CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 11511 of 2018-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-002-APP-668-2017-18 dated 29.11.2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Sun Pharmaceuticals Industries Limited **.... Appellant**
Plot No. 25, GIDC Industrial Estate, Phase-iv, Panoli,
BHARUCH, GUJARAT -394116

VERSUS

Commissioner of Central Excise & ST, Vadodara-ii **.... Respondent**
1st Floor, Room No.101, New Central Excise Building,
Vadodara, Gujarat -390023

APPEARANCE :

Shri AB Nawal, Cost Accountant for the Appellant
Shri Rajesh R. Kurup, Superintendent (AR), for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 05.09.2024
DATE OF DECISION: 27.09.2024

FINAL ORDER NO. 12234/2024

C.L. MAHAR :

The brief facts of the matter are that the appellant is 100% EOU engaged in the manufacturing of bulk drugs falling under Chapter heading No. 29 of Central Excise Tariff Act, 1985. For manufacturing of bulk drugs the appellant procured imported raw materials as well as indigenous raw material without payment of Customs/ Central Excise duty for manufacturing the finished goods for exporting the same or for sale in Domestic Tariff Area as per existing Export Import policy. It is submitted that during the course of manufacturing final products, various inputs are used and all these inputs get integrated with each other during the manufacturing process and as a result thereof a concentrated solvent emerges which is called Mother Liquor. The Mother Liquor so emerged is further processed for purification, in this process it gets segregated in usable solvent and non-usable solvent. The usable solvent is further used in the manufacturing of bulk drugs of various batches and non-usable solvent. The non-usable solvent is further cleared

by the appellant in Domestic Tariff Area on payment of applicable rate of duty.

2. The department during the course of audit entertained a view that the appellant cleared by-product (spent solvent) in Domestic Tariff Area at concessional rate of duty by availing benefit of Notification No. 23/2003-CE dated 31.03.2003. A show cause notice dated 25.09.2015 came to be issued demanding Central Excise duty amounting of Rs. 45,42,195/- for the period 2009-10 to 2013-14. The provisions with regard to penalty and interest have also been invoked in the show cause notice.

3. The basic contention of the department was that the spent solvent emerging during the manufacturing process of bulk drugs is a by-product and not a waste and scrap and therefore, the appellant has wrongly availed the benefit of exemption Notification No. 23/2003-CE dated 31.03.2003 because the following conditions of the notification have not been fulfilled:-

(a) The goods being cleared in Domestic Tariff Area, other than scrap. waste or remnants are similar to the goods which are exported or expected to be exported from the units during specified period of such clearances.

(b) The total value of such goods being cleared, into Domestic Tariff Area from the unit does not exceed 50% of the free Board Value of exports made during the year (starting from 1st April of the year and ending with 31st March of next year by the said unit.

(c) The balance of the production of the goods which are similar to such goods under clearance into Domestic Tariff Area, is exported out of India or disposed of in Domestic Tariff Area in terms of Paragraph 6.9 of the Export and Import Policy.

4. Shri AB Nawal, learned Cost Accountant appearing on behalf of the appellant submits that the impugned order-in-appeal is legally not sustainable as the spent solvent is not a by-product but is merely a waste which emerges during the process of manufacturing of bulk drugs and the same cannot be further used in the manufacturing process by the appellant. It has further been argued that such spent solvent is neither excisable nor is

dutiable as per Central Excise Act. The learned Cost Accountant relied upon various case laws in this regard which are as follows:-

(a) Commissioner of C. Ex., Hyderabad vs. Aurobindo Pharma Limited - 2010 (249) E.L.T. 415 (Tri. - Bang.)

(b) Commissioner of C. Ex., Hyderabad-I vs. Aurobindo Pharma Limited - 2010 (259) E.L.T. 673 (A.P.)

(c) Sandoz Pvt. Limited vs. Commissioner of Central Excise, Raigad - 2016 (343) E.L.T. 1170 (Tri. - Mumbai)

5. We have also heard Shri Rajesh R. Kurup, learned Superintendent (AR) who has reiterated the findings as given in the order-in-appeal.

6. After considering the rival submissions, we feel that the matter is no longer res-integra as the issue has already been decided by Hon'ble Andhra Pradesh High Court in the case of Commissioner of C. Ex., Hyderabad-I vs. Aurobindo Pharma Limited - 2010 (259) E.L.T. 673 (A.P.) which has also been upheld by the Hon'ble Supreme Court reported as Commissioner vs. Aurobindo Pharma Limited – 2011 (269) ELT A147 (SC). The relevant extract of the Hon'ble Andhra Pradesh High Court decision is reproduced below:-

