REGISTERED SPEED POST

सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 195/204/13-RA / 5317
F. No. 195/320/14-RA

Date of Issue: 17.09.2021

ORDER NO. 305-306/2021-CX (WZ) /ASRA/MUMBAI DATED 07.09.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against Orders in Appeal No. P-I/MMD/ 202/2012 dated 17.10.2012 passed by Commissioner (Appeals), Central Excise, Pune-I and PD/45/Th-I/2014 dated 27.06.2014 passed by Commissioner of Central Excise (Appeals-I), Mumbai.

Applicant : M/s Parle Products Pvt. Ltd. Vile Parle (East), Mumbai.

Respondent : (i) Commissioner of Central Excise, Pune-I, and
(ii) Commissioner of Central Excise, Mumbai-I.

ORDER

These Revision Applications have been filed by M/s Parle Products Pvt. Ltd. Vile Parle (East), Mumbai (hereinafter referred to as the "applicant") against Orders-in-Appeal Nos. shown at column No. 3 of Table below.

TABLE

Sl. No.	Revision Application Nos.	Order-In-Appeal No. & Date	Order-In-Original No. & Date	Amount of Rebate involved.
1	2	3	4	5
1.	195/205/13-RA	P-I/MMD/ 202/2012 dated 17.10.2012 passed by Commissioner (Appeals) , Central Excise, Pune-I	P-I/Divn I/Reb/ 35/2012 dated 26.04.2012	Rs.1,18,110/-, Rs. 88,582/-, Rs.1,18,109/-. Rs.3,24,801/-
2.	195/320/14-RA	PD/45/Th-I/2014 dated 27.06.2014 passed by Commissioner of Central Excise (Appeals-I), Mumbai.	09/TKS-11/Th-1/ 2013 dated 02.12.2013	Rs. 27,67,334/-

RA No. 195/205/13-RA

2. The brief facts of the case are that the applicant, cleared biscuits for export from the factory of their Contract Manufacturing Unit (CMU) namely, M/s Shiv Shakti Processed Foods, Tal. Vadgaon Maval, Pune after payment of excise duty under cover of ARE-1s. On export of the said goods the applicant filed three separate rebate claims on 1.03.2012 for duty paid on biscuits along with supporting documents. The Deputy Commissioner, C.Ex. Division Pune-I (original authority) vide Order in Original (at column No. 4 of Sl. No. 1 of Table above) sanctioned the rebate of Rs.3,24,801/- (at column No. 5 of Sl. No. 1 of Table above).

3. On examination of the aforesaid Order in Original the same was found legally not correct on the following grounds:-

- The exported goods were exempt under the Notification No. 03/2006 CE dated 01.03.2006 and there was no need to pay duty at the time of the export.

- In terms of Board's Circular No. 940/01/2011-CX dated 14.11.2011, the assesse has no option to pay duty and claim rebate thereof under rule 18 of Central Excise Rules, 2002.
- Further, subject goods being fully exempted items, availment of Cenvat credit by the manufacturer was not proper. This being case of export of exempted goods, input duty burden relief could be claimed by following the procedure under Notification No.21/2004 CE(NT) dated 06.09.2004 for export of goods under ARE 2 procedure. As the said procedure was not followed in this case the applicant was not entitled to the said relief also. As such in both situations,, i) claiming Cenvat credit for inputs and rebate of duty paid from such credit account on exempted goods sought to be exported under Rule 18 of Central Excise Rules, 2002 were not correct.

4. Commissioner (Appeals) vide Order in Appeal (at column No. 3 of Sl. No. 1 of Table above) allowed the appeal filed by the Commissioner of Central Excise, Pune-I by annulling the said Order-in-Original passed by the Deputy Commissioner of Central Excise, Pune-I Commissionerate .

5. Being aggrieved with the aforesaid Order in Appeal, the applicant has filed the instant Revision Applications mainly on the following grounds:-

5.1 The Ld. Commissioner (Appeals) has erred in passing the impugned Order, without hearing them on the issue and without taking their say in the matter, which is in violation the principles of natural justice. The impugned order is not sustainable on merits also on following grounds

5.2 The Order impugned is in grave violation of natural justice as the Ld. Commissioner (A) has not taken on record their say in the matter before annulling the order of original authority granting rebate. The 2nd Proviso to Section 35 specifies that "no adjournments shall be granted more than three times". In the instant matter the Ld. Commissioner (A) granted hearing on 10/9/2012 under letter forwarding Appeal filed by Dept., which was received by them on 30/8/2012. Thus within 10 days of receipt of Department's Appeal, hearing was granted for which appellants vide letter dated 14/9/2012 prayed for allowing time to file Cross-objection to Department Appeal and then to fix the hearing in the matter. The Ld. Commissioner(A), without granting any hearing hastily passed ex-parte impugned order, which is in grave violation of principles of natural justice and hence un-sustainable & void .

