IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2214 OF 2013

M/s. Parle Products Ltd.
a Private Limited, registered
under the Companies Act, 1956,
having its registered office at
V. S. Khandekar Marg, North
Level Crossing, Vile Parle (East),
Mumbai – 400 057 ...Petitioner

Versus

1. **Union of India,**
Ministry of Law & Justice
Aayakar Bhavan, New Marine
Lines, Mumbai – 400 020

2. **The Commissioner of Central Excise**, Thane-I Commissionerate
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (West)
Mumbai – 400 028

3. **The Assistant Commissioner of Central Excise**, Kalyan-IV Division,
Thane-I Commissionerate,
Bhagwandas Mension, Shivaji
Chowk, Kalyan (West) ...Respondents

Adv. Padmavati Patil a/w. Adv. Kiran Chavan i/b. Adv. Padmavati Patil for Petitioner.

Adv. P. S. Cardozo a/w. Adv. Sangeeta Yadav and Adv. Umesh Gupta for Respondents.

CORAM : M. S. SONAK &
JITENDRA JAIN, J.J.

ARGUMENT CONCLUDED ON : 14th OCTOBER 2024

JUDGMENT PRONOUNCED ON : 21st OCTOBER 2024

JUDGMENT :- (Per Jitendra Jain, J.)

1. By this petition under Article 226 of the Constitution of India, the Petitioner seeks to challenge an order dated 14 February 2013 passed by the Revisional Authority under Section 35EE of the Central Excise Act, 1944, in which the rebate claim of the Petitioner allowed by the Appellate Authority has been reversed. This petition raises very peculiar issue where Petitioner – assessee is claiming that they are not covered by exemption notification with respect to biscuits exported out of India and Respondent – revenue is contending that Petitioner – assessee is entitle to the exemption notification but since the Petitioner has voluntarily paid duty although not due they are not entitle to the rebate / refund of sum so wrongly paid.

Brief facts:-

2. The Petitioner is a Company engaged in the manufacturing Biscuits, Confectioneries, etc. This product biscuit is exigible to excise duty under Section 4A of the Central Excise Act based on its Maximum Retail Price (**MRP**). The products manufactured by the Petitioner are cleared for home consumption and export. With respect to biscuits cleared for home consumption, Petitioner is claiming exemption under notification No.3/2006-CE dated 1st March 2006 since the biscuits are cleared in packaged form with per kg. Retail Sale Price (RSP) not exceeding Rs.100/-. However, the said biscuits, when exported, do not

bear the retail sale price in rupees and as specified in notification No.3/2006. Therefore, the Petitioner paid duty on the export under Section 4 of the Central Excise Act, 1944 on clearance of goods for export based on the transaction value.

3. The excise duty paid on clearance for exports of biscuits is claimed as a Rebate under Rule 18 of the Central Excise Rules, 2002. Assistant Commissioner of Central Excise, Kalyan Division – Respondent No.3 denied the said claim of the Petitioner on the ground that the exemption notification does not provide for any condition and since for computation of the assessable value abatement of 35% of the retail sale price is given to goods under Section 4A of the Central Excise Act, 1944, he concludes that the retail sale price of biscuits per kg. must be less than Rs.100/- and since the Petitioner failed to prove that the price is more than Rs.100/-, biscuits exported are covered by exemption notification and are exempted from payment of duty. Consequently, they are not entitled to a rebate of duty paid on exported goods which are exempt although Petitioner has paid the duty. The said Authority also refers to an order passed by the Commissioner of Central Excise, Thane, dated 12th August 2009 being, order No. 05-BR-01-TH-I-09, which has disallowed the Cenvat Credit availed in respect of duty on inputs used in manufacture of such exempted biscuits cleared for export and for which the recovery

proceedings had been initiated. The Petitioner challenged the said Order-In-Original (O-I-O), rejecting the Rebate claim by filing an appeal before the Commissioner (Appeals).

4. The Commissioner (Appeals), on 20th September 2010, reversed the aforesaid order and allowed the appeals of the Petitioner by holding that exemption notification No.03 of 2006 is not applicable for goods under consideration cleared for export since provisions relating to retail sale price are not applicable on exported goods and the requirement for claiming exemption under Notification No.03 of 2006 is that the package retail sale price per kg. should be less than Rs.100 which cannot be satisfied in case of goods which are exported. The Appellate Authority relied upon the decision of the Tribunal and the Himachal Pradesh High Court. The Appellate Authority also relied upon the orders in the case of the Petitioner itself passed by his predecessors on a similar issue, which orders revenue have accepted on merits.