> **"6.** The Counsel for APL relies on *Indian Oil Corporation Ltd*. v. *Collector of Central Excise, Baroda* - 2006 (202) E.L.T. 37 (S.C.) and *CCE, Hyderabad* v. *Novapan Industries Ltd.* - 2007 (209) E.L.T. 161 (S.C.) and submits thast when the issue of excisability of spent solvent is already decided in the earlier cases in respect of the same assessee or when a similar question is decided by the Commissioner (Appeals) or the CESTAT, the department, having not filed an appeal against the earlier judgment, cannot reagitate the matter. He also relies on various judgments in *Collector, Central Excise, Bombay* v. *S.D. Fine Chemicals Ltd*. - 1995 (77) E.L.T. 49 (S.C.), *Collector of Central Excise, Baroda* v. *United Phosphorus Ltd*. - 2000 (117) E.L.T. 529 (S.C.), *CCE, Chandigarh-I* v. *Markfed Vanaspati & Allied Industries* - 2003 (153) E.L.T. 491 (S.C.), *Collector of Central Excise, Patna* v. *Tata Iron & Steel Co. Ltd.* - 2004 (165) E.L.T. 386 (S.C.) and *CCE, Hyderabad-III* v. *Natco Pharma Ltd.* - 2007 (208) E.L.T. 573 (Tri.) and contends that the spent solvent does not satisfy the twin tests laid down by the Supreme Court in *Markfed Vanaspati & Allied Industries* and *S.D. Fine Chemicals Ltd.*, and, therefore, no interference is called for.
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> **7.** Two issues arise for consideration. First, whether the department, having accepted the principle in the earlier case, can be permitted to take contra stand in subsequent cases. Secondly, whether the resultant spent solvent in the manufacturing activity of APL is liable to duty in view of Note-11 under Chapter 29 of the Central Excise Tariff Act. We may make it clear that if the answer to the first question is in the negative, there is no need for this Court to go into the second aspect of the matter.

8. The first question is no more *res integra*. It is well settled. To avoid burdening this judgment with precedents, we need to excerpt only from *Indian Oil Corporation Ltd.*, wherein it was held.

> .....the learned Additional Solicitor General has fairly conceded that against the order passed by the Tribunal in the case of *Hindustan Petroleum Corporation Ltd*., v. *CCE, Hyderabad*, 2000 (124) E.L.T. 323 (T), no appeal was preferred by the department and the said order has attained finality. Since no appeal was preferred against the order passed by the Tribunal in *Hindustan Petroleum Corporation Ltd.*, and the same has become final, the department is not entitled to raise the same point in other cases in view of the decisions of this Court in *Union of India & Others* v. *Kaumudini Narayan Dalal & Another* reported in (2001) 10 S.C.C. 231; *Collector of Central Excise, Pune* v. *Tata Engineering & Locomotives Co. Ltd*., reported in 2003 (158) E.L.T. 130 (S.C.), *Birla Corporation Limited* v. *Commissioner of Central Excise* reported in 2005 (186) E.L.T. 266 (S.C.) and *Jayaswals Neco Ltd*. v. *Commissioner of Central Excise, Nagpur* reported in 2006 (195) E.L.T. 142 (S.C.), wherein it has been held that if no appeal is filed against an earlier order of the earlier appeal involving the identical issue was not pressed by the revenue, the revenue is not entitled to press the other appeals involving the same question. In *Birla Corporation Ltd.*, this Court observed as follows :
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> In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was, therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in *Pepsico India Holdings Ltd.*, 2001 (130) E.L.T. 193, cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesses in a quandary. *Birla Corporation Ltd.* (supra) is being followed consistently.
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> Since the point involved in the present case is identical to the point involved in *Hindustan Petroleum Ltd.*, (supra) and the department having accepted the principle laid down in *Hindustan Petroleum Corporation Ltd.*, (supra), the department cannot be permitted to take a different stand in the present appeals.

9. Yet again, in *Novapan Industries Ltd.*, following *Birla Corporation Ltd*., v. *CCE* and *Jayaswals Neco Ltd*., v. *CCE, Nagpur* the Supreme Court reiterated the law that, *"the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in subsequent cases".*

10. In *CCE, Hyderabad* v. *Aurobindo Pharma Ltd.* the learned Tribunal considered the question, whether spent solvent (spent methanol, in that case) is liable to duty. It was held as follows.

> On a careful consideration, we notice from the extracted order of the *Commissioner* v. *Herren Drugs & Pharmaceutical Ltd.*, Order-in-Appeal No. 99/2005, dated 28-6-2005, that the Commissioner has examined the issue in depth and in detail. It has been clearly brought out that the spent solvents had already been utilized in the factory and latter it had undergone further purification for reuse. The excess spent solvents were sold to the outsiders, as it had lost its value and therefore, what was sold was not new goods but only spent solvents which had undergone certain purification process. Such purification process of chemicals has been held to be not a process of

manufacture as held in the case of *S.D. Fine Chem*, this issue has been affirmed by the Supreme Court. The Tribunal ruling in the case of *New Sharrock Mills* v. *Commissioner*, 2005 (190) E.L.T. 35 (Tribunal) held that recovery of caustic soda from spent caustic soda lye by increasing the concentration of spent caustic soda lye does not amount to manufacture inasmuch as caustic soda itself was initial product used for mercering the fabrics.

