammu factory amounts to manufacture.

6.11 Both sides relied upon the judgment of the Hon'ble Apex Court in the case of Liquide North India Pvt. Ltd. - 2011 (271) ELT 321. The appellant relied upon the judgment of the Apex

Court to contend that labelling done by the Appellant amount to manufacture. Mr. Mondal relied upon paragraph 21 of the judgment to contend that affixation of additional label is not covered by note 3.

6.12 I find that the Hon'ble Supreme Court of India, in the context of Note 10 to Chapter 28, prior to its amendment in 2008 Budget, held that the manufacturing activity within the meaning of the said note would mean either (a) Labelling or re-labelling of containers and repacking from bulk packs to retail packs; (b) and adoption of any other treatment to render the product marketable to the consumer. I find that the Hon'ble Supreme Court of India has held that "Thus, either an activity of labelling or relabeling of containers and repacking from bulk to packs to retails packs OR adoption of any treatment so as to render the product marketable to the consumer would amount to manufacture."

6.13 I have carefully perused paragraph 21 of the judgment of the Hon'ble Supreme Court of India relied upon by Mr. Mondal. In my view, the appellant are right in contending that paragraph 21 of the judgment of the Hon'ble Supreme Court of India cannot be read without referring to the order of this Tribunal.

(a) Paragraph 6 of the order of this Tribunal, in the case of Air Liquide North India Private Limited reported in 2004 (174) ELT 2011 is relevant and reads as under:

"6. The facts that the Helium gas cylinders as purchased by the respondents were marketable, as they purchased it from the market, but they carried out the above referred detailed tests and analysis and segregated the gas cylinders into different grades on the basis of those tests and the extent of purification done by them of the gas contained therein and thereafter sold the same to different customers as per their requirements. Therefore, it can be safely concluded that through the various tests, detailed above, the respondents rendered the Helium gas marketable to various types of consumers. The issuance of a separate certificate along with each cylinder at the time of the sale to a consumer, containing all the details regarding the moisture, purification, quality, also amounted to relabeling of the

gas cylinders. For re-labelling purposes, it is not essential that label should be re-fixed on the article, it would be enough if the same is issued along with the item to the consumer."

6.14 In the above context, the Hon'ble Supreme Court of India in paragraph 21 held as under:

"21. So far as the issue with regard to re-labelling is concerned, we are in agreement with the view expressed by the Tribunal that re-labelling would not mean mere fixing of another label. When the Appellant was selling different certificates to its different customers, we can say that the appellant was virtually giving different marks of different labels to different cylinders having different quality and quantity of gas."

6.15 It can be seen that what is approved by the Hon'ble Supreme Court of India is the findings of this Tribunal in paragraph 6 to the effect that for re-labelling purposes, it is not essential that label should be re-fixed on the article, it would be enough if the same is issued along with the item to the consumer.

6.16 It can be seen that the Hon'ble Supreme Court of India has not held that what is understood by the learned Commissioner or being argued on his behalf.

6.17 I find that the Appellant have relied upon the decision of this Tribunal in the case of Nestle India Limited, reported in 2004 (169) ELT 315 = 2004-TIOL-346-CESTAT-DEL. This Tribunal, in the context of Note 11 to Chapter 29 (which was similar to un-amended note 3 to Chapter 18, in paragraph 8 held as follows:

"8. According to the learned Advocate the crucial requirement for the application of the last portion of Note 11 is that but for the adoption of that treatment, the product should not be marketable to the consumer and as the vitamins, starting materials, are marketable, Note 11 is not applicable. Note 11 to Chapter 29 reads as under :

"In relation to products of this Chapter, labeling or relabelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to manufacture."