5. The revenue challenged the appellate order of 20th September 2010 by filing a Revision Application under Section 35EE of the Central Excise Act, 1944. The Revisional Authority reversed the order of the Appellate Authority and restored the Order-In-Original, primarily on the ground that no duty was required to be paid on the goods exported because of exemption notification and, therefore, the

duty paid on such exported goods cannot be treated as duty paid under the provisions of the Central Excise Act, 1944. The said authority also relies upon the order passed by the Commissioner of Central Excise, Thane, dated 12th August 2009 (which was relied in O-I-O), which pertained to disallowing Cenvat Credit availed in respect of inputs used in such exempted biscuits cleared for export and for which recovery proceedings were initiated.

6. It is on this backdrop that the Petitioner is before us challenging the order of reversal passed by the Revisional Authority.

Submissions of the Petitioner:-

7. Ms. Patil, learned counsel for the Petitioner submitted that for claiming exemption under notification No.03 of 2006, the retail sale price per kg. of biscuits in package form should not exceed Rs.100/-. She contends that since goods are exported, the provisions of the Standards of Weights and Measures Act and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 are not applicable. Consequently, the retail price does not get reflected on the package to show the value in rupees. Therefore, the goods cleared for export do not qualify for exemption, and hence, they paid the duty, which is claimed by way of rebate under Rule 18 of the Central Excise (No.2) Rules, 2001. Alternatively, she submits that if the contention of the revenue that the goods exported are exempted under notification

No.03 of 2006 is to be accepted, then the duty paid on such exported goods would amount to revenue retaining the said amount without any authority of law and therefore, even on this count the rebate claim cannot be denied. She further submits that the order of Commissioner of Central Excise, Thane, in case No.05/BR/01/TH-I/09 dated 12th August 2009 referred to and relied upon by the Original and Revisional Authority in their orders, has been reversed by the Appellate Tribunal vide order dated 7th April 2015 and same is reported in 2015-TIOL-1075-CESTAT-MUM and the revenue has accepted the said order. She further submitted that the revenue had denied similar claims in the past, which were carried in appeals, and two Appellate Authorities vide orders dated 15th April 2010 and 29th July 2010 have allowed the claim of rebate, and the said Appellate orders have been accepted by the department on merits.

8. Ms. Patil, inter alia (in addition to others), has relied upon the following decisions in support of her above contentions:-

(i) **Ravi Foods Pvt. Ltd. Vs. Commissioner (Appeals)**[1]
(ii) **Arvind Ltd. Vs. Union of India**[2]
(iii) **Repro India Ltd. Vs. Union of India**[3]
(iv) **Flemingo Duty Free Shops vs. State of Karnataka**[4]

1 2018-TIOL-970-HC-AP-CX
2 2014 (300) E.L.T. 481 (Guj.)
3 2009 (235) E.L.T. 614 (Bom.)
4 2009 (248) ELT 69 (Kar)

Submissions of Respondents:-

9. Ms. Cardozo, learned counsel for the respondent–revenue supported the orders passed by the Original and Revisional Authorities and contended that the exemption notification No.03 of 2006 was not conditional notification and the Petitioner was not required to pay the duty under Section 5A(1A) of the Central Excise Act, 1944 on such exempted goods. They have paid the duty, which they were not required to pay. There is no provision in the Act for a refund of the said duty wrongly paid. Further, she submitted that in the absence of any enabling provisions for the grant of refund of the amount wrongly paid by the Petitioner, Article 265 of the Constitution of India also cannot be pressed into service. Ms. Cardozo relied upon the decision of the Bombay High Court in the case of ***Mahindra and Mahindra Ltd. Vs. Commissioner of C. Ex., Mumbai-V***[5] in support of her submissions. She justified the orders passed by the Revisional Authority and the Original Authority.

10. We have heard learned counsel for the Petitioner and the Respondent and have also perused the documents and judgments which were brought to our notice during the course of the hearing.

Analysis and Conclusions:-

11. Entry No.18A of notification No.3/2006 dated 1st March 2006 granting exemption reads as under :-

5 2015 (321) E.L.T. 51 (Bom.)

