NEUTRAL CITATION
2025:GUJHC:64078-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 450 of 2024

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PRINCIPAL COMMISSIONER, CUSTOMS, AHMEDABAD COMMISSIONERATE

Versus

M/S SUN PHARMACEUTICALS INDUSTRIES LIMITED

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Appearance:
MR ANKIT SHAH(6371) for the Appellant(s) No. 1
MR HARDIK P MODH(5344) for the Opponent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

Date : 06/11/2025
ORAL ORDER
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. Admit. Learned Advocate Mr.Modh waives service of notice of admission on behalf of the respondent. At the outset, learned advocates appearing for the respective parties have submitted that the issue is squarely covered by the decision of this Court dated 18.12.2024 passed in Special Civil Application No.14949 of 2015 in the case of Messrs dishman Pharmaceuticals and Chemicals Pvt. Ltd. And Anr. Vs. Union of India and Anr.

2. Learned advocate Mr.Shah appearing for the appellant at the outset, has submitted that when the matter was admitted and impugned order was challenged, the Customs, Excise & Service Tax Appellant Tribunal, West Zonal Bench, Ahmedabad (for short "the CESTAT") has recorded the interim order passed by this Court in the case of **Messrs**

NEUTRAL CITATION
2025:GUJHC:64078-DB

Dishman Pharmaceuticals and Chemicals Pvt. Ltd. (supra) and now, the final decision has been passed by this Court in the said case.

3. The facts, which are not in dispute, are incorporated as under:

> *"3A. M/s. Sun Pharmaceuticals Industries Limited, (herein after referred to as "the respondent") was a 100% EOU unit engaged in the manufacture of pharmaceutical products falling under chapter 30 of the first schedule to the central excuse Tariff Act, 1985. And importing the goods duty free in terms of Notification No.52/2003-cus dated 31.03.2003.*
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> *B. During the year 2012-13 they exited from the 100% EOU Scheme. Accordingly, they applied for de-bonding (letter dated 29.08.2012 enclosed) and self-assessed the duty liability with a significant amount paid through cash and the remaining through CENVAT Credit. The department issue 'No Objection Certificate' on 30.10.2012 regarding their De-bonding from 100% EOU, in view of legal undertaking dated 26.10.2012 submitted to accept any future liability/refund due to any legal provisions… … ….*
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> *C. The CERA Audit noted that the respondent had paid the countervailing duty amounting to Rs. 8,30,90,677/- by utilizing Cenvat credit for imported raw material lying in stock instead of payment through customs duty through challan in the heads of customs. It is alleged that the respondent has contravened the following provisions of law:*
> *i. Section 668 of the Customs Act, 1962 read with Notification No. 52/2003-cus dated 31.03.2003 in as much as they failed to pay duties of Customs on the imported material, which were de- bonded; and*
> *ii. Cenvat Credit Rule 3(4) of the cenvat Credit Rules, 2004 in as much as they had utilized Cenvat credit for inadmissible purpose.*
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> *D. Accordingly, a show cause notice No. V/Cus/SPIL/H-I/Adj/Commr/44/2015-16 dated 15.07.2015 was issued to the respondent for non-payment of customs duty of Rs.*

NEUTRAL CITATION
2025:GUJHC:64078-DB

8,30,90,677/- under section 28 of the cystoms Act, 1962 along with applicable interest and penalty. Also a show cause notice was given to Mr. Manoj Kanojia (Assistant Manager in the unit) for penalty under section 117 of the Customs Act, 1962… … ….

E. The respondent contended that they were a manufacturer of exisable goods under the Central Excise law. As per Section 3 of the Central Excise Act, 1944 & Notification no 23/2003 – CF dated 31-03-2003 as amended, the respondent is liable to pay Excise duty under Section 3 of the Central Excise Act, 1944 andnot custom duty under Section 28 of the Customs Act, 1962. That the respondent is liable to pay the excise duty and the computation of excise duty is equal to the aggregate duty of customs duty. It is only the method of computing the excise duty but it is ot a customs duty. The respondent further relied upon the case of M/s. Dishman Pharmaceuticals and Chemicals Pvt. Limited vs. UOI- 2015- TIOL-2869-HC-AHM-CX.

