CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 1238 of 2012

[Arising out of Order-in-Appeal No. 33/CE/APPEAL/CHD-II(J&K)/2012 dated 14.02.2012 passed by the Commissioner (Appeals), CE, ST & Cus, Chandigarh-II]

Sun Pharmaceuticals Industries **……Appellant**
6-9, EPIP, Kartholi,
Bari Brahmana,
Jammu 181133

VERSUS

Commissioner of Central Excise, Chandigarh-I **……Respondent**
Central Revenue Building,
Plot No. 19, Sector 17-C,
Chandigarh 160017

APPEARANCE:

Present for the Appellant: Sh. Kiran Sawale, Advocate

Present for the Respondent: Sh. Aneesh Dewan & Sh. Harish Kapoor, Authorized Representatives

CORAM: HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

FINAL ORDER NO. 60329/2024

DATE OF HEARING: 30.05.2024
DATE OF DECISION: 25.06.2024

PER: S. S. GARG

The present appeal is directed against the Impugned Order No. 33/CE/APPEAL/CHD-II(J&K)/2012 dated 14.02.2012 passed by the Commissioner (Appeals), whereby the learned Commissioner (Appeals) has rejected the appeal of the appellant.

2. Briefly stated facts of the present case are that the appellant is engaged in manufacture of P & P Medicines and Scrap falling under Tariff Item Nos. 30049099, 30039090 and 39203090. The appellant filed refund claim of the Cenvat duty paid through PLA in terms of the provisions of Notification No. 56/2002-CE dated 14.11.2002 as amended. The adjudicating authority partly allowed the refund but partly rejected the refund claim on account of education cess and secondary & higher education cess paid through Cenvat Credit account of BED; and also appropriated an amount from the sanctioned refund amount. Aggrieved by the order of the adjudicating authority, the appellant filed appeal before the Commissioner (Appeals), who has upheld the Order-in-Original and rejected the appeal of the appellant. Hence, the appellant preferred the present appeal.

3. Heard both the parties and perused the material on record.

4.1 The learned Counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law.

4.2 He further submits that the appellant filed a refund claim of Rs.21,18,710/- on account of duty paid in PLA (Personal Ledger Account) as balance of total duty payable in the month of February 2011 after utilization of Cenvat Credit Balance. He submits that as per Notification No. 56/2002-CE, the said amount paid in cash shall be eligible for refund.

4.3 He further submits that the Adjudicating Authority has partly allowed the refund claim made by the appellant but partly rejected the refund of Rs.62,842/- on account of education cess and secondary & higher education cess paid through Cenvat Credit account of BED for the month of February 2011.

4.4 He also submits that the adjudicating authority without issuing any show cause notice and without granting personal hearing, has appropriated an amount of Rs.4,61,315/- from the sanctioned refund claim amount on the following grounds :–

(a) an amount of Rs.3,71,534 (i.e. Rs.3,61,990/- as BED, Rs.6,362/- as education cess and Rs.3,182/- as S&H education cess) on account of irregular Cenvat credit availed by the appellant.

(b) an amount of Rs.87,520/- as interest on account of irregular Cenvat credit availed by the appellant.

(c) an amount of Rs.755/- as interest on delayed payment of duty by the appellant.

(d) an amount of Rs.1,506/- (i.e. Rs.1005/- and Rs.501/-) on account of short payment of education cess and S&H education cess on reversal of inputs cleared as such.

4.5 Further, he submits that the amount of Rs.3,71,534/- was reversed in the month of February 2011 itself which means Cenvat Credit was reduced and more amount was paid in cash for payment

of excise duty on clearance of finished goods and this fact is confirmed in para 8 of the Order-in-Original that the appellant has reversed the Cenvat Credit. Despite this, the amount of Rs.3,71,534/- was again deducted from the sanctioned refund claim, which resulted in twice deduction of amount; and balance amount was appropriated on account of interest and short payment without giving an opportunity of being heard and without considering the submissions of the appellant.

5.1 On the other hand, the learned Authorized Representative for the Revenue reiterates the findings of the impugned order and submits that rejection of refund claim of Rs.62,842/- on account of education cess and S&H education cess paid through Cenvat Credit account of BED for the month of February 2011 is justified and this issue has been considered in details by the Division Bench of this Tribunal in the case of ***Commissioner of C.E., Jammu vs. R.B. Jodhamal & Co. Pvt Ltd – 2013 (288) ELT 446 (Tri. Del.),*** wherein the Tribunal after considering the various judgments of the Tribunal and the High Courts, has held in para 8 as under:

> *"**8**. In view of the above discussion, we hold that –*
>
> *(a) A unit availing of exemption under Notification No. 56/2002-CE cannot utilize BED Credit for payment of education cess and S & H cess which are not exempted under this notification; and*
>
> *(b) Extra BED paid through PLA on account of diversion of BED Credit for payment of education cess and S & H cess would not be refundable under Notification No. 56/2002-CE."*

5.2 The learned AR further submits that this issue has now been finally settled by the Hon'ble Apex Court in case of ***M/s Unicorn Industries vs. Union of India – 2019 (370) ELT 3 (SC)*** whereby the Hon'ble Apex Court has held that the earlier decision of the Supreme Court in the case of ***SRD Nutrients Pvt Ltd vs. Commissioner - 2017 (355) ELT 481 (SC)*** as it held to be *per incuriam*.