S. No.	***Chapter or heading or sub-heading or tariff item of the First Schedule***	***Description of excisable goods***	***Rate***	***Condition No.***
(1)	***(2)***	***(3)***	***(4)***	***(5)***
18A.	*1905 31 00 or 1905 90 20*	*Biscuits cleared in packaged form, with per kg. retail sale price equivalent not exceeding Rs.100.* ***Explanation 1 –*** *"Retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be, and the price is sole consideration for such sale.* ***Explanation 2 –*** *"per kg. retail sale price equivalent" shall be calculated in the following manner, namely :-* *If the package contains X gm of biscuits and the declared retail sale price on it is Rs. Y, then the per kg. retail sale price equivalent = (Y*1000) / X* *Illustration:- If the package contains 50gm of biscuits and the declared retail sale price on it is Rs.2, then per kg. retail sale price equivalent= Rs.(2X1000) / 50 = Rs.40.*	*Nil*	-

12. The issue for consideration is not whether exemption notification is conditional or unconditional but whether goods under consideration exported out of India answers the description of goods mentioned in column 3 of the above notification.

13. On a perusal of the above exemption notification, in our view, only biscuits cleared in packaged form, for which retail sale price does not exceed Rs.100/- per kg. are eligible for exemption under notification No.03 of 2006. There is no dispute that the biscuits exported by the Petitioner did not have the retail sale price in rupee embossed on the package. A person must emboss the retail sale price on the package as per the Standards of Weights and Measures Act, 1976 and the Standards of Weights and Measures (Packaged Commodity) Rules 1977. It is not in dispute that the said the Standards of Weights and Measures Act and the Rules do not apply to the goods exported out of India. Therefore, in our view, the description of the goods specified in notification No.03 of 2006 would not answer the biscuits exported by the Petitioner since, there is no retail sale price per kg. equivalent not exceeding Rs.100/- on the package. Therefore, the Petitioner's goods which are exported are not entitled for exemption and therefore Petitioner was justified in making payment of duty under Section 4 of the Central Excise Act based on the transaction value.

14. In this connection, Petitioner is justified in relying upon Paragraph 6.2(d) of Chapter I of CBEC's Excise Manual of Supplementary Instructions, 2005 and Circular 625/16/2005-CX dated 28th February 2002 where the revenue accepts that items meant for exports would not bear MRP printed on it. It further clarifies that the

provision of Section 4A dealing with duty on MRP would be applicable only where the manufacturer is "*legally obliged*" to print the MRP as per the Standards of Weights and Measures Act, 1976 or the Rules made therein. Therefore the goods under consideration exported out of India would not fall within description mentioned in the exemption notification. Respondents have also accepted the payment made by the Petitioner under Section 4 of the Central Excise Act, 1944. Therefore, the contention of the revenue that Petitioner's exported goods were exempted under notification No.3/2006 cannot be accepted and consequently the whole basis of rejecting the claim of rebate that goods are exempted and the Petitioner was not required to pay duty as per Section 5A(1A) of Central Excise Act and, therefore, cannot get a refund/rebate falls to the ground.

15. Assuming, the contention of revenue that the goods exported are exempted under notification No.03/2006 is accepted, then in that scenario, we fail to understand as to under what authority of law the revenue retained the duty paid (as per revenue wrongly paid) by the Petitioner since, in that case, retention would be contrary to Article 265 of the Constitution of India which provides that no tax shall be levied or collected except by authority of law. Suppose the revenue's case that goods under consideration exported are exempt is to be accepted. In that case, the amount collected under Section 4 of the

Central Excise Act will amount to collection without the authority of law.

16. We do not agree with the contention of the revenue that merely because there is no enabling provision for refund, they are entitled to retain the amount which the Petitioner has paid, although they were not required to pay the duty. It is a settled position in law that unless a person is liable to pay duty or tax, no amount can be recovered and, if recovered cannot be retained but is to be refunded. If revenue contends that the Petitioner is exempted from payment of duty on biscuits exported, then surely the amounts collected are without the authority of law. Therefore, under Article 226 of the Constitution of India, this Court can undoubtedly direct the revenue to refund the said amount, which, according to its own submission, is retained without the authority of law. If the amount is not refunded, it would amount to the Government unjustly enriching itself, which certainly cannot be accepted by any Court of law.

17. The Original Authority and the Revisional Authority have relied upon the order of the Commissioner of Central Excise, Thane No.5-BR-01-TH-I/09, dated 12th August 2009, which pertains to the disallowance of Cenvat credit availed on inputs used in the manufacturing of exempted biscuits. This order was the subject matter of appeal before the Tribunal, and the Tribunal vide order dated 7th

April 2015 has allowed the appeal of the Petitioner. There is no further challenge to the Tribunal's order since revenue has accepted the said order on merits. Therefore, the submissions made by the revenue by relying upon the order of the Commissioner of Central Excise, Thane, dated 12th August 2009, also do not survive.