5.3 The impugned order records that biscuits cleared for export are @ 84.94 per kg. and hence exempted from duty. These findings are incorrect as export biscuit packs are not affixed with Retail Sale Price (RSP) are they are meant for sale in export market. In terms of Section -1 of Legal Metrology Act, 2009 which specifies that the Act "extends to whole of India" and hence export biscuit packs sold overseas / out-of India are not required to be affixed with 'retail sale price' . Therefore the exemption under Notification No. 3/2006 at

Sr. No. 18 A specifying condition of affixing a "retail sale price" equivalent not exceeding Rs.100, cannot be applied to export biscuit packs which are not affixed any 'retail sale price'. Therefore the finding that biscuits cleared for export @ Rs. 84.94, which price is taken from ARE-1, is erroneous and untenable.

5.4 The biscuits for export are not bearing any retail sale price (RSP) / Maximum Retail Price (MRP) under Section 4A and were cleared under transaction value under Section 4 of C.Ex. Act, 1944. Even CBE&C clarified that on export goods RSP/ MRP cannot be printed and Section 4A is inapplicable to such goods. Therefore, biscuits cleared for export under transaction value without printing RSP / MRP on packages, cannot be subjected to the exemption under Notification 3/2006 CE, which primarily envisages condition to print RSP on biscuit packages, which is not printed in present case on export biscuit packs. (The applicant has reproduced the CBE&C clarification appearing in C. Ex. Manual of Supplementary Instructions in Chapter-3 at para 6.2 (d) for ready reference).

The above clarification of Board affirms that export packages cannot be printed with MRP /RSP and Section 4A of RSP is inapplicable to such products.(applicant has also enclosed copies of Export-Wrappers of biscuits varieties viz. Parle-G/Milk Power/Nice/One).

5.5. As regards reliance placed on Board Circular No. 940/1/2011-CX dated 14/1/2011 in impugned order, it is submitted that the Circular clarifies that the manufacturer cannot opt to pay duty on unconditionally / fully exempted goods which circular is squarely inapplicable in present matter as exemption under Notification. No.3/2006 CE -Sr. No. 18A is subject to condition that biscuit packs are affixed with 'retail sale price' equivalent not exceeding Rs. 100 per kg. As export biscuit packs do not bear any RSP / not affixed with RSP as such biscuits are for sale in foreign countries, the exemption under Sr. No. 18A of Notification. No. 3/2006 could not be made applicable to export biscuit packs. Also at Sr. No. 18 of Notification 3/2006 CE, rate of duty @ 5% is specified for biscuits not complying condition under Sr. No, 18A of said Notification. Therefore, the findings that duty was not payable on export biscuit packs in terms of Board Circular dated 14/1/2011 is erroneous & unsustainable .

5.6 Reliance placed on ruling in case of Johri Digital Health Case [2012 (281) ELT 156] is misplaced in as much as said ruling denies rebate on excisable goods which are un-conditionally exempted from duty. The facts in present matter are different since export biscuit packs in question are not exempted from duty as the same are not affixed with RSP value and hence liable to excise duty under Sr. No. 18 of Notification 3/2006 CE (ibid) . Therefore, ratio of Johri Digital invoked in the order is squarely inapplicable as the facts in both matters are not the same.

5.7 The very same issue in their own case the Commissioner Appeals-Mumbai Zone-I vide Order-in-Appeal mentioned below have held that biscuits cleared for export, not affixed with RSP value, are chargeable to duty & not exempted under Sr. No. 18A of Notin. 3/2006 CE (ibid) and rebate claimed of duty paid on export biscuits, is admissible. The said OIAs also held that Cenvat credit claimed on inputs used in such export biscuits is admissible under Cenvat Rules.

1. M-I /PAP/ 134/2010 dated 19/3/2010 passed by Commr(A), Mumbai.

The Hon'ble Tribunal ruled on this issue and relied on Timewell Technics Vs. CCE 2009 (238) ELT 643 (T-Ahmd.) and CCE Vs. Drish Shoes Ltd. - 2010 (254) ELT 417 (HP)

