CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89916 OF 2014

[Arising out of Order-in-Original No: Belapur/11/Bel-I/R-IV/COMMR/KA/ 2014-15 dated 14th August 2014 passed by the Commissioner of Central Excise, Belapur.]

Sandoz Pvt Ltd
Plot No.D-31/32 TTC Industrial Area, Turbhe
Navi Mumbai – 400705 … ***Appellant***

versus

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

APPEARANCE:

Shri Prakash Shah, Sr Advocate along with Shri Mohit Raval and Shri Ananta Khandait, Advocates, Advocate for the appellant

Shri Badhe Piyush, 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: 85900/2025

DATE OF HEARING: 12/12/2024
DATE OF DECISION: 05/06/2025

PER: C J MATHEW

Though the impugned order[1] of Commissioner of Central

[1] [order-in-original no. Belapur/11/Bel-I/R-IV/COMMR/KA/ 2014-15dated 14th August 2014]

Excise, Belapur has directed recovery of ₹ 57,53,198, being the duty foregone on ‘packing material’ and ‘other inputs’ procured for manufacture of ‘cephalosporins’ and ‘carbapenems’, by enforcement of bond executed by them to qualify for entitlement of benefit of notification[2] and confirmed demand of ₹ 17,86,024, as duty not paid on ‘spent/solvent’ between April 2007 to March 2012 cleared on payment of only basic duty of customs (BCD) into ‘domestic tariff area (DTA)’, while dropping demand for ₹ 1,10,68,334, as duty on manufactured goods that had to be destroyed owing to shelf-life prescriptions, and also demand of ₹ 97,504, as duty foregone on ‘data loggers’ imported by them, the dispute before us is limited to ‘inputs’ and ‘packing material’ allegedly procured in excess of requirement and having to be destroyed thereafter.

2. According to Learned Counsel for the appellant, the duty liability on ‘spent/solvent’, arising during manufacture of pharmaceutical products, was liable to duty in accordance with section 3 of Central Excise Act, 1944 and, in acknowledgement thereof, had discharged duty liability before issue of notice. It was also submitted that the components of demand that were dropped in adjudication has not been appealed against by the jurisdictional Commissioner of Customs and Central Excise.

[2] [no. 52/2003 dated 31st March 2003]

3. Learned Counsel for the appellant submitted that they had procured certain ‘inputs’ and ‘packing material’ which, owing to the sensitive nature of their activity, could not be retained beyond the period prescribed in industry protocols. He argued that no liability on these goods arose as both the relevant notification[3] as well as section 3 of Central Excise Act, 1944, the statute governing goods manufactured in the unit, do not provide for recovery of duty on destroyed goods. It was submitted that duty liability has been fastened on destroyed goods in the impugned order without questioning the legitimacy of destruction and the allowance by the scheme in the Foreign Trade Policy (FTP) itself for destruction with remission of duty. In this connection, Learned Counsel also drew our attention, to

> *‘5.4: Request for granting of permission for destruction of raw materials, components, packing materials etc., without payment of duty though permissible under Foreign Trade Policy 2004-09 but not specifically covered in Customs Notification No. 52/2003 Cus dated 31.03.03; (Point sponsored by M/s Strides Arcolab Ltd.)*
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> *We are manufacturers and exporters of Pharmaceutical Products, having licence in 100% EOU. We are procuring raw materials and packing materials and we are exporting the finished product falling under chapter no. 30. As per drug rules, we are testing the raw materials, packing materials and finished products at all stages and it is also mandatory. During the process there is possibility of rejection either raw material, packing material or finished*

[3] [no. 52/2003-Cus dated 31st March 2003]

product and the same will not be stored at any place and has to destroy in the presence of Quality Control Department and also it is mandatory as per drug rules. In terms of para 6.31 of FTP 2004-09. no duty shall be payable in case of rejected material destroyed with in the unit after intimation to customs authorities. But there is no such provision in Customs either Notfn. 52/03 Cus dt. 31.03.03 or Notfn. 22/03 CE dated 31.03.03.