F. The respondent also stated that the period involved in the instant matter pertains to 2012-13 and the show cause notice has been issued on 15.07.2015 i.e. after lapse of more than two years, which is beyond the normal period of limitation of one year and there is no suppression of facts on the part of the respondent, therefore extended period cannot be invoked in this case."

4. It appears that by the order dated 23.11.2016, the adjudicating authority has confirmed the demand raised in the show-cause notice and ordered the recovery of customs duty of Rs.8,30,90,677/- along with applicable interest and equal penalty and also imposed penalty of Rs.25,000/- on Shri Manoj Kanojia, Assistant Manager-cum-authorized signatory of the respondent. Being aggrieved, the respondent-Industry filed an appeal before the CESTAT,

NEUTRAL CITATION
2025:GUJHC:64078-DB

Ahmedabad and the issue to be decided by the Tribunal is *"whether the amount of the counter-veiling duty which is payable at the time de-bonding 100% EOU can be paid from the accumulated Cenvat credit by an EOU Unit."*

5. Thus, in the present appeal, the substantial question of law, i.e *"whether the amount of the counter-veiling duty which is payable at the time de-bonding 100% EOU can be paid from the accumulated Cenvat credit by an EOU Unit."*, is akin to the one, which is already answered by this Court in the judgement dated 18.12.2024 in the case of **Messrs Dishman Pharmaceuticals and Chemicals Pvt. Ltd. (supra).** The relevant observations are as under:

> *"6. The short issue which therefore, arises for determination of this Court is whether the petitioners can be permitted to pay an amount equal to the excise duty leviable on the goods lying with the petitioners at the manufacturing plant proposed to be debonded, from the Cenvat credit account of the company ?*
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> *7. Mr. P.M Dave, learned advocate for the petitioners has submitted that the petitioners have brought to the notice of the excise authorities numerous cases of debonding permitted to EOUs. It was specifically submitted that an EOU is also manufacturer and all the benefits allowed to manufacturers are admissible to an EOU at the time of debonding and therefore, an EOU is allowed to avail Cenvat credit on capital goods, inputs and taxable services and must also consequently, be allowed to utilize duly availed Cenvat credit for discharging liabilities of the excise duty foregone on duty free procurement.*

NEUTRAL CITATION
2025:GUJHC:64078-DB

8. Learned advocate Mr. Dipak Kanchadani appearing for the respondent has submitted as under:-

8.1 Present writ petition under Article 226 of the Constitution of India is premature as the petitioners were issued a speaking order which was appealable in nature, therefore, the petitioners must be relegated to avail the alternative remedy.

8.2 Secondly, the issue that arises in the present case is that of debonding whereas the judgements cited by the petitioners pertain to the manner of payment of duty and therefore not applicable in the facts of the present case.

8.3 Thirdly, Mr. Khanchandani, learned advocate for the respondent No.2 submitted that the manner of utilization of Cenvat by 100% EOU is prescribed in Rule 17 of the Central Excise Rules and therefore, the provisions of the said Rule had to be followed and therefore, the petitioners have to pay the excise duty forgone from their Cenvat credit account only by cash. In view of the above, the present petition deserves to be dismissed and interim relief granted on 30.10.2015 deserves to be vacated.

9. Discussion and Findings :-

9.1 The petitioner No.1-Company is engaged in manufacturing of pharmaceutical and chemical products. The petitioners had their factory situated in village Lodriyal in Taluka Sanand, District Ahmedabad which was allowed to be operated as 100% Export Oriented Unit (EOU) . The petitioners had operated the unit as an "EOU" till January, 2015 when one of its manufacturing units was proposed to be excluded from the existing EOU, a practice known as partial debonding, which is permissible under the EOU Scheme. The Development Commissioner, KASEZ had in principle allowed the petitioners' application for partial debonding but certificate of confirmation regarding discharging duties foregone on the goods lying unutilized in the petitioners' plant that was proposed, had to be taken from the respondent No.2 .The petitioners had proposed that the customs duty foregone on the imported materials shall be paid

NEUTRAL CITATION
2025:GUJHC:64078-DB

in cash whereas, the excise duty foregone on the goods lying in the plant shall be paid from legally availed Cenvat credit lying with the petitioners. The petitioners had further reasoned that the difference in the modes of payment was on account of the fact that the customs duties were required to be discharged by any importer(s) by paying dues as prescribed whereas, the excise duties could be paid by the manufacturer(s) of the goods from the accrued Cenvat credit of the said manufacturer (s).