5.8 In view of the above submissions, impugned order is not sustainable.

RA No. 195/320/14-RA

6. The brief facts of the case are that the applicant, had filed 51 rebate claims under the provisions of Section the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 in respect of Biscuits exported from the factory premises of manufacturer exporter M/s Bunty Foods (India) Pvt Ltd. The rebate claims were rejected by the Assistant Commissioner of Central Excise, Kalyan IV Division vide Order in Original Nos. R-1007/2009-10 to R-1009/2009-2010 all dated 30.11.2009 on the ground that the biscuits cleared on payment of duty through Cenvat account were exempted vide Notification No. 3/2006-CE dated 01.03.2006 as amended. On appeal, the Commissioner (Appeals) vide Order in Appeal No. SB/162 to 164/Th-1/2010 dated 20.09.2010 set aside the Order in Original and allowed the rebate claims. In pursuance to the Order in Appeal, the rebate claim amount was paid to the applicant. However, an appeal was filed by the revenue against the Order in Appeal before the Joint Secretary (RA), New Delhi. During the pendency of this appeal a Show Cause Notice F. No. V/Adj/SCN/15- 106/Parle/K-IV/Th-1/2011 dated 19.07.2011 was issued to the applicant for recovery of the rebate claim amount along with interest. The appeal of the revenue was decided by the Joint Secretary, Government of India, New Delhi vide Order No. 128-130/2013-CX dated 14.02.2013 allowing the appeal of the revenue and setting aside the Order in Appeal No. SB/162 to 164/Th-1/2010 dated 20.09.2010 of the Commissioner (Appeals). After the decision of the Joint Secretary, Government of India, New Delhi, the Show Cause Notice dated 19.07.2011 was decided by the Respondent vide Order-in-Original No.

09/TKS-11/TH-1/2013 dated 02.12.2013 thereby confirming the recovery of refund amount of Rs. 27,67,334/- granted to the applicant under Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB of the Central Excise Act, 1944.

7. Being aggrieved by the impugned orders, the applicant filed appeal before Commissioner Central Excise (Appeals-I), Mumbai who vide PD/45/ Th-I/2014 dated 27.06.2014 passed by Commissioner of Central Excise (Appeals-I), Mumbai rejected the appeal filed by the applicant and upheld the Order in Original.

8. Being aggrieved with the aforesaid Order in Appeal, the applicant has filed the instant Revision Application mainly on the following grounds:-

8.1 They exported their final products on payment of duty, which fact is not disputed and claimed rebate under Rule 18 of Central Excise Rules, 2002 fulfilling all the conditions prescribed for admissibility of rebate under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

8.2 In the present case the biscuits exported by them have been specified under schedule to CETA and are subject to duty of excise @ 6%. Denial of rebate on the ground that the same goods were cleared for home consumption by availing exemption under Notfn 3/2006-CE [Sr. No. 18A] is incorrect when there is no bar for entitlement of rebate under Rules 18, CER when all the conditions of the said rule and Notification No. 19/2004-CE ibid have been fulfilled.

8.3 When the fact of the export is not in dispute and duty payment character is not in dispute denying rebate claim is not correct.

1. Aarti Industries L-2014 (305) E.L.T. 196 (Bom.)
2. UM cables Limited-2013(293) ELT 641 (Bom.)
3. Madhav Steel – 2010 TIOL 575 HC MUM CX
4. Cummins India Ltd. (2013(288) ELT 330 (Bom.)
5. Tablet India Ltd-2010(259) ELT 191 (Mad.)
6. Ford India Pvt Ltd.- 2011(272) ELT 353 (Mad.)
7. GargTex-O Fab Pvt. Ltd.-2011(271) ELT 449(G.O.I.)
8. Commissioner of Central Excise 2006(205) ELT 1093 (G.O.I.)
9. Vinergy International – 2012 (278) ELT 407 (G.O.I.)
10. Cotfab Exports 2006(205) ELT 1027(G.O.I.)
11. Leighton Contractors-2011 (267) ELT 422 (G.O.I)
12. Barot Exports – 2006 (203) ELT321 (G.O.I.)

8.3 Section 5A(1A) applies to the cases where exemption is granted absolutely and unconditionally. Only when there is unconditional exemption from payment of duty the goods would be hit by the restriction imposed under Section 5A(1A). In the present case, Notfn. No. 3/2006-CE dated 1.3.2006 at Sr. No. 18A exempts biscuits cleared in packaged form having retail price less than Rs.100 per Kg. In other words only biscuits covered under the aforesaid description have been granted exemption from payment of duty under the said Notfn. (The applicant has reproduced Sr. No.18A of Notfn. No.3/2006-CE).

In view of the above, the exemption granted under Section 18A of Notfn No. 3/2006-CE is conditional exemption hence is not hit by the bar of Section 5A(1A).

In any case, the exemption Notification issued under Section 5A are applicable to the goods cleared for home consumption and does not apply to exports, as goods exported are not exempted goods but are chargeable to duty at par with dutiable goods.