6. After considering the submissions made by both the sides and perusal of the material on record, I find that the as regards the rejection of refund claim of Rs.62,842/- is concerned, the same cannot be allowed in view of the decision of Division Bench of this Tribunal in the case of ***Commissioner of C.E., Jammu vs. R.B. Jodhamal & Co. Pvt Ltd*** (supra), wherein it has been held that a unit availing of exemption under Notification No. 56/2002-CE cannot utilize BED Credit for payment of education cess and secondary & higher education cess which are not exempted under the said notification; and now finally settled by the Hon'ble Apex Court in case of ***M/s Unicorn Industries vs. Union of India*** (supra).

7. I note that the appellant is registered in the state of Jammu & Kashmir and were availing benefit of area based exemption under Notification No. 56/2002-CE dated 14.11.2002. The said notification provides mechanism to give effect to aforesaid exemption by way of refund of duty paid through PLA. As per the procedure, the manufacturer avails Cenvat Credit of duty/cess paid by them on inputs and utilizes whole of the CENVAT credit available with them on

last day of the month for payment of Central Excise duty and Cess. The balance amount of duty is paid in cash and on application of refund, the refund is granted for payment of Central Excise made in cash only. The refund is granted by way of cash or by way of self credit in PLA. The above said issue is no more *res-integra* and stands finally decided by the decision of the Hon'ble Supreme Court in the case of ***M/s Unicorn Industries vs. Union of India*** (supra), wherein the Hon'ble Apex Court, after considering the provisions of Notification No. 71/2003-CE dated 09.09.2003 has held that a notification has to be issued for providing exemption under the said source of power and that in the absence of notification containing an exemption to such additional duties in the nature of education cess and secondary & higher education cess, they cannot be said to have been exempted.

8. Further, I note that the provisions of Notification No. 56/2002-CE dated 14.11.2002 are *pari-materia* to the provisions of Notification No. 71/2003-CE dated 09.09.2003. It is pertinent to reproduce the relevant findings of the case of ***M/s Unicorn Industries cited*** (supra) which are reproduced herein below:-

> ***"39.*** *Rule 8 of Central Excise Rules, 1944, authorises the Central Government to grant an exemption to any excisable goods from the whole or any part of duty leviable on such goods. Rule 8 is extracted hereunder :*
>
> > ***"8. Power to authorise an exemption from duty in special cases. -*** *(1) The Central Government may from time to time, by notification in the official Gazette, exempt (subject to such conditions as may be specified in the notification) any excisable goods*

from the whole or any part of duty leviable on such goods.

(2) The Central Board of Excise and Customs may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

The word 'duty' is defined under Rule 2(v) to mean the duty as levied under the Act.

40. *Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9-9-2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in Modi Rubber Limited (supra), which*

has been followed by another three-Judge Bench of this Court in Rita Textiles Private Limited (supra).

41. *The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the Courts. The reason employed in SRD Nutrients Private Limited (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.*

42. *The decision of Larger Bench is binding on the Smaller Bench has been held by this Court in several decisions such as Mahanagar Railway Vendors' Union v. Union of India & Ors., (1994) Suppl. 1 SCC 609, State of Maharashtra & Ors. v. Mana Adim Jamat Mandal, AIR 2006 SC 3446 and State of Uttar Pradesh & Ors. v. Ajay Kumar Sharma & Ors., (2016) 15 SCC 289. The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be per incuriam in Subhash Chandra & Ors. v. Delhi Subordinate Services Selection Board & Ors., (2009) 15 SCC 458, Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129, and Central Board of Dawoodi Bohra Community & Ors. v. State of Maharashtra & Ors., (2005) 2 SCC 673 = 2010*

(254) E.L.T. 196 (S.C.). It was held that a smaller bench could not disagree with the view taken by a Larger Bench.

43. *Thus, it is clear that before the Division Bench deciding SRD Nutrients Private Limited and Bajaj Auto Limited (supra), the previous binding decisions of three-Judge Bench in Modi Rubber (supra) and Rita Textiles Private Limited (supra) were not placed for consideration. Thus, the decisions in SRD Nutrients Private Limited and Bajaj Auto Limited (supra) are clearly per incuriam. The decisions in Modi Rubber (supra) and Rita Textiles Private Limited (supra) are binding on us being of Coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.*

44. *Resultantly, we have no hesitation in dismissing the appeals. The judgment and order of the High Court are upheld, and the appeals are dismissed. No costs."*

9. Further, as regards the appropriation of an amount of Rs.4,61,315/- is concerned, I find that the impugned order is not sustainable because appropriation cannot be done without issuing any show cause notice and without granting personal hearing to the appellant. This issue was considered by the various benches of this Tribunal in the following cases:

- ***Deposit Insurance and Credit Guarantee Corporation vs. CCE & ST (LTU), Mumbai – [2023] 156 taxmann.com 139 (Mumbai – CESTAT)***
- ***Indian Oil Corporation Ltd vs. CCE, Vadodara - [2003] 2003 taxmann.com 1034 (New Delhi – CESTAT)***
- ***Kerala State Electricity Board vs. CCE, Cochin - [2002] 2002 taxmann.com 2234 (Bangalore – CEGAT)***

The Tribunal in all the cases cited supra, has held that the refund cannot be appropriated when there is no confirmed demand at the

time of adjudication and recovery provisions of Central Excise Act are not applicable to service tax.

10. In view of my discussion above, I pass the following order:

(i) The rejection of refund of Rs.62,842/- on account of education cess and S&H education cess is upheld; and

(ii) Appropriation of an amount of Rs.4,61,315/- from the sanctioned refund amount is set aside.

11. The appeal of the appellant is partially allowed in the above terms.

(Order pronounced in the court on 25.06.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

RA_Saifi