18. It is also important to note that similar claims of the Petitioner were rejected on two previous occasions, and both the appellate authorities have allowed the claim of rebate in an identical fact situation. The revenue has accepted these orders on merits and not simply because the tax effect was below the prescribed threshold limits. Therefore, we fail to understand how, today, the revenue, after accepting the orders of the appellate authorities in the Petitioner's own case, can contend the contrary. There is no rebuttal to this by the revenue. Therefore, the Petitioner's rebate claim must be allowed even on this count.

19. The Petitioner, in its compilation of the case laws, has relied upon various decisions of the Mumbai Tribunal and other Tribunals wherein on identical fact situations and the submissions made by the revenue, the Tribunals have rejected the said submissions and allowed the rebate claimed or allowed Cenvat Credit in terms of Rule 19 of the Central Excise Rules. The revenue has not been able to refute these decisions rendered by the Tribunal and which have been accepted by

the revenue and, therefore, on this count also, the revenue respondents cannot argue contrary after having accepted on merits the decision rendered on identical fact situation.

20. The claim of the Petitioner is under Rule 18 of the Central Excise Rules, 2004, which provides that where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and on fulfillment of such procedure, as may be specified in the notification. Section 2(d) of the Central Excise Act, 1944 defines “excisable goods” to mean goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. Rule 2(d) of Cenvat Credit Rules, 2004 defines “exported goods” to mean excisable goods which are exempt. Clause 1 (1.2) of Part V of the CBEC’s Excise Manual of Supplementary Instructions 2005 clarifies that in Rule 18 and in the notification allowing rebate, the expression ‘export goods’ has been used, which refers to excisable goods (dutiable or exempted) as well as non-excisable goods. It is further clarified that the benefit of the input stage rebate can be claimed on the export of all finished goods, whether excisable or not.

21. Therefore, the contention of the revenue that the goods exported were exempted under Notification No.3 of 2006 and the petitioner was not required to pay duty and consequently cannot claim a rebate under Rule 18 is contrary to the said clarification. Notification No. 19/2004 dated 6th September 2004 as amended from time to time under Central Excise Rule 18 providing for procedure, conditions and limitations for the grant of rebate of duty do not state that if the Petitioner has wrongly paid excise duty (assuming the department's contention on this is accepted), the rebate claim will not be considered. We may clarify that we have already observed that the Petitioner was not entitled to exemption notification No.3 of 2006. Still, it is to test the arguments of the revenue Respondents that we have dealt with this issue. It is not the case of the revenue that any of the condition of this notification issued under Rule 18 is violated or not complied with.

22. Although Petitioners have relied upon various case laws, we deem it fit to refer to only one directly on the point under consideration: the decision in the case of ***Ravi Foods Pvt. Ltd. Vs Commissioner (Appeals) (supra)***. An identical submissions were made by the revenue and raised before the Telangana High Court at Hyderabad in the case of ***Ravi Foods Pvt. Ltd. (supra)*** and the High Court in paragraphs Nos.23 to 25 observed as under:-

> *23. But we fail to understand the logic behind such a conclusion reached by the Commissioner (Appeals). First of all, the exemption Notification was not a blanket exemption. It was an exemption available to the goods of a particular description, subject to their satisfying two conditions viz., (a) that they are cleared in packaged form, and (b) that their per kg. retail sale price equivalent does not exceed Rs. 100/-. Even the definition of the expression "retail sale price" is indicated in Explanation 1 and the method of calculation of per kg. retail sale price equivalent is given in Explanation 2. Therefore, the availability of the exemption depended upon all these factors. Hence, it cannot be concluded that the exemption was absolute and unconditional. By holding the exemption to be absolute and unconditional, the Commissioner (Appeals) committed a grave error.*
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> *24. The availing of Cenvat credit by the petitioner, was considered by the Commissioner (Appeals) to be irrelevant. But such an opinion goes contrary to the decision of a Division Bench of the Bombay High Court in Repro India Ltd. v. Union of India, wherein the High Court of Bombay pointed out that the failure to fulfill export obligations, may result in other consequences and that therefore the grant of Cenvat credit is a matter of relevance.*
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> *25. In Commissioner v. Suncity Alloys Pvt. Ltd., a Division Bench of the Rajasthan High Court was concerned with a claim for rebate of duty, on the goods exported by the assessee. The Revenue raised a similar contention as they have raised now to the effect that the goods were exempt from payment of duty and that therefore the amount paid by the assessee cannot be treated as duty paid so as to enable the manufacturer to claim rebate. But the said contention of the Revenue was repelled by the Rajasthan High Court on the ground that even in cases where the manufacturer pays duty which is not leviable, he may be entitled to claim refund of the same. Therefore, the Department may not be right in retaining the duty paid by the petitioner.*

23. In our view, the above decision squarely covers the petitioner's case on both counts and adequately answers the contentions based on which the respondent revenue seeks to justify its orders.