Comments:

The assessee who are manufacturers of pharmaceutical products need to test raw materials, packing materials and finished goods at all stages which gives rise to rejection and the same cannot be used again, thereby they become waste and scrap and the same needs to be destroyed, within the EOU premises. The destruction of the same is mandatory as per drug laws. Para 6.31 of the FTP permits destruction of the above said items. The above goods having become waste and scrap, they are very much covered under Notification 52/03 which provides for destruction of capital goods and waste and scrap. Keeping in view the nature of the industry, the request of the assessee is genuine and their request has been considered by the Assistant Commissioner of Customs, Customs Division, Bangalore.'

in the minutes[4] of the meeting of 100% EOUs on 9th February 2007 chaired by Commissioner of Customs, Bangalore, to highlight that destruction, mandated by prescriptions in laws governing the pharmaceutical industry, turned the goods into 'waste, and, thereby, along with 'capital goods', covered by the governing notification. It

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[4] [C.No. VIII/48/365/ 2006 Cus. Tech dated 27th February 2007]

was also pointed out that, in the absence of specific provision for recovery, the action taken by the adjudicating authority is tantamount to imposition of conditions, stipulations and procedures at the whims of the jurisdictional customs authorities. It was further submitted that the show cause notice, though issued under section 28 of Customs Act, 1962, was adjudicated without touching upon the framework within which extended period could be invoked and, instead, relied upon enforcing the bond executed by the appellant which was beyond the competence of Commissioner of Customs.

4. Relying on the decision of the Tribunal in *S Balasubramanian, Director (Operations), Surana Telecom & Power Ltd v. Commissioner of Central Excise, Customs & Service Tax, Hyderabad – III [2019 (370) ELT 1412 (Tri.-Hyd.)]* and in *Sterlite Optical Technologies Ltd v. Commissioner of Customs & Central Excise, Aurangabad [2011 (270) ELT 266 (Tri.-Mumbai)],* it was contended that the bond could be invoked only when proceedings for recovery under section 142 of Customs Act, 1962 are commenced. Relying upon the decision of the Tribunal in *Reliance Transport & Travels Ltd v. Commissioner of Customs, New Delhi [2019 (369) ELT 1317 (Tri.-Del.)],* that was affirmed by the Hon'ble Supreme Court, it was contended that the proceedings which commenced with proposal to invoke section 28 of Customs Act, 1962 could not itself be, even implicitly, dropped by recourse to enforcement of bond, which lay in an entirely different

jurisdictional framework, without dropping the initiated proceedings.

5. According to Learned Authorized Representative, the impugned order was very clear in that the appellant had procured 'inputs' and 'packing material' in excess of requirement and, having kept these beyond the period prescribed in the laws governing the pharmaceutical industry, caused loss of duties of customs arising therefrom and that the provisions in the Foreign Trade Policy (FTP), as well as in the governing notification, pertaining to restricted 'tolerance limit', in the absence of 'standard input output norms (SION)', had been exceeded by the appellant.

6. It is common ground that the appellant is an 'export oriented unit (EOU)', operating with 'letter of permission (LoP)' issued under the Foreign Trade Policy (FTP) by jurisdictional Development Commissioner, and that, in consequence, was required to warehouse imported goods, as set out in chapter IX of Customs Act, 1962, to enable deployment of duty free material in manufacturing process. It is also common ground that the appellant had procured raw material without payment of duties of customs and duties of central excise in accordance with the entitlement in notification[5] issued for implementation of the 'export oriented unit (EOU)' scheme of Foreign Trade Policy (FTP) for the relevant period. That recovery of duties was

[5] [no. 45/2003 dated 31st March 2003 and no. 22/2003-CE dated 31st March 2003]

proposed, insofar as ‘raw materials’ and ‘packing materials’ imported from abroad, as well as such finished manufacture, was concerned, only on, and only from prohibition on export or domestic clearance by the laws governing pharmaceuticals, destroyed goods was conceded in show cause notice dated 19th June 2014. In the annexure to the show cause notice, deployment of inputs in goods that were destroyed had been set out along with the value thereof for computation of duty liability of ₹ 54,51,504 and ₹ 3,10,694 between 31st October 2007 and 31st October 2009 as recoverable.