11. Therefore, the department accepted the assessee's contention that at the relevant period the spent solvent is not a marketable product after process of manufacture. The question now - we are afraid - cannot be reagitated on the strength of the ratio in *Birla Corporation Ltd.*, which received approval in *Indian Oil Corporation Ltd.* and *Novapan Industries Ltd.*

12. These appeals fail and are, accordingly, dismissed. No costs.**"**

This Tribunal in the case of Sandoz Pvt. Limited vs. Commissioner of Central Excise, Raigad - 2016 (343) E.L.T. 1170 (Tri. - Mumbai) has also held as follows:-

"7. Undisputed facts are that the appellant had during the course of manufacturing of bulk drugs generated waste arising in fermentation process is treated, dried and compost and removed as bio-manure by filling them in old bags without payment of duty. It is also undisputed that the bio-manure did bring some consideration to the appellant. We find that the demand of duty is on the ground that the appellant had cleared waste solvent in the guise of bio-manure. This allegation in the show cause notice is not properly addressed by the adjudicating authority as well as the first appellate authority. If the waste solvent is cleared from the factory premises of the appellant as bio-manure, undoubtedly the same should be in the form of liquid. The Range Supdt. of the Central Excise of the appellant's factory has categorically recorded that bio-manure is solid waste which is filled in gunny bags and removed from the factory without payment of duty. There is also no contravention of the fact that the solid waste is generated in fermentation process of manufacturing of 'Rifampicin'. The said process is made aware to department. There is no finding on such factual matrix. In the absence of any contravention of this factual matrix, the duty demanded on the bio-manure as a waste solvent from the appellant seems to be not in accordance with law.

7.1 Be that as it may, we find strong force in the contention of the learned Advocate that the Hon'ble High Court of Bombay in the case of *Hidalgo Industries Ltd.* (supra) were considering similar issue of duty liability on dross and skimming of aluminium, zinc or other non-ferrous sheets arising during the course of manufacturing; Revenue had invoked provisions of Section 2(d) of Central Excise Act, 1944, for demand of duty, was upheld by Larger Bench of this Tribunal. Their Lordships while upturning the Larger Bench's decision held as under :-

"22. That the Revenue does not wish to abide by them would not mean that the Tribunal is justified in not following them. We find that the attempt made by the Tribunal to hold that what is marketable and satisfies the requirement stipulated in the Explanation necessarily means that they are liable for imposition of duty under Section 3 is directly contrary to the binding judgments of the Hon'ble Supreme Court on the same issue. The attempt of the Tribunal in para 6.5 in proceeding to analyse that the process and concluding that nobody deliberately manufactures waste, dross and scrap is in direct conflict with the findings of the Hon'ble Supreme Court. Waste and scrap emerge as a by-product in the course of manufacture of other products. The whole purpose of making these observations is to justify the conclusion that because there is a reference to these

items in the Tariff Entry or the Tariff Schedule that would change the colour of the controversy. That would enable the Tribunal to then hold that the earlier judgments and in the case of this very assessee are no longer good law. However, we do not see how the decision in the case of Grasim Industries Ltd. (supra) and particularly the above reproduced paragraphs could have been brushed aside by the Tribunal. The Hon'ble Supreme Court listed the twin tests and which have to be satisfied before the goods can be said to be excisable to tax or Central Excise duty. It is in these circumstances that the attempt of the Tribunal and which is supported before us by Mr. Sethna cannot be upheld. Each of these observations and from para 6.5 onwards run counter to the Judgments of the Hon'ble Supreme Court."

7.2 This entire issue can also be decided by considering the allegations made in the show cause notices. The show cause notices allege that the appellant had cleared the waste solvent and it is undisputed that these waste solvent cannot be reused by the appellant in their factory. In our considered view the taxability/dutiability of the waste solvent has been decided in favour of the assessee *Aurobindo Pharma* (supra). Hon'ble High Court of Andhra Pradesh has in a speaking order (as cited hereinabove) categorically recorded that waste solvent that arises during the course of manufacturing of bulk drugs are not dutiable.

7.3 In view of the foregoing, we hold that the impugned orders wherein the demand of duty is confirmed are unsustainable and liable to be set aside and we do so. Since the impugned orders wherein the demand of duty liability has been set aside, Appeal Nos. E/89375/2013 and E/85614/2015 consequently needs to be allowed and rebate amount appropriated against pending demand of appeals are to be held as incorrect. These two appeals are also needs to be allowed and we do so.

7. Following the above decisions, we are of the view that impugned order-in-appeal is not sustainable in law and therefore we set-aside the same. Accordingly, the appeal is allowed.

(Pronounced in the open court on 27.09.2024*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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