

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

**Excise Appeal No. 10637 of 2013-DB**

(Arising out of OIO-91-92/COMMR/SURAT-II/2012 dated 24.12.2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-SURAT-II)

**SUN PHARMACEUTICAL INDUSTRIES LTD** .....Appellant  
PLOT NO. 4708, GIDC, ANKLESHWAR,  
BHARUCH-GUJARAT

*VERSUS*

**C.C. E. & S.T. – SURAT-II** .....Respondent  
NEW C.Ex BUILDING...OPP. GANDHI BAUG,  
CHOWK BAZAR, SURAT, GUJARAT-395001

**AND**

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CHOWK BAZAR, SURAT, GUJARAT-395001

**APPEARANCE:**

Shri. A.B. Nawal, Cost Accountant for the Appellant

Shri. P.K. Singh, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)  
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

**Final Order No. A/ 10872-10873 /2023**

DATE OF HEARING: 21.12.2022

DATE OF DECISION: 13.04.2023

**RAJU**

This appeal has been filed by M/s Sun Pharmaceuticals Industries Limited against denial of cenvat credit.

2. Learned Counsel pointed out that the appellants were procuring inputs from 100% EOU. The said goods had suffered excise duty as per Notification No. 23/03-CE dated 31.03.2003. He pointed out that the cenvat credit which can be availed in respect of goods procured

from 100% EOU is governed by the formula prescribed under Rule 3(7)(a) of Cenvat Credit Rules, 2004. According to the said Rule, the cenvat credit that can be availed is governed by the following formula:

$$\text{Value} \times [(1 + \text{BCD}/400) \times (\text{CVD}/100)]$$

(where **Value** is assessable value of inputs or Capital Goods)  
(**BCD** is the Basic Customs duty) and  
(**CVD** is the Additional duty of Customs)“

2.1 Learned counsel pointed out that two show cause notices were issued to the appellant. One notice is invoking extended period of limitation from March 2007 to February 2009 and second for normal period of limitation from March 2009 to April 2009. The Show Cause Notices also sought imposition of penalty under Rule 15 of Central Excise Rules and demand interest under Section 11AB of Central Excise Act, 1944.

2.2 He argued that the said formula prescribed under Rule 3(7)(a) of Cenvat Credit Rules applies only if the goods are cleared by EOU availing Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003. He pointed out that in many cases the invoices received by them clearly show that the benefit of Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003 has not been availed. He pointed out that the same was pointed out to the adjudicating authority however that fact has been ignored and without any evidence a conclusion has been reached that all invoices were received availing Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003.

2.3 He further argued that while calculating the excess CENVAT credit by the formula given in rule 3(7)(a) i.e. X multiplied by  $((1 + \text{BCD}/400) \times \{\text{CVD}/100\})$  where X denotes assessable value and BCD and CVD denotes ad valorem rates, Dept has taken a BCD rate as rate as shown on invoice i.e. concessional rate of duty as

per Notification 23/2003 CE, viz 1.875%/3.75% as the case may be, whereas BCD rate should be taken as tariff rate. Therefore demand raised is based on wrong interpretation of rule 3(7)(a). He pointed out that Appellant recalculated the CENVAT credit as per formula given in rule 3(7)(a) and in some cases they found excess avilment of CENVAT credit of Rs.25,854/- which was reversed by them immediately vide Entry No.745 dated 06.10.2020 and intimated to Range Superintendent vide letter dated 07.10.2010. If BCD rate is taken as 7.5% then CENVAT credit eligible amount arrives at equal to CVD portion only of which Appellant has taken the credit. He pointed out that Ld. Commissioner in his order wrongly stated that, Appellant contending as all invoices raised by EOU supplier are not duty paid under Sr.No.2 of Notification No.23/2003 CE dated 31.03.2003 hence formula is not applicable in those cases. The formula specified in rule 3(7) (a) is applicable in cases only where the goods are procured from an EOU which pays excise duty u/s 3 of Central Excise Act, 1944 read with Sr.No.2 of Notification No.23/2003 dated 31.03.2003.

2.4 He argued that conversely, when EOU clears the goods without availing the benefit of exemption of Sr.No.2 and on payment of excise duty at full rate DTA procuring such goods is entitled to avail CENVAT credit of all excise duties under rule 3(1) of CENVAT Credit rules, 2004 and the same cannot be restricted by applying the formula.

2.5 In view of the above, he argued that CENVAT credit entitled of equivalent amount of CVD and SAD as if the goods are imported. He further argued that, CENVAT Credit allowed on Special Additional Duty if the like goods are imported and Education Cess CVD and SHE Cess on CVD, Special Additional Duty is already mentioned in the list given in Rule 3 of CENVAT Credit Rules as entitlement for CENVAT Credit and

the formula given only for CVD portion and not for SAD or Education Cess or SHE Cess. He argued that the Appellant has rightly availed the CENVAT credit no interest and penalty can be levied upon the Appellant. He further argued that in Appeal No.10637/2013, the period involved is March 2007 to Feb 2009 and the Show cause notice has been issued on 24.02.2010 hence the demand is partially hit by limitation. There is no suppression of facts and hence extended period of limitation cannot be invoked in the present case. He pointed out that similar issue has been covered in Appellant's own case decided by Hon'ble CESTAT, Mumbai and Chandigarh.