7. The basis of the demand are twofold; that the destroyed quantities were in excess of the tolerance limit (2%) permitted for goods that were not covered by the ‘standard input output norms (SION)’ for the relevant product group and that the excess thereof had not been proved to the satisfaction of the proper officer as used in production owing to which condition no. 3(c) and 3(d)(ii) in notification[6] was breached. It was also pointed out by the original authority that the destruction had been necessitated by lack of diligence in procurement and that, even so, the liability therefrom could had crystallized by elapse of time in storage beyond stipulated period without regularization in terms of notification[7] governing duty free imports.

8. From the manner in which the adjudicating authority has dealt

[6] [no. 52/1003-Cus dated 31st March 2003]
[7] [no. 53/1997-Cus dated 3rd June 1997]

with the issue of ‘inputs’ and ‘packing materials’, imported but not used in manufacture, and, admittedly, destroyed in the factory, it would appear that the scheme and its manner of implementation, through the relevant provisions of Customs Act, 1962 and governing notification issued under section 25 of Customs Act, 1962, has been misconstrued. The scheme of export promotion, through export oriented units (EOU), had been in existence for several decades and was aligned, one way or another, with the provisions of Customs Act, 1962. The scheme underwent several changes that, in many ways, paralleled the liberalization of control over manufacturing units and the relevant notifications, issued from time to time, reflected the evolution. The sweeping changes made in Foreign Trade Policy (FTP), since the enactment of Foreign Trade Regulation (Development and Regulation) Act, 1992 and the paradigm shift brought out in the Foreign Trade Policy 2002-2007, relaxed norms even further. The adjudicating authority has placed reliance on notification[8] to fasten the responsibility on the appellant herein for failure to have the warehousing period extended whereas that very notification already stood rescinded, along with several others, upon the issue of notification[9] that operated for the period covered by the show cause notice. These only point to the confusion in the mind of the adjudicating authority about the scheme and the manner in which the scheme was to be implemented.

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[8] [no. 53/1997-Cus dated 3rd June 1997]
[9] [no. 52/2003-Cus dated 31st March 2003]

9. With the changes effected in the Foreign Trade Policy (FTP) of 2002-2007, the requirement of warehousing was no longer a condition for grant of exemption in notification[10] and it appears that 'bond' was construed otherwise. The continuation of warehousing, notwithstanding, emphasis on exceeding period of storage by the adjudicating authority is of no relevance.

10. The scheme of exemption in the impugned notification requires compliance with conditions and one among those is the execution of bond upon which a unit, issued with the 'letter of permission (LoP)', becomes eligible for benefits of exemption. Conditions in the bond are not the conditions contingent upon which exemption is granted; bond, as prescribed, should be furnished. In the event of any other conditions of exemption in notification having been breached, it would be open to the 'proper officer' to proceed in the manner prescribed for recovery of duty foregone as in any other notification issued under section 25 of Customs Act, 1962. Though the proceedings rest upon the only provision for recovery in Customs Act, 1962 that is vested in the proper officer by section 28 of Customs Act, 1962, the proposal in the show cause notice was, for some inexplicable reason, not continued by the adjudicating authority. Though that should suffice for 'red flagging' the proceedings and for discard of the findings and outcome, we proceed further. Not satisfied with effective dropping of proceedings by failing to take recourse