Assuming whilst denying that the restriction imposed under section 5A(1A) is applicable and the applicants were required compulsorily to avail exemption and should not have paid duty, the said amount paid as duty cannot be treated as duty paid under the provisions of Central Excise Act and the same is nothing but a deposit and should be refunded to the Applicants. In support, the Applicants rely on the judgment in the case of CAPITAL IMPEX (P) LTD. - 2010 (261) E.L.T. 844 (T), wherein it was held that, rebate of duty paid on stainless steel which was exported on payment of duty, is admissible, even if the same stainless steel was exempt under Notfn. No.10/2003-CE dated 1.3.2003. The said Judgment, after considering the provisions of Section 5A(1A), CEA, held that, amount of duty paid on exports was not payable by the assesse and hence, was a deposit, which was to be given back to him.(the applicant has reproduced paras 18 & 19 of the said Order).

8.4 If the duty paid by them was not authorized by law (as per Section 5A(1A) of CEA) then the same could not be retained by the Govt. and should be paid back to them. Based on the following judgement:-

Adarsh Metal Corporation 1993 (67) ELT 483 (Raj.)

8.5 The exports are excluded from application of Standards of Weights and Measures Act, 1976 and rules made there under, and there is no requirement to mention MRP on exported goods. In support, reliance is placed on Karnataka High Court judgment in the case of Flemingo Duty Free Shops - 2009 (248) ELT 69 (Kar).

In view of the above, biscuits exported in the present case do not bear MRP/RSP and therefore exemption available only to biscuits bearing MRP/RSP of less than Rs. 100 per kg is not available to biscuits exported.

Further in Chapter 3 of CBEC's Supplementary Instructions at para 6.2(d) it has been clarified that in cases where RSP is not printed on goods exported, Section 4A is not applicable. The aforesaid clarification would further support their stand that the exemption based on RSP was not available to the biscuits exported and hence, their payment of duty is correct.

The impugned Order holds that, the notification 3/2006-CE does not require the goods to which exemption is granted to be subject to valuation under section 4A hence, para 6.2 (d) of Chapter 3 of CBEC Supplementary Instructions would not be useful to them

In this connection, it is submitted that, the said para 6.2 (d) specifies the illustrative list of items on which MRP cannot be printed and under such list, one of the items is Export goods and the applicants take recourse to support their contention that, the biscuits exported by them also do not bear MRP hence, exemption under notn. 3/2006-CE to biscuits cleared in packaged form having retail sales price less than Rs.100 Per Kg is not available. In consequence of which, their payment of duty on goods exported is correct and rebate of such duty paid is admissible.

They rely upon the case of one of their Contract Manufacturing Unit i.e. Modi Bakers Case wherein the Tribunal -Mumbai vide Final Order No. A/385/14/EB/C-II dated 23.5.2014 has held that, the requirement of affixing MRP is only meant for goods required to be sold in India and has nothing to do with the goods exported, hence, any exemption given on basis of MRP applies to goods sold in India and has no application whatsoever in respect of identical goods exported.(the applicant has enclosed the copy of said CESTAT Order).

8.6 Till 1.7.2001, as per Explanation (i) to Rule 12 (Rebate of duty), the expression "manufacture" included the process of blending of any goods or making alteration or any other portion thereon.

Interpreting the said Rule 12 of CER, 1944, CBEC, vide its Circular No.129/40/95- CX dated 29.5.1995, in para 2.2, had clarified that the benefit of inputs stage rebate under Rule 12(1)(b) can be claimed on export of all finished goods, whether excisable or not. But by Notification No.42/94-CE(NT), this facility has been extended only to goods appearing under the Schedule to the CETA. It is not necessary that the goods exported are chargeable to central excise duty. Consequently, the benefit under Rule 12(1)(b) of CER, 1944, could be claimed even by a unit exempted from registration under Rule 174 of CER, 1944, in view of production of goods exempted from payment of central excise duty. It is not necessary that the eligible finished goods to be exported are chargeable to central excise duty for allowing rebate, as, rebate claim is permissible on export of all finished goods, irrespective of whether they are excisable or not;

Further, in the said Circular in para 2.5, it was clarified that the definition "manufacture", for the purpose of grant of input stage rebate, had also been

made liberal to include the process of blending, grinding, or any other operation thereon.

New Central Excise Rules were brought on statute book w.e.f.1.7.2001 and, according, to Rule 18 thereof, rebate of duty paid on excisable goods exported and/or duty paid on materials used in the manufacture or processing of such export goods is admissible.

From the above, it is clear that what was provided in Explanation to Rule 12 of CER, 1944, has also been incorporated in Rule 18 of CER, 2002.

Notification No.40/01-CE(NT) permits rebate of duty paid on excisable goods exported to all countries, except Nepal and Bhutan. Notification No.21/2004-CE(NT) [erstwhile Notn.No.41/01 -CE(NT)] permits rebate of duty paid on excisable goods used in the manufacture or processing of export goods.

In a nutshell, Explanation to Rule 12, as it was in vogue till 30.6.2001, has been incorporated in Rule 18 and Notification No.41/2001-CE(NT) and/or 21 /2004- CE(NT).

