Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 02

Excise Appeal No. 11451 of 2015

[Arising Out of OIO-SIL-EXCUS-000-COM-031-14-15 Dated-14/05/2015 passed by the Commissioner of Central Excise, Customs and Service Tax-SILVASA)

Sun Pharmaceuticals Industries Limited **.....Appellant**
Survey No. 259/15, Village-Dadra,
Silvassa, Dadra & Nagar Haveli

VERSUS

C.C.E & S.T.-Silvasa **.....Respondent**
Central Excise, Customs & Service Tax, Commissionerate
Silvassa, 4th floor, Adarsh Dham Building, Vapi Daman Road Vapi
Opp. Old Town Police Station, VAPI,Gujarat

WITH

Excise Appeal No. 11452 of 2015

[Arising Out Of OIO-SIL-EXCUS-000-COM-031-14-15 Dated-14/05/2015 passed by the Commissioner of Central Excise, Customs and Service Tax-SILVASA)

Sailesh Desai **.....Appellant**
Director, Sun Pharmaceutical Industries Limited.,
Survey No. 259/15, Silvassa
Dadra & Nagar Haveli

VERSUS

C.C.E & S.T.-Silvasa **.....Respondent**
Central Excise, Customs & Service Tax, Commissionerate
Silvassa, 4th floor, Adarsh Dham Building, Vapi Daman Road Vapi
Opp. Old Town Police Station, VAPI,Gujarat

APPEARANCE:
Shri. A.B. Nawal, Cost Accountant for the Appellant
Shri. Rajesh R Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. SATENDRA VIKRAM SINGH, MEMBER (TECHNICAL)

Final Order No. 10311-10312/2025

DATE OF HEARING:06.03.2025
DATE OF DECISION:05.05.2025

SOMESH ARORA

The appellant is an 100% EOU who are engaged in both exports as well as sales in DTA. The Notification No. 23/2003-CE granted exemption from payment of SAD if goods being cleared to DTA are not exempted by the state Government from payment of Sales Tax/VAT. The appellant also availed the benefit of this exemption notification did not pay SAD and on stock transfer of goods to sister units without payment of VAT/CST as for stock transfers, no sales tax was applicable Against Department's allegation of non payment of SAD on stock transfer to the sister concern units, the Appellant explained that SAD is not payable on goods sold on stock transfer basis. However, on insistence of the Department, they paid the duty under protest. Another issue is that the Appellant destroyed some goods on being found unfit for consumption but department required payment of duty on the said destroyed goods. Department, however, viewed that the Appellant have neither paid Central Excise Duty (equal to 4% Addl. Duty of Customs) nor sales tax/VAT on DTA clearances and have thus wrongly availed benefit of Notification No: 23/2003-CE. The basic condition for eligibility of exemption under the said notification is that if the goods being cleared into the domestic Tariff Area are not exempt by the State Government from payment of Sales Tax or value added tax SAD has been imposed vide Section 3(5) of the Customs Tariff Act. 1975 and rate of 4% has been prescribed on all goods imported into India vide Notification 19/2005 dated 1/3/2005. From a reading of Section 3(5), it is clear that levy of SAD under this sub-section on import of any article is not dependent on the sales tax payable, but whether sales tax are leviable on it. Therefore, if an article on which sales tax/Value Added Tax are leviable, has been notified by the Central Government by a notification issued under Section 3(5) as attracting

SAD @ 4% then SAD would be chargeable on import of that article even if some State Governments or in some areas of a particular State Government, that article has been fully exempted from the payment of sales tax/VAT.

2.1 The Department alleged that whenever sales tax is not paid, SAD has to be paid. On destruction of expired tablets/capsules, remnants and raw materials, the appellant had taken permission from the local authority of Food and Drugs Administration, Silvasa for the destruction for destruction of finished goods only and did not obtain any prior permission from the Central Excise/Customs Authorities. For the destruction of the raw-materials they had not obtained any permission either from FDA or Central Excise/Customs Authorities. Para 6.8 (e) & (f) of the Foreign Trade Policy 2009-14 which deals with the sale of waste/scrap/remnants arising out of production process or in connection therewith and their destruction are reproduced as under:-