9.2 The dispute arose in respect of the portion of the excise duty payable by the petitioners when, the respondent No.2, by communication dated 03.08.2015 (impugned) called upon the petitioners to pay the excise duty only in cash and not from the Cenvat credit, relying upon Rule 3(4) of the Cenvat Credit Rules, 2004 . The petitioners thereafter, made a representation on 12.08.2015 as to why it ought to to be permitted to utilize the Cenvat credit for discharging their excise duty liability. By further communication dated 19.8.2015 (impugned), the said representation came to be rejected. The petitioners therefore, challenged the aforesaid two communications dated 03.08.2015 and 19.8.2015 by way of present writ petition.

10. Partial debonding of an unit from the existing EOU is permissible under EOU Scheme, inasmuch as, there is no bar to such debonding, that has been brought to the notice of this Court.

10.1 In case of Eicher Motors Ltd. [1999 (106) ELT 3(SC)], it has been held by the Hon'ble Supreme Court as under :-

> *"5. Rule 57-F(4-A) was introduced into the Rules pursuant to the Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Heading Nos. 87.02 and 87.04 or chassis of such motor vehicles under Heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16- 3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to the 1995- 96 Budget, the*

NEUTRAL CITATION
2025:GUJHC:64078-DB

Central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. In the 1995-96 Budget, the MODVAT Scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accrued on inputs is less than the duty liable to be paid on the final products and thus the credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufactured by way of cash. Prior to the 1995-96 Budget, the excise duty on inputs used in the manufacture of tractors and commercial vehicles varied from 15% to 25%, whereas the final products attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilisation of the credit, all vestitive (sic) facts or necessary incidents thereto have taken place prior to 16-3- 1995 or utilisation of the finished products prior 16-3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing Scheme. Now by application of Rule 57-F(4-A), the credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that

NEUTRAL CITATION
2025:GUJHC:64078-DB

is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate that the Scheme is merely being altered and, therefore, does not have any retrospective or retroactive effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the Rules available, certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that the right, which had accrued to a party such as the availability of a scheme, is affected and, in particular, it loses sight of the fact that the provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assesses concerned. Therefore, the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier Scheme necessarily that the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said Rule would result in affecting the rights of the assessees

6. We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section

NEUTRAL CITATION
2025:GUJHC:64078-DB

37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the Rule cannot be applied to the goods manufactured prior to 16-3- 1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods

10.2 In the case of Collector Vs. Dai Ichi Karkaria Ltd. [1999 (112) ELT 353 (SC)], the Hon'ble Apex Court has recorded categorical findings as under:-

"Rule 57G provides that the manufacturer intending to take credit of duty paid on inputs must file a declaration with the concerned excise officer indicating what the final products are that are manufactured in its factory and the inputs intended to be used therein and obtain an acknowledgement thereof. The manufacturer, having filed the declaration and obtained the acknowledgement, can take credit for the duty on the inputs received by him. Rule 57I provides for the recovery of credit wrongly availed of or utilised in an irregular manner. The manufacturer is then required to show cause why he should not be disallowed such credit, or, if it has utilised it, why its value should not be recovered from him. After considering the reply, the concerned excise officer is empowered to make the appropriate order in such terms.

It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless

NEUTRAL CITATION
2025:GUJHC:64078-DB

the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

It is, therefore, that in the case of Eicher Motors Ltd. vs. Union of India [1999(106) ELT 3] this Court said that a credit under the MODVAT scheme was as good as tax paid

10.3 In the the case of Indsur global Vs. Union of India reported in 2014(310) ELT 833 (Guj.), this Court has held as under :-

"34. By no stretch of imagination, the restriction imposed under sub-rule (3A) of rule 8 to the extend it requires a defaulter irrespective of its extent, nature and reason for the default to pay the excise duty without availing cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail.