6.18 AS per the last portion of this Note, any treatment which renders the product marketable to the consumer shall amount to manufacture; from the perusal of this Note, it does not flow that the last portion of the Note will be applicable only to a product which prior to the adoption of that treatment was in a non-marketable state. That may be one of the situation but not the only situation. Even if a product is by itself marketable and the assessee undertakes some treatment on the product which render it marketable in some other form, the said treatment would be covered by the phrase "any other treatment to render the product marketable to the consumer". In the case of Nestle the appellant mix the various vitamins in a pre-determined ratio which render them marketable to the consumer as inter-mixture of vitamins. The vitamins, that is the starting material, were marketable, prior to the treatment as individual vitamins, whereas the treatment rendered by the appellant has made them marketable as inter-mixture of vitamins. In the case of Lakme Lever, supra, the appellant have merely packed 12 assorted colours of lipsticks in one carton instead of 12 lipsticks of one colour. In view of these facts, the Tribunal observed that the process should be one which confers upon a product the attributes of marketability which it did not possess earlier. The vitamins, in the original form, do not have the attribute of marketability as inter-mixtures of vitamins which the treatment rendered by the appellant has attributed. Similarly in Lupin Laboratories case [2002 (139) E.L.T. 366 (Tri. - Mumbai)] = 2002-TIOL-500-CESTAT-MUM, four tablets were put in a single pack with a view to maintain the continuity and regularity of intake of these four drugs which were the main anti-tuberculosis drugs. These four tablets were not mixed together to form only one tablet. We, therefore, hold that the process carried out by the appellant render the product marketable as inter-mixture of vitamins and as such the activity amounts to manufacture."

6.19 In pursuance of a remand order passed by the Hon'ble Supreme Court of India, this Tribunal in its order reported in 2009 (235) ELT 577 held as under:

"70. While applying the law laid down by the Apex Court in relation to legal fiction created by the statutory provision under Note 11 of Chapter 29 quoted above, we will have to primarily ascertain the purpose behind introducing the said Note 11. The Note certainly relates to connotation of the term "manufacture" and it seeks to widen the scope thereof by including the activities which would otherwise fall outside the scope of the definition of the said term under Section 2(f) of the said Act. Therefore, the purpose for which the said Chapter Note has been introduced in Chapter 29 is to widen the scope and the meaning of the term 'manufacture' in relation to the products covered by the said Chapter 29 of the Tariff Act. Mere process of labeling or relabelling of the containers and even repacking from bulk to retail pack are described as amounting to manufacture and, therefore, the resultant product would attract the duty under the said Act. Likewise, any process adopted for rendering the product marketable would also amount to manufacture even though such activity may not come within the purview of the definition of the term under Section 2(f). In other words, the Chapter Note attempts to remove any doubt the activity described therein as being manufacture and sufficient to attract duty under the said Act."

6.20 The above paragraph of the order of this Tribunal makes it clear that mere process of labelling or relabeling of container will amount to manufacture. It cannot be held that activity of labelling does not amount to manufacture merely because goods are manufactured in Jammu and re-credit of duty paid thereon is taken as credit when in plain terms of note 3 to chapter 18 labelling or relabeling amounts to manufacture.

6.21 Now, I will examine the activities undertaken by the appellant on the imported coco butter. The learned Commissioner did not accept the contention of the appellant that it re-packed the imported goods on the ground that the appellant have not maintained the record of cartons and labels in the factory at Taloja. Further, the learned Commissioner has held that 25 Kg. package has remained 25 Kg.

6.22 I find that the department in the show cause notice accepts that the appellant replaced the cartons by removing the old cartons and repacking them in new cartons and labelling undertaken on the new cartons.

Show Cause Notice

Paragraph 4

"....

"It is claimed by the assessee that in case of imported Cocoa Butter all boxes of imported Cocoa butter are removed and are replaced by the boxes with printed matter as described above in case of material received from J&K. After this same labelling process mentioned above is undertaken in respect of imported goods also"

Paragraph 5.1

"....The samples of the labels and packing material were withdrawn under Panchanama dated 14.8.2012........."

"....In case of imported goods replacing the same in new boxes and labelling is under taken..."

Paragraph 5.2

"....No packing or repacking activity is undertaken at Taloja Unit, except in the case imported goods...."

6.23 I find that from page 140 of the appeal paper book shows that the tare weight of the cartons at the time of import, which varied from 0.550 grams to 1 Kg., whereas the tare weight of carton used by the Appellant for re-packing was 0.750 grams. The other documents on record such as packing list of the supplier at the time of import and packing list of the appellant at the time of export to substantiate the above contention. There no dispute raised by the Commissioner in his impugned order that tare weight of the cartons of imported coco butter is different from the tare weight of the carton used for export of imported coco butter in the light of the documents produced by the Appellant.