Interpreting Rule 18 of CER, 2002, CBEC, in its Excise Manual Supplementary

Instructions, as on 1.9.2001, in Chapter 8, has clarified as under:

Para 1.2 Et 1.3 of Part-V of Chapter 8 of CBEC's Excise Manual of Supplementary instructions (Rule 18):

"1.2 It may be noted that in Rule 18 and in the said Notification, expression "export goods" has been used. It refers excisable goods (dutiable or exempted) as well as non-excisable goods. Thus, the benefit of input stage rebate can be claimed on export of all finished goods whether excisable or not.

1.3 It may be also noted that materials may be used for manufacture or processing. In other words, any processing not amounting to manufacture (such as packing blending etc.) will also be eligible for the benefit under said notification."

Similar clarification also exists in para 1.2 and 1.3 of Part-V of Chapter 8 in the CBEC's Excise Manual of Supplementary instructions 2005 issued on 17.5.2005, the relevant portion of which is as reproduced below:

"1.2 It may be noted that in Rule 18 and in the said Notification, expression

"export goods" has been used. It refers excisable goods (dutiable or exempted) as well as non-excisable goods. Thus, the benefit of input stage rebate can be claimed on export of all finished goods whether excisable or not.

1.3 It may be also noted that materials may be used for manufacture or processing. In other words, any processing not amounting to manufacture (such as packing bleding etc.) will also be eligible for the benefit under said Notification."

In view of the above, rebate of the duty is admissible, even if the resultant products are excisable or otherwise.

8.7 Even if assuming without accepting that, the biscuits exported are exempt goods, it is a settled position of law that even if duty is paid on exempt goods, rebate is admissible, based on the following judgements:-

CCE, Vadodara V Jayant Oil Mills – 2009 (235) ELT 223 (Guj) (Para 7,8 & 9)

Suncity Aloys Pvt. Ltd. 2007 (218) ELT 174 (Raj) (Para 3).

The tribunal has taken the same view, which, to the best of their knowledge, has not been challenged by the Dept.

(a) Norris Medicines Ltd. 2003(56) RLT 353 (T)
(b) Medispan Ltd. 2004 (178) ELT 848 (T)

The Commissioner of Central Excise, (Appeals), Mumbai Zone I, in their own case, vide Order-in-Appeal No. M-1/PAP/134/2010 dated 19.3.2010, has held that, rebate of duty paid on biscuits of RSP less than Rs. 100 per kg exported is admissible. The said Order-in-appeal dated 19.3.2010 has been accepted by the dept., which fact has been specifically acknowledged and accepted by Commissioner of Central Excise (Appeals), Mumbai Zone I, in Order-in-Appeal No. SB/59/M-IV/10 dated 29.7.2010, in the Applicant's own case, wherein it was held that, credit of duty paid on inputs is admissible, even if resultant product is exempt.(Copy of OIA enclosed).

8.8 They rely upon the Orders of the Tribunal wherein it has been consistently taking a prima facie view in their own case that, credit of duty paid on inputs used in manufacture of biscuits exported is admissible and cannot be denied just because biscuits are subject to NIL rate of duty. The said Orders are as follows:

a) Bunty Foods (I) Pvt. Ltd.-Order No. S/257/10/EB/ C-11 dated 13.09.2010

b) Bunty Foods (I) Pvt. Ltd.-Order No. S/263/10/EB/ C-11 dated 24.09.2010

The impugned Order holds that in the Applicants own case, Joint Secretary (RA), Government of India, New Delhi vide Order- No. 128-130/2013 dated 14.2.2013 on similar issue has set aside Commissioner (Appeals) order in favour of Applicants, and has held in favour of revenue and which Order on challenge has not been stayed by High Court, hence is binding precedent.

In this connection, they submit that, Learned Revisionary Authority in the said Order dated 14.2.2013 relies upon Order-in-Original No. 5/BR-01/TH-1/09 dated 12.8.2009 passed by CCE, Thane-I which had disallowed the credit availed on inputs used in manufacture of exempted biscuits and ordered for recovery of credit along with interest and also has imposed penalty. The said Order-in-Original on challenge before Tribunal has been stayed by Order No.S/263/10/EB/ C-11 dtd. 24.09.2010 and has prima facie held that, credit is admissible.

Further, the said Order also does not consider any of the judgments of various High Courts, Tribunal judgments relied upon hereinbefore, especially the Final Order of the Tribunal dated 23.05.2014 in case of Modi Bakers.

In view of the above submissions, the impugned Order in Appeal is not sustainable.

9. A personal hearing in these cases was held on 17.02.2021 through video conferencing which was attended online by Shri Sachin Chitnis, Advocate and reiterated the points made in earlier submissions. In respect of Revision Application No. 195/204/13-RA, he submitted that they were not given opportunity to file cross objections. He requested for one week's time for filing additional written submissions.

