

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT. JUSTICE T.RAJANI

+ Writ Petition No.6448 of 2017

% Date: 24-01-2018

M/s. Ravi Foods Pvt. Ltd., Unit-I, 7-4-112/1,
Madhuban Colony Road, Kattedan, Hyderabad-77,
Rep. by its Authorized Signatory Sri G.Sai Babu
... Petitioner

Vs.

- \$ 1. Commissioner (Appeals), O/o. Commissioner of
Customs & Central Excise (Appeals),
7th Floor, Kendriya Shulk Bhavan,
Opp. L.B. Stadium, Basheerbagh, Hyderabad-04
2. Commissioner, O/o. Commissioner of Customs,
Excise & Service Tax, Hyderabad II Commissionerate,
Basheerbagh, Hyderabad
3. Asst. Commissioner of Central Excise,
Shamshabad Division, CLS Bldg., 4th Floor,
Station Road, Abids, Hyderabad
... Respondents

! Counsel for Petitioner: Mr. S.Niranjan Reddy,
Senior Counsel, representing
Mr. K.Siddharth Rao

Counsel for Respondents: Mr. B.Narasimha Sarma,
Standing Counsel

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> Head Note:

? Cases referred:

1. 2009 (235) ELT 614
2. 2007 (218) ELT 174 (Raj.)

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Order: (per V.Ramasubramanian, J.)

The petitioner has come up with the above writ petition challenging an order passed on an appeal, reversing the order of the Original Authority granting rebate on the duty of excise paid on the biscuits exported by the petitioner.

2. Heard Mr. S.Niranjan Reddy, learned Senior Counsel appearing for the petitioner and Mr. B.Narasimha Sarma, learned Standing Counsel for the respondents.

3. The petitioner is engaged in the manufacture of food products viz., biscuits and wafers, falling under Heading No.19 and confectionery falling under Chapter No.17 of the Schedule to the Central Excise Tariff Act, 1985. According to the petitioner, they cleared the subject goods for both domestic as well as export market. In respect of the goods cleared for export, the petitioner makes payment of the duty of excise on the transaction value as per Section 4 of the Central Excise Act, 1944 and avails CENVAT Credit on the inputs and input services. According to the petitioner, they export biscuits through their merchant exporters with price being the sole consideration and the orders are executed in US \$/other foreign exchange terms without any sale being done in the Indian currency.

4. On 01-3-2007, the Central Government issued Notification No.3/2007 in exercise of the powers conferred by Section 5A(1) of the Central Excise Act, 1944. At Serial No.18A of the said Notification, biscuits cleared in packaged form with per kg. retail sale price equivalent not exceeding INR 50, was indicated to attract nil rate of duty. By a subsequent Notification bearing No.22/2007, dated 03-5-2007, a slight modification was made, to the previous Notification, making INR 50 as INR 100. Another Notification bearing No.12/2012, dated 17-3-2012, also contained a similar prescription at Serial No.27 relating to biscuits cleared in packaged form.

5. On 16-9-2015 and 20-10-2015, the 3rd respondent passed Orders-in-Original bearing Nos.52, 53 and 60/2015-16, sanctioning the rebate claim made by the petitioner in respect of goods which were exported and in respect of which the petitioner had paid duty of excise.

6. As against these orders, appeals were preferred before the 1st respondent in Appeal Nos.03, 04 and 07/2016. By a common order dated 24-01-2017, the 1st respondent allowed the appeals, on the ground that the goods manufactured by the petitioner were unconditionally exempted from payment of duty and that therefore the duty paid cannot be treated as duty paid under the Central Excise Act, 1944 so as to enable the petitioner to claim rebate under Rule 18 of the Central Excise Rules, 2002. Aggrieved by the

said common order, the petitioner has come up with the above writ petition.

7. As against the impugned order, the petitioner has an alternative remedy of revision under Section 35EE of the Act. But according to the petitioner, the revision is to an officer of the level of Joint Secretary to Government. Since the 1st respondent viz., the Commissioner (Appeals) is also of the same rank as Joint Secretary to Government, the petitioner has chosen to bypass the alternative remedy of revision and come up before this Court by way of writ petition.

8. There is no dispute about the fact that the order of the 1st respondent is not amenable to the jurisdiction of the CESTAT under Section 35B. By virtue of Clause (b) of the proviso to Section 35B(1), no appeal shall lie to the Appellate Tribunal, as against an order relating to a rebate of duty of excise. Therefore, a revision to the Central Government alone will lie under Section 35EE(1). The grievance of the petitioner was that at the time when they came up with the writ petition, the person holding office as Joint Secretary was of the same rank as the 1st respondent (Appellate Authority) and that therefore they could not file a revision.