6.24 I further find from the statement of Mr. Ramkrishna Dubey recorded during the visit to the Appellant factory at Taloja in *which he clearly stated that the Appellant repacked the imported coco butter. I find that there is no rebuttal to the said statement. The Appellant contention of repacking of imported goods is further supported by the fact that not only the new cartons are entered in the Cenvat register but the empty cartons found and seized from the factory of the Appellant during search under a panchnama. I find that under panchnama what is seized is new cartons and labels and not used or old cartons.*

6.25 I cannot sustain the findings of the learned Commissioner that repacking is not satisfactorily proved for want of maintaining of records at factory. I find that even though it is claimed by the department that no records of labels is maintained at the factory it is accepted by the department that labelling is done by the Appellant.

6.26 In my view, the evidence on record prove beyond reasonable doubt that the appellant have repacked the imported coco butter in new cartons exported them after labelling. I find that the learned Commissioner had held that the appellant have affixed two labels on the imported coco butter and exported in the same manner in which they did it on coco butter received from Jammu factory.

6.27 I find that the appellant have changed the cartons of the imported coco butter and the labels are affixed on the new cartons. This is clearly labelling. Note 3 is applicable and the activity amounts to manufacture. I find no material on record which would suggest that the appellant affixed two labels on the imported coco butter on the original carton in which they were imported.

6.28 In my view the contents of the label affixed on the imported cartons cannot be the decisive factor to hold that no repacking and labelling has been done on the imported cocoa butter. Neither the show cause notice nor impugned order proceeds on the basis that contents of the label affixed on the exported coco butter raises doubt about repacking. The show cause notice admits and accepts that repacking is done on the imported coco butter, no dispute can be raised by the learned Commissioner on repacking of imported coco butter.

6.29 I am in full agreement with the learned Member (Judicial) that the activity of labelling undertaken by the appellant amounts to manufacture in terms of note 3 of chapter 18 of CETA, 1985."

3.3 We also take note of the submissions made by the learned Special Counsel. As reported at 2016 (336) ELT A183 (SC), the order of the Hon'ble Supreme Court has just issued the following order:-

"Delay condoned.

Issue notice."

Since no stay granted, we are not in agreement with the submissions made by the learned Special Counsel for keeping this matter pending. Even the early hearing application filed by the revenue in the matter has been dismissed by the Hon'ble Apex Court vide its order dated 06.09.2019 observing as follows:

"Having heard learned counsel for the appellant/applicant, we find no ground to entertain the application for early hearing and the same is accordingly dismissed."

3.4 Even in the case of Cargill India Pvt. Ltd. [2019 (366) ELT 194 (SC), referred to by the learned Special Counsel, the issue was not in respect of the same appellant for which the appeals were disposed. The said order of Hon'ble Apex Court is reproduced below:

"2. *The issue of classification is raised in this appeal. The Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") in the impugned order [2017 (353) E.L.T. A99 (Tribunal)] had noted that the said issue of classification is pending in this Court in other appeals. On that basis the CESTAT has disposed of the appeal. Liberty is also given to approach the CESTAT after the verdict of this Court in the appeals pending here. In that view of the matter the CESTAT should not have disposed of the appeal and should have kept the appeal pending till the issue is decided by this Court.*

3. *In view thereof the order of the CESTAT disposing of the appeal is set aside and it is clarified that the appeal would remain pending before the CESTAT till the issue is decided by this Court whereafter the parties can approach the CESTAT.*

4. *Status quo which was granted by the CESTAT shall continue."*

The situation in the case before us is where the issue has been decided in the case of appellants themselves, and after consideration of the issue before us we allowed the opportunity to learned special counsel to distinguish the earlier judgment of tribunal and make submissions on merits.

3.5 We find that the issue is squarely covered by the earlier decision in appellant's own case we proceeded to dispose of these appeals. Respectfully following the judicial precedent, the impugned orders need to be set aside.

4.0 Appeals are allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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