10. In their written submission filed during the previous personal hearing, on 09.12.2019, the applicant contended as under:-

When the Writ Petition against rejection of rebate claims is pending for final decision by the Hon'ble High Court, they earnestly requested to keep the matter in abeyance till the final verdict of Hon'ble High Court. Without prejudice, even on merits, they submitted that the impugned Order is not sustainable inasmuch as:

(i) That the fact of payment of duty and export of duty paid Biscuits is not in dispute at all. Therefore, once the duty paid goods are exported, rebate of duty thereon is admissible, under Rule 18 of CER, based on settled position of law on the issue;

(ii) That exemption under Notn.No.3/2006-CE (Sr.No.18A) is not absolute one, but it is conditional one, as exemption was available only if the "per Kg Retail Sales Price equivalent not exceeding Rs.100/-"; In other words, if the RSP/MRP per Kg is more than Rs.100/-, exemption thereunder was not available;

(iii) That the barring provisions of Section 5A(1A) of CEA would be applicable only to those goods which are exempted absolutely and not to the goods exempted conditionally;

(iv) That even if duty is paid on the exempted goods exported, still the rebate of such duty paid is admissible, in support of which reliance is placed on the following judgments:

(a) Arvind Ltd. - 2014 (300) ELT 481 (Guj)
(b) Arvind Ltd. Upheld by Supreme Court - 2017 (352) ELT A-21 (SC)
(c) Hindustan Platinum - 2017 (352) ELT 105 (Tri)

(v) That requirement of affixing of MRP under SWMA is not applicable to exported goods; as a result, exemption on the basis of MRP of less than Rs.100/- per Kg under the above Notification No. 3/2006-CE is meant only for goods sold in home market and not applicable to export of such goods, in support of which reliance is placed on the following judgments:

(a) Modi Bakers - 2014 (309) ELT 547 (T)

(b) Jaypee Cement - 2017 (358) ELT 427 (T)

(vi) That exemption under any Notification is available to the goods cleared for home consumption and not for the goods cleared for export, unless it is specifically provided for, as the goods exported are not treated as exempted goods for the purpose of central excise law;

(vii) That the requirement of affixation of RSP/MRP on the goods would be applicable to the goods cleared to home market and not on the goods cleared for export, as the provisions of Standards of Weights & Measures Act (Legal Metrology Act) and/or Rules made thereunder would be applicable in India, i.e. to the goods cleared in home market and not to the goods exported to international market, in support of which reliance is placed on the following judgments/CBEC clarifications:

(a) Flemingo Duty Free Shops Pvt. Ltd. - 2009 (248) ELT 69 (Kar)
(b) Modi Bakers - 2014 (309) ELT 547 (T)
(c) Timewell Technics Pvt. Ltd. - 2009 (238) ELT 643 (T)
(d) Indo Nissin Foods Ltd. - 2008 (230) ELT 143 (T)
(e) Gillette India Ltd. - 2006 (193) ELT 331 (T)
(f) Para 6.2(d) of CBEC Circular No.625/16/2002-CX dated 28.2.2002

(viii) That rebate under Rule 18 of CER was admissible to the "export goods". The expression "export goods" means excisable goods (dutiable or exempted) as well as non-excisable goods, which gets support from the clarification given by CBEC in Para 1.2 of Part-V of Chapter 8 of Supplementary Instructions in CBEC's Central Excise Manual, 2005;

(ix) That, in any case, if the goods exported were exempted and no duty thereon was payable, then the duty wrongly paid thereon cannot be considered as "duty" and it should be considered as only a mere "deposit" with the Govt. in which case, the Dept. must return such deposit to the assesse, as

the Dept. is not empowered to keep any money collected unlawfully, in support of which reliance is placed on the following judgments:

(a) Ravi Foods - 2018 (16) G.S.T.L. (A.P.)
(b) Suncity Alloys Pvt. Ltd. - 2007 (218) ELT 174 (Raj)
(c) Jayant Oil Mills - 2009 (235) ELT 223 (Guj)
(d) Capital Impex (P) Ltd. - 2010 (261) ELT 844 (Tri)

(x) That once rebate was lawfully sanctioned and paid, the question of recovery of the same and/or interest thereon also does not arise at all.

With the above submissions and those made in the Revision Application, PPPL prayed to either keep the matter pending till final verdict from the Hon'ble High Court on the Writ Petition filed by them against earlier Order passed by the JS(RA)-GOI or to allow their Revision Application, in view of subsequent development of law on the issue in favour of the trade, including the Hon'ble Gujarat High Court judgment in the case of Arvind Limited, which has been upheld by the Hon'ble Apex Court (supra), the ratio of which squarely covers the issue in dispute in the present case also. It is prayed accordingly.