35. The situation can be looked at slightly different angle. With or without the provisions of sub-rule (3A), liability to pay interest for the default period as per sub-rule (3) of rule 8 continues. Sub-rule (3A) is basically a mechanism for stringent recovery and does not create a new

NEUTRAL CITATION
2025:GUJHC:64078-DB

liability unless this mechanism itself is breached. In C/SCA/3344/2014 JUDGMENT such a mechanism to provide for withdrawal of CENVAT credit facility for paying the duty borders to creating a penalty. Insisting on an assessee in default to clear all consignments on payment of duty would be a perfectly legitimate measure. However, to insist that he must pay such duty without utilising CENVAT credit which is nothing but the duty on various inputs already paid by him would be a restriction so harsh and out of proportion to the aim sought to be achieved, the same must be held to be wholly arbitrary and unreasonable. We may recall, the delegated legislature in its wisdom now dismantled this entire mechanism and instead has provided for penalty at the rate of 1% per month on delayed payment of duty.

36. In the result, the condition contained in sub-rule (3A) of rule 8 for payment of duty without utilizing the cenvat credit till an assessee pays the outstanding amount including interest is declared unconstitutional. Therefore, the portion "without utilizing the cenvat credit" of sub-rule (3A) of rule 8 of the Central Excise Rules, 2002, shall be rendered invalid.

11. Rule 3(4) of the Cenvat Credit Rules was an enabling provision for utilization of Cenvat credit. This Court has held in CCE Vs. Shilpa Copper Wire Industries reported in 2011(269) ELT 17 (Guj.) that there is no difference between 100% export oriented unit and a normal DTA Unit as regards the Cenvat scheme.

12. During the pendency of the aforesaid petition, the Goods and Service Tax Act, 2017 has come into force from July, 2017.

13. After the GST regime has come into force, the underlying scheme of availing Cenvat credit for payment of duties has been continued in Chapter XX - Transitional provisions.

Section 142(6)(a) of the Central Goods and Service Tax Act, 2017 reads as under:-

NEUTRAL CITATION
2025:GUJHC:64078-DB

"(6) (a) every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944) and the amount rejected, if any, shall not be admissible as input tax credit under this Act:

14. In view of the provision of Section 142(6)(a) of GST Act,also the petitioners will not be liable to pay the amount of excise duty in cash and would be entitled for refund of the outstanding credit in cash as per the aforesaid provisions.

15. It will be seen on plain reading of section that "any amount of credit found to be admissible to the claimant shall be refunded to him in cash". Therefore, there can be no arguments to the contrary that the legitimately availed Cenvat credit could not be used for the payment of duties and therefore, the demand of the respondents to pay the excise duty on goods that would be manufactured in the concerned manufacturer plant of the petitioner -company after debonding has to be rejected outright.

16. Therefore, in view of the interim order dated 30.10.2015, since the "No Due Certificate" has been issued to the petitioners for debonding out of 100% EOU scheme upon the petitioners having been permitted to pay the excise duty forgone from the legally availed Cenvat credit account, this petition succeeds and the direction to pay excise duty in cash conveyed by the Respondent No.2 vide letters No. F.No.VIII/48-08/Cus/Dishman/13-14 dated 3.8.2015 and 19.8.2015 are hereby quashed and set aside . Rule is made absolute to the aforesaid extent. No order as to costs."

6. Thus, since the tribunal had placed reliance on the interim order passed by this Court in the

NEUTRAL CITATION
2025:GUJHC:64078-DB

aforementioned decision of this Court in the case of **Messrs Dishman Pharmaceuticals and Chemicals Pvt. Ltd. (supra),** and the same has become final, the present appeal stands dismissed. Question of law as mentioned hereinabove is answered in favour of the respondent.

Sd/-
(A. S. SUPEHIA, J)

Sd/-
(PRANAV TRIVEDI,J)

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