> *(e) Scrap / waste / remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under Duty Exemption Scheme, on payment of concessional duties as applicable, within overall ceiling of 50% of FOB value of exports. Such sales of scrap / waste / remnants shall not be subject to achievement of positive NFE. In respect of items not covered by norms, DC may fix ad-hoc norms for a period of six months and within this period, norms should be fixed by Norms Committee. Ad-hoc norms will continue till such time norms are fixed by Norms Committee. Sale of waste / scrap / remnants by units not entitled to DTA sale, or sales beyond DTA sale entitlement, shall be on payment of full duties. Scrap / waste / remnants may also be exported.*
>
> *(f) There shall be no duties / taxes on scrap / waste / remnants, in case same are destroyed with permission of Customs authorities.*

2.2 As the destruction of goods was not made appropriately and after following proper procedures, the appellant was required to pay the duty /reverse credit availed for the goods i.e expired tablets/capsules/raw materials destroyed. The appellant also did not reverse the entire Cenvat Credit involved in destruction of goods. The appellant had also failed to prepare the proper document, showing the duty payable and as a result failed to pay the duty involved of Rs 88,66,739/-.

3. To support its case, the department relied upon the ruling in the case of Moser Baer India Ltd vs CCE Noida-2009(240) ELT 25 (Tri-LB), Para 7.4 and Para 12 are reproduced below:-

> ***<u>Para</u>*** *"7.4 The exemption granted by some of the states cannot affect the rate prescribed under Sectio 3(5) notification and similarly the exemption granted by a state government in respect of assessee in some specified areas can have no bearing on the rate of SAD, fixed by the Central Government by a notification issued under Section 3(5) of the Customs Tariff Act, 1975.*
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> ……………………………
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> ……………………………
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> *12. When clearances are effected from the 100% EOU, the assessment is required to be done. The rates of duty applicable and the valuation are to be determined at the time of removal. In the present case, there are cases of clearances on which sales tax leviable is exempted and there are cases where sales tax is being paid. As assessment has to be undertaken at the time of each removal, we hold that in respect of clearances on which sales tax is paid, the SAD component should not be included"*

3.1 Another decision relied upon by the department is in the case of JOHN DEERE (I) PVT. LTD. Versus CCE, PUNE-III reported at 2014 (311) E.LT. 189 (Tri.- Mum.)to emphasize that clearance of goods by 100% EOU to Domestic Tariff Area without including the component of 4% SAD while arriving at the duty for it's payment is in contravention of Condition No. 1 of Notification No 23/2003-C.E dated 31.03.2003 whereby exemption given under this Notification would be allowed only when goods cleared in DTA are not exempt by State Government from payment of Sales tax/ VAT. The Tractors sold by appellant were exempted from Sales tax (VAT), their unit being located in a remote area, benefit of Notification No. 23/2003-CE was not available to them.

4. On the other hand, the appellant made the following arguments:

4.1 That SAD is not applicable on DTA clearances made on stock transfer basis.For this proposition, they relied upon the order in their own case vide Final Order No. A/11559-11561/2014 that the exemption from payment of SAD is also available under Notification No. 23/2003-CE dated 31.03.2003 as per Serial No. 1. The SAD is not applicable when goods cleared are exempted from VAT/CST and that in their case, unit is availing packaged scheme for Union territory whereby VAT paid is reimbursed as part of investment reimbursement as a capital subsidy. In any case, the entire situation is revenue neutral.

4.2 As far as demand on destroyed goods is concerned, no duty is payable when goods found unfit are destroyed in the factory premises. As per Para 6.8 and Para 6.15 of the relevant Foreign Trade Policy when read with chapter 18 of the Central Excise manual, same are also allowed in their own case through favourable order from CESTAT . They likewise also pleaded that no interest and penalty is imposable in the present case and the extended period of limitation is not available to the department as they have not suppressed anything. Their audit was being done on regular basis and in case of destruction, intimation was given to the department.

4.3 During the course of arguments, the Learned Counsel pleaded that no penalty be imposed. He admitted that the decision of Moser Baer India Ltd Vs. Commissioner of Central Excise, Noida as reported in 2009(240) ELT 25(Tri-L.B) is against the appellant. The party thus fairly agreed that the issue relating to discharge of SAD on the goods cleared to DTA by 100% EOU has been decided in favour of the department. The Appellant have also pleaded on the issue of limitation and revenue neutrality for which they have relied on various case laws in it's case compilation.