3. Learned Authorized Representative relied on the impugned order.

4. We have considered rival submissions. We find that Notification No. 23/2003-CE under Serial No. 2 dated 31/03/2003 prescribes as follows:

Sr. No.	Chapter or heading No. or sub-heading No.	Description of Goods	Amount of Duty	Conditions
2.	Any Chapter	All goods	In excess of the amount equal to the aggregate of duties of customs leviable on like goods, as if,-  (a) the duty of customs specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), read with any other notification in force was reduced by 50%, and  (b) no additional duty of customs was leviable under sub-section (5) of section 3 of the said Customs Tariff Act:  Provided that while calculating the aggregate of customs duties, additional duty of customs leviable under sub-section (5) of section 3 of the said Customs Tariff Act shall be included if the goods. cleared into Domestic Tariff Area are exempt from payment of sales tax or value added tax.  Illustration: Assuming product X has the	2

			<p>value Rs. 100/- under section 14 of the Customs Act, 1962, and for the purposes of this illustration, is chargeable to basic</p> <p>customs duty of 10% ad valorem and additional duty of 20% ad valorem only, then the computation of duty required to be paid would be as follows:</p> <p>Basic Customs duty but for this exemption= Rs. 10/-</p> <p>Basic Customs because of this exemption= Rs. 5/-</p> <p>Value for the purposes of calculation of additional duty = Rs. 100/- Rs. 5/-= Rs 105/-</p> <p>Additional duty = 20% of Rs. 105/-= Rs * 0.21 /- .</p> <p>Total duty payable after this exemption= Rs. 5/- + Rs. 21 /-=Rs 26/-</p> <p>(Column (4) at Sl. No. 2. has been substituted vide NTF. NO * 0.1 / (2) * 8 * CE, DT. 01/03/2008)</p>	
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Rule 3(7)(a) of the Cenvat Credit Rules, prescribes as under:

*“3(7) Notwithstanding anything contained in sub-rule (1) [, sub-rule (1a)] and sub-rule (4), -*

*(a) CENVAT credit in respect of inputs or capital goods produced or manufactured, by a hundred per cent. export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or in a Software Technology Park other than a unit which pays excise duty levied under section 3 of the Excise Act read with serial numbers 3, 5, 6 and 7 of Notification No. 23/2003-Central Excise, dated the 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003] and used in the manufacture of the final products or in providing an output service, in any other place in India, in case the unit pays excise duty under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003-Central Excise, dated the 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003], shall be admissible equivalent to the amount calculated in the following manner, namely :-*

*Fifty per cent. of [X multiplied by {(1+BCD/100) multiplied by (CVD/100)}], where BCD and CVD denote ad valorem rates, in per cent. of basic customs duty and additional duty of customs leviable on the inputs or the capital goods respectively and X denotes the assessable value :*

**[Provided that the CENVAT credit in respect of inputs and capital goods cleared on or after 1st March, 2006 from an export oriented undertaking or by a unit in Electronic Hardware Technology Park or in a Software Technology Park, as the case may be, on which such unit pays excise duty under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003-Central Excise, dated 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003] shall be equal to [X multiplied by [(1+BCD/200) multiplied by (CVD/100)]] :**

**[Provided further that the CENVAT credit in respect of inputs and capital goods cleared on or after the 7th September, 2009 from an export-oriented**

*undertaking or by a unit in Electronic Hardware Technology Park or in a Software Technology Park, as the case may be, on which such undertaking or unit has paid –*

*(A) excise duty leviable under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003-Central Excise, dated 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003]; and*

*(B) the Education Cess leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 and the Secondary and Higher Education Cess leviable under section 136 read with section 138 of the Finance Act, 2007, on the excise duty referred to in (A),*

*shall be the aggregate of –*

*(I) that portion of excise duty referred to in (A), as is equivalent to –*

*(i) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, which is equal to the duty of excise under clause (a) of sub-section (1) of section 3 of the Excise Act;*

*(ii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act; and*

*(II) the Education Cess and the Secondary and Higher Education Cess referred to in (B).]”*

From the above, it is seen that Rule 3(7)(a) of Cenvat Credit Rules applies only the duty has been paid at the concessional rate prescribed in Serial No. 2 of Notification No. 23/2003-CE dated 31/03/2003. The appellant has submitted a significant number invoices during hearing. A perusal of these invoices shows that benefit of Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003 has not been availed while payment of duty. Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003 prescribes that the duty shall be calculated at the normal rate for BCD/CVD and thereafter the total duty is reduced by 50%. A perusal of invoices produced by the appellant clearly shows that the duty has not been discharged in this manner. In the appeal memorandum also, the appellant has given a chart on page 90 and 91 as Exhibit 'G'. It has been specifically claimed in respect of many entries that benefit of Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003 has not been availed. From the above it is apparent that the observation of Commissioner in the impugned order that duty has invariably been paid under Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003 is prima facie incorrect.

5. In view of above, the matter needs to be reconsidered by the original adjudicating authority by examining all invoices individually. The provisions of Rule 3(7)(a) of Cenvat Credit Rules would be applicable only in cases where the duty has been paid taking benefit of Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003.

6. Further it is noticed that Tribunal vide order No. 88018 of 2016-SMB dated 22.02.2010 in the appellant's own case has held that the BCD mentioned in the said formula refers to the BCD leviable on the like goods if imported into India. The ratio of the said decision needs to be applied for deciding the cases where the invoices clearly indicate that duty has been paid availing benefit of Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003. In all other cases where duty has not been paid availing benefit of Serial No. 2 Notification No. 23/2003-CE dated 31/03/2003, the registration prescribed under Rule 3(7)(a) cannot be applied. The impugned order is set aside and the matter is remanded to the original adjudicating authority for fresh decision in light of above observations.

(Pronounced in the open court on 13.04.2023)

**(RAMESH NAIR)**  
**MEMBER (JUDICIAL)**

**(RAJU)**  
**MEMBER (TECHNICAL)**

NEHA