24. Coming to the decision heavily relied upon by the learned counsel for the revenue in the case of ***Mahindra and Mahindra (supra)***, we fail to understand how this decision applies to the facts of the present case. The case before the Bombay High Court concerned export under “bond” whereas in the instant case of the Petitioner, the claim of

rebate is on account of payment of duty on export of goods. Secondly, the goods in the case of ***Mahindra and Mahindra Ltd. (supra)*** were unconditionally exempted and issue before Court was whether it is conditional or unconditional, whereas, in the Petitioner's case, goods exported are not exempted as observed by us above since the goods exported do not match the description of goods notified in Notification No.3 of 2006 and therefore even on this count, the facts are different. Furthermore, the Coordinate Bench was not concerned with the situation where the revenue justified retaining the amount (which, according to revenue, is wrongly paid) paid by the Petitioner, although according to the revenue, the Petitioner was not liable to pay the duty, whereas, in the Petitioner's case, it is the submission of the respondent-revenue that Petitioners have wrongly paid the duty although they were not required to pay.

25. ***Mahindra and Mahindra (supra)*** was a case where the goods were exempt under a particular notification. In contrast, in the present case before us, we have already observed above that the goods cleared by the Petitioner export are not covered by exemption notification No.3 of 2006. In the case of ***Mahindra and Mahindra (supra)***, the claim was not made under Rule 18 of the Central Excise Act, 2002, whereas in the present case before us, the claim was made under Rule 18 of the Central Excise Rules.

26. Furthermore, in the case of ***Mahindra and Mahindra (supra)***, this Court held that exemption was unconditional since there was no condition prescribed in Column No.5 and the description of the goods read as "All goods (except road tractors for semi-trailers of engine capacity more than 1800 cc)" which matched with the goods cleared. In the case before us, the description of the goods specified in notification no.3 of 2006 does not match the description of the goods which are exported by the Petitioner since, in the case of export, the requirement of the retail sale price per kg. not exceeding Rs. 100/- is not satisfied. Based on these facts, this Court observed that if the exemption was unconditional, then the assessee could not insist on payment of duty on exempted goods and, after that, insist on credit for the same.

27. The whole basis of reasoning in the case of ***Mahindra and Mahindra (supra)*** was that the exported goods were unconditionally exempted by notification, which is not so in the case before us. This Court also observed in the case of ***Mahindra and Mahindra (supra)*** that the assessee did not attempt to pay duty on the parts cleared for home consumption but paid duty on the goods exported, although the nature of the description of the goods for home consumption and export was the same. In our view, it was on these facts that the decision of this Court in the case of ***Mahindra and Mahindra (supra)***

was rendered. The facts in the Petitioner's case before us are different; therefore, in our view, the reliance placed by the revenue Respondents on the decision in the case of ***Mahindra and Mahindra (supra)*** is misplaced and misconceived.

28. It is a well-settled position that the decision is rendered in the context of the facts before the Court. If the facts are different, then the ratio of the said decision cannot be applied to another case mechanically. The decision is an authority for what it actually decides, having due regard to the factual conceptus. The ratio is of the essence, and not every observation found therein nor what may appear to logically flow from the various observations in the judgment. Therefore, in our view, the decision relied upon by the Revenue in the case of ***Mahindra and Mahindra Ltd. (supra)*** does not apply to the facts of the Petitioner's case.

29. We have analysed the submissions made by both the parties and whether we accept the submissions of both or reject the both there does not appear to be any escape route for Respondent-revenue to deny the claim of the Petitioner under Rule 18 of the Central Excise Rules.

30. Given above, Petition is allowed in terms of prayer clauses (a) and (b), which read as under:-

(a) *That this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, order or direction under Article 226 of Constitution of India, calling for the records of the case pertaining to the Rebate Claims of the Petitioners and after going into the question of legality and propriety thereof, be pleased to quash and set aside the Order no.128-130/2013-CS dated 14.02.2013 (at Exhibit 'A') passed by the Ld. Joint Secretary, Government of India (Respondent No.2), thereby allowing the Petitioners' Rebate Claims;*

(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other Writ, order or direction under Article 226 of the Constitution of India, directing the Respondents to grant and sanction the 51 Rebate Claims being Rebate Claim No.15830 to 15849 dated 17.10.2007 and 17360 to 17380 dated 07.11.2007 filed by the Petitioners.

31. Rule is made absolute in above terms.

(JITENDRA JAIN, J.) (M. S. SONAK, J.)