5. We find that the first issues in the matter is whether clearances made by the appellant from its 100% EOU to various group companies located in DTA which were considered as stock transfer by the appellants will attract 4% SAD if no VAT has been paid on such clearances. The second issue is leviability of duty on destruction of expired tablets/ raw materials/remnant samples in the factory premises. The department is of the view that the assessee had to discharge applicable duty at the time of their issuance for destruction. We find that in the case of Moser Baer India Ltd, one of the issues, inter alia, was of imposition of SAD on clearances from 100% E.O.U. <u>The value included goods cleared in DTA by E.O.U and exempted from sales tax/ VAT</u>. Hon'ble Larger Bench concluded vide para 1, 7.1, 7.3, 7.4, 7.6 and para 8, 12-13 that if an article on which sales tax/VAT or other local taxes are leviable and same is notified by the Central Government by notification issued under Section 3(5) of the Customs Tariff Act, 1975 as attracting SAD @ 4% ad valorem, then SAD would be chargeable on import of the article, even if some State Governments give exemption overall or for some area of a particular state and if that article has been fully exempted from payment of sales tax/VAT. Therefore, we conclude that on merits if supplies are made by 100%EOU to specified exempt area, even if such area is not leviable to VAT/sales tax, it would still be chargeable to 4% SAD. Even the learned counsel had fairly conceded that the decision of the Larger Bench of the Tribunal in the case of Moser Baer India Ltd (cited supra) is against them. On point of limitation, the appellant's contention that the issue finally got resolved by the decision in Moser Baer India Ltd is not acceptable as the said decision came in 2005 whereas the dispute in this case relates to period from June 2010 to March 2013. Regarding filing of regular returns, it

is observed that they have not disclosed availment of benefit at Sr. 1 of Notification No. 23/2003 and have indicated only Sr. 2 of the above notification. Therefore, the appellant's argument on invocation of extended period fails. The appellant's reliance on the decision of Hon'ble on Gujarat High Court in Kay Kay Press Metal Corporation-2013 (297) ELT 40 (Guj.) also does not help as issue was decided in 2009 which is much before the period of dispute in this case. Para 3.1 of the said decision is reproduced below:

> ***Para "3.1*** *The Tribunal was justified in recording the aforesaid findings. In the facts of the case, it was not possible to ascribe any willful suppression or mis-statement on the part of the assessee for not paying excise duty because* ***during the period in question****, various decisions of the Tribunal were to the effect that the activity of cutting, bending, bunching of plates or channels in which the assessee was engaged, did not amount to manufacturing activity. In Continental Foundation Jt. Venture v. CCE, Chandigarh, 2007 (216) E.L.T. 177 (S.C.), Apex Court observed that when there was bona fide doubt as to non-excisability of the goods due to divergent views of the Hon'ble Supreme Court, the extended period of 5 years cannot be invoked. Mere failure or negligence in not taking license or not paying duty, is not sufficient for invoking extended period. (emphasis supplied)"*

5.1 We also find that in 2009 (235) ELT 676 (Tri. Ahm.) in the matter of Sun pharmaceutical Ltd vs. Commissioner of Central Excise and Customs, Daman (decided by this Bench), it has been held that for expired medicines, if despite waiting for long for permission to destroy the goods, no permission is received and the destruction is carried out by party on its own in their premises, then the demand of duty cannot be sustained. It is not coming out from the records in this case as to whether permission was sought for by the appellant and still the party had destroyed the goods circumventing requirement of grant of some reasonable period to the department or not. If reasonable time was not allowed by the party, the duty shall be demandable otherwise not. On the issue of destruction of goods, further details are warranted. These aspects need to be looked into by the adjudicating authority with all the relevant details along with limitation issue. Accordingly, we remand the matter to the original authority to decide the issues as pointed out above regarding the duty demand and also about the period allowed by the party for the department to act on their request for destruction, if any.

6. Appeal partly allowed.

(Pronounced in the open court on 05.05.2025)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)

Prachi