[10] [no. 52/2003-Cus dated 31st March 2003]

to the power invoked in the show cause notice, the jurisdiction to invoke the bond, executed as one of the conditions prescribed in the impugned notification, has not been made clear in the impugned order. The exemption in terms of impugned notification is granted by the assessing officer under section 17 of Customs Act, 1962. Likewise, the condition in the bond for payment of duty leviable on the goods and the interest charged, at the rate as specified in the notification from the date of import of the said goods till the payment of duty, is contingent upon the said officer not having been satisfied about usage of goods in connection with production and packing of the goods, and in accordance with 'standard input output norms (SION)', for export or cleared for home consumption within a period of three years from the date of import or procurement. Investigation was taken up in March 2012 of goods, purportedly imported between October 2007 and October 2009. Therefore, satisfaction of the proper officer would have to be of the goods for the said period, to the extent that the 'standard input output norms (SION)', not being so compliant. The 'standard input output norms (SION)' serve many purposes and not least of which is control of the goods imported for use in manufacturing process ever since physical control of warehousing had been done away with. That such correlation may have all the appearances of placing premium on efficient production, which is not the purpose of either the notification or Customs Act, 1962, and devised primarily for control over imported goods used by licensees under other export promotion schemes, should have persuaded that the norms, instead of being mechanically applied, be basis for reconciliation within the framework of the notification as well as the Policy and the scheme itself; the norms were not intended to restrict import as there was no quantitative target to be fulfilled but as a measure of calibration in the event of suspicion that goods had not been exported but diverted either after manufacture or, even, as such. In the admitted factual matrix of the goods having been destroyed, the recovery of duty on the presumption of clandestine clearance of manufactured goods or as imported does not arise. The scheme in the Foreign Trade Policy (FTP) itself provides for destruction and consequent remission of duty. Even Customs Act, 1962, in terms of section 22 and section 23, provides for remission of payment of duty between the time of import and clearance for home consumption.

11. Insofar as obsolete/destroyed goods, on which duties of customs were yet to be discharged, is concerned, the legal position is clear. The policy prescriptions governing the 'export oriented unit (EOU)' scheme is also no less clear. The notification governing exemption from duties of customs is also abundantly clear. The goods which have not been cleared for home consumption, either in its finished form or in the form as imported, are not liable to duties of customs; the destruction of goods, which is undisputed, precludes any consequence of non-compliance with the norms and negates presumption of clandestine removal. The adjudicating authority appears to have been carried away beyond the

minutiae of control, through registers, which limited authorization, under Customs Act, 1962, for recovery of duty only on such goods that either have been cleared for home consumption or may, by operation of law, be presumed to gave been cleared without payment of duty.

12. It was also inappropriate on the part of the Commissioner of Customs to invoke the provisions of bond executed, only as threshold condition to be eligible for availment of notification[11] and obliging the executor to conform to the terms of the bond upon demand, without either notice of intent or justification for appropriation of jurisdiction. It is clear from the show cause notice that no such demand was made on the appellant; nor was any proposal for demand under section 28 of Customs Act, 1962 confirmed in adjudication proceedings to be recovered through bond. The adjudicating authority has acted in excess of jurisdiction. The transformation of proceedings under section 28 of Customs Act, 1962 into another proceedings, which has its nearest approximation in section 142 of Customs Act, 1962 and also procedural prescription set out thus,

> *'142. Recovery of sums due to Government.*
>
> *xxxxx*
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> *(2) Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other*

[11] [no. 52/2003-Cus dated 31st March 2003]

mode of recovery, be recovered in accordance with the provisions of that sub-section.'

has no authority under law without a confirmed demand.

13. The prescriptions in section 142 of Customs Act, 1962 refer either to Assistant Commissioner or Deputy Commissioner as 'proper officer'. It was incumbent upon the adjudicating authority to make it clear in the impugned order as to the manner in which the functions of 'proper officer' had been appropriated by him in accordance with law. The absence of that taints the entire process of adjudication.

14. In the light of the above, the impugned order cannot be sustained and is consequently set aside to allow the appeal.

(Order pronounced in the open court on 05/06/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*