9. But at the time of arguments, the learned Standing Counsel for the Department produced a copy of Office Order bearing No.202/2017, dated 20-7-2017, by which the Government nominated officers of the rank of Principal Commissioners and ex-officio Additional Secretaries to

Government of India as the Revisional Authorities. Therefore, it was contended by the learned Standing Counsel for the Department that the difficulty expressed by the petitioner stood removed.

10. But we do not think that we will drive the petitioner to avail the alternative remedy of revision at this stage, merely on account of a subsequent development. At the time when the petitioner filed the writ petition in February 2017, they were actually disabled from filing a revision. Merely because the Government nominated officers of superior rank subsequently (in July, 2017), the petitioner cannot be driven to seek remedy before the Revisional Authority.

11. That takes us to the merits of the case.

12. The case of the petitioner is that they paid excise duty on goods cleared for the domestic market where per kg. retail sale price was more than INR 100 and that they paid excise duty on goods cleared for export on the basis of transaction value in terms of Section 4. Therefore, the petitioner availed rebate of duty.

13. But the stand of the Department is that the petitioner was not liable to discharge excise duty on the goods exported in view of the absolute exemption from payment of duty under Notification No.12/2012, dated 17-3-2012 and that therefore the amount paid could not have been treated as duty paid, so as to enable them to claim rebate.

14. The Appellate Commissioner agreed with the Department and held that under Section 5A(1A) of the Central Excise Act, 1944, no option is available to any person to pay duty, when goods are exempted from payment of the whole of the duty unconditionally. The Commissioner (Appeals) held that in terms of the prescription contained in the 3rd column as against Serial No.27 of the Notification No.12/2012, the exemption granted to biscuits was absolute and that therefore in view of the decision of the Government of India dated 14-12-2013 passed in Revision No.128-130/2013, biscuits manufactured and cleared for export without declaring any retail sale price were out of Section 4A of the Central Excise Act, 1944. Accordingly, the Appellate Commissioner set aside the order of rebate, holding that the goods manufactured were unconditionally exempt from payment of duty under the Notification and that in terms of Section 5A(1A) of the Central Excise Act, 1944, the petitioner did not have the option to pay duty.

15. Assailing the order of the Appellate Authority, it is contended by Mr. S.Niranjan Reddy, learned Senior Counsel for the petitioner, that the exemption granted under Notification No.12/2012 was not absolute and unconditional; that the 2nd respondent has already held that the petitioner is entitled to avail CENVAT Credit on goods cleared for export, valued in terms of Section 4 of the Central Excise Act, 1944

and that the Appellate Authority failed to follow an order of the CESTAT as well as his own order in another appeal.

16. We have carefully considered the above submissions.

17. The first question that arises for consideration is as to whether the exemption granted under Notification No.12/2012, was absolute and unconditional. If it is so then the order of the Appellate Commissioner is right. If not, it is incorrect.

18. The relevant portion of Notification No.12/2012 relating to Serial No.27, reads as follows:

No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
27	19053100 or 19059020	Biscuits cleared in packaged form, with per kg. retail sale price equivalent not exceeding Rs.100. Explanation 1.-For the purposes of this entry, "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.-For the purposes of this entry, '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 50 gm of biscuits and the declared retail sale price on it is Rs.2, then, per kg. retail sale price equivalent = $Rs.(2*1000)/50 = Rs.40$	Nil	

19. It can be seen from column No.3 of the table extracted above that what are exempt are those biscuits cleared in packaged form with per kg. retail sale price equivalent not exceeding to Rs.100/-. There are two explanations provided in column No.3. The first explanation defines what is retail sale price. The second explanation provides the method of calculation of per kg. retail sale price equivalent.

20. The Commissioner (Appeals) proceeded on the basis that even admittedly, the value of the subjected goods was less than Rs.100/- per kg. both when they were removed domestically and when they were exported. Therefore, the Commissioner (Appeals) came to the conclusion that the exemption was absolute.

21. At this juncture, it is to be noted that in terms of Section 5A(1A) of the Central Excise Act, 1944, if the exemption granted under Section 5A(1) is absolute, the manufacturer of such goods shall not pay duty of excise. This is why the Department has taken a stand that the petitioner ought not to have paid excise duty, when the exemption granted under Notification No.12/2012 was absolute.

22. To come to the conclusion that the exemption was absolute, the Commissioner (Appeals) pointed out that there was no necessity for the packages to bear the retail sale price.

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.

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**¹, 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.

25. In **Commissioner v. Suncity Aloys Pvt. Ltd.**², a Division Bench of the Rajasthan High Court was concerned

¹ 2009 (235) ELT 614

² 2007 (218) ELT 174 (Raj.)

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.

26. In view of the above, the writ petition is allowed and the impugned order of the Commissioner (Appeals) is set aside. The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

T.RAJANI, J.

24th January, 2018.
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HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT. JUSTICE T.RAJANI

Writ Petition No.6448 of 2017
(per VRS, J.)



24th January, 2018.
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