11. In their additional written submission filed through email dated 17.02.2021 the applicant submitted as under :-

In support of the contention that the clearance of biscuits on payment of duty under Sr.No.18 of Notfn. No. 3/06 is legal and proper, exhaustive arguments were made inasmuch as:

(i) that the provisions of Standards of Weights and Measures Act, 1976 and Rules framed there under are not applicable for the goods exported;

(ii) that provisions of Section 5A[1A) apply only to goods to which exemption is granted absolutely;

(iii) that exemption under Sr.No.18A of Notfn. No. 3/2006-CE applies subject to fulfilment of various conditions in as much as it is applicable only when

(iv) that the exemption notification issued under Section 5A is applicable for domestic clearances and does not apply to exports ;

(v) that reliance was placed on the following judgments (Compilation of which was emailed on :

(I)	**Even if exempted goods exported on payment of duty - rebate admissible:**
	Notn.No.3/2006-CE dated 1.3.2006
	Section 5A of CEA, 1944
	Section 2(d) of CEA, 1944

	Rule 2(4) of CCR, 2004
	Rule 18 Et 19 of CER, 2002
	Notn.No.19/2004-CE
	Para 1.2 & 1.3 of Part V of Chapter 8 of CBEC'S EXCISE MANUAL of Supplementary Instructions, 2005 issued on 17.5.2005 by CBEC (Export without payment of duty)
	Para 6.2(d) of Part II of Chapter 3 of CBEC's EXCISE MANUAL of Supplementary Instructions, 2005 issued on 17.5.2005 by CBEC
	CBEC No.940/1/2011-CX dated 14.01.2011
10.1	Arvind Ltd. – 2014(300) ELT 481 (Gui)
10.2	-do- Upheld by SC - 2017 (352) ELT A-21 (SC)
11.	Hindustan Platinum - 2017 (352) ELT 105 (T)
(II)	**Exempted goods exported on payment of duty - Govt not entitled to retain amount - rebate admissible**
	Suncity Aloys - 2007 (218) ELT 174 (Raj)
	Ravi Foods - 2018 (16) GSTL 80 (A.P.)
(III)	**Requirement of mentioning/affixing MRP under Standard of Weights and Measures Act, 1975 not applicable to export:**
	Modi Bakers - 2014 (309) ELT 547 (T)
	Jaypee Cement - 2017 (358) ELT 427 (T)

(vi) that specific query regarding payment, the Applicant say that they have paid duty from PLA as well as utilizing credit.

12. Government has carefully gone through the relevant case records and perused the impugned orders-in-appeal and the orders-in-original. The applicant had filed rebate claims in respect of duty paid on biscuits cleared for export which were exempt from payment of duty under Notification No. 03/2006-CE dated 01.03.2006. The Departments contention was that the applicant did not have the option to pay duty on these goods as the sub-section (1A) of Section 5A of the CEA, 1944 was applicable to these clearances.

13.1 The rebate claims filed by the applicant and involved under R.A. No. 195/204/13-RA had originally been sanctioned by the jurisdictional Deputy Commissioner vide his OIO dated 08.05.2012. The Department filed appeal before Commissioner(Appeals) against the order sanctioning refund. The OIO dated 08.05.2012 was annulled by the Commissioner(Appeals) and the revision application filed by the applicant against the OIA has been registered as R.A. No. 195/204/13-RA.

13.2 The rebate claims involved under R.A. No. 195/320/14-RA had been rejected by the Assistant Commissioner vide his OIO's dated 30.11.2009. The matter was carried in appeal by the applicant before the Commissioner(Appeals) who allowed the rebate claims. The Department filed revision application against this order. During the pendency of the revision application, the rebate claims had been sanctioned to the applicant in terms of the order of Commissioner(Appeals) allowing the rebate claims. However, protective demands were issued to the applicant. The Revisionary Authority allowed the application of the Department vide Order No. 128-130/2013-CX

dated 14.02.2013. Aggrieved by this order, the applicant had filed Writ Petition No. 2214/2013 before the Hon'ble Bombay High Court. The writ filed by the applicant is pending before the Hon'ble High Court. However, since there was no stay against this order of the Revisionary Authority, the protective demand issued to the applicant was confirmed by the original authority and upheld by the Commissioner(Appeals) vide OIA dated 27.06/08.07.2014. This order of Commissioner(Appeals) is impugned in these proceedings.

14.1 Government observes that the Sr. No. 18A of Notification No. 03/2006-CE dated 01.03.2006 provides for exemption to biscuits cleared in packaged form with per kg retail price equivalent to or less than Rs. 100/- per kg. This notification has been issued under sub-section (1) of Section 5A of the CEA, 1944. The sub-section (1A) of Section 5A of the CEA, 1944 is relevant to the interpretation of the applicability of this notification. The sub-section (1A) of Section 5A of the CEA, 1944 is reproduced below.

> *"(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods."*

14.2 On going through sub-section (1A) of Section 5A of the CEA, 1944, it is observed that to qualify for exemption contained in Notification No. 03/2006-CE dated 01.03.2006, the retail price of the biscuits should be Rs. 100/- per kg. or less. This sub-section does not specify that the goods should be covered by the provisions of the Standards of Weights and Measures Act, 1976 or that the goods should be printed with RSP/MRP. The notification also does not state that the exemption would not apply when such goods are exported. The exemption under the notification has been granted absolutely to biscuits whose retail price is equivalent to or less than Rs. 100/- per kg. and hence the manufacturer did not have the option to compulsorily avail the exemption by virtue of the express provision under sub-section (1A) of Section 5A of the CEA, 1944. The term "absolutely" used in the sub-section means that the exemption is available irrespective of any condition. In the present case, the exemption available cannot be said to be a conditional exemption as no condition is required to be fulfilled for availing the benefit thereof. Illustratively, if the exemption was subject to the condition that the MRP/RSP of Rs. 100/- or less per kg. requires to be affixed on the product, then the exemption could have been construed to be conditional. Since there is no such condition prescribed, the exemption available to biscuits with retail price of Rs. 100/- per kg. or less in Notification No. 03/2006-CE dated 01.03.2006 has to be compulsorily availed by the applicants for both domestic clearances as well as exports.

15.1 As per the provisions of Para 4.1 of Part I of Chapter 8 of the Supplementary Manual, the goods cleared for export shall be assessed to duty in the same manner as the goods cleared for home consumption. In the case laws relied upon by the applicant, the appellate authority had held that when

two exemption notifications are available, it is up to the assessee to choose the one which is beneficial to him. In the present case, the applicant had availed the benefit of exemption notification for home clearances and paid duty on clearances for export which was not permissible as per law. If two exemption notifications are in existence, it would be his prerogative to avail the one which is beneficial to him. The applicant cannot simultaneously avail exemption for the same goods and choose to not avail it for those goods at other times. By choosing to avail the benefit of exemption notification, the applicant was bound to avail it for all clearances of those goods.

15.2 The availment of CENVAT credit on the inputs utilised for the manufacture of biscuits entailed that only part of such CENVAT credit was being used to pay duty on the final products cleared for export. Such a practice would detract from the concept and purpose of the CENVAT scheme. Concept of tax on export to be zero rated cannot mean that tax not concerning with export is loaded on export goods somehow to encash the same.

15.3 Ratio laid down by the judgment of the Hon'ble Gujarat High Court in the case of Arvind Ltd. vs. UOI[2014(300)ELT 481(Guj.)] which has thereafter been affirmed by the Hon'ble Supreme Court[2017(352)ELT A21(SC)] is relevant here. In that case, inspite of there being an exemption notification which fully exempted their goods, Arvind Ltd. had availed the benefit of Notification No. 59/2008-CE dated 07.12.2008 and paid duty on the export goods. The relevant portion of the said judgment of the Hon'ble Gujarat High Court is reproduced below.

> *"**9.** On, thus, ...It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.*
>
> ***10.** We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. ....."*

15.4 In the above judgment, Hon'ble High Court has laid down that when there are two exemption notifications which co-exist, the assessee can avail one for domestic clearances and the other one which is beneficial to them for export so as to obtain refund/rebate of duty paid on inputs used in the exported goods(emphasis supplied). Thus, as long as, intent is to get refund/rebate of duty paid on inputs consumed in exported goods, exporter can choose to pay higher rate of duty on exported goods, even if it is an effective rate.

15.5 In the instant case, since applicant did not maintain separate accounts for utilising inputs while availing exemption for domestic clearances and paying duty on exports of the same goods, the applicant was required to follow provisions of Supplementary Manual, and the goods cleared for export were required to be assessed to duty in the same manner as the goods cleared for home consumption.

16. Government observes that the rebate claims filed by the applicant in R.A. No. 195/204/13-RA involve duty paid out of CENVAT account where the final product was fully exempt. The applicant did not have the option to pay duty on those clearances in view of the stipulation in respect of goods which are fully exempt under Section 5A(1A) of the CEA, 1944. The option available to the applicant would have been to claim the rebate of duty paid on inputs used in the manufacture of the export goods by following the ARE-2 procedure. The applicant has put forth some arguments to contend that the provisions of the Standards of Weights and Measures Act would not apply to export clearances. However, the exemption Notification No. 03/2006-CE dated 01.03.2006 does not exclude export goods from its ambit.

17. The inadmissibility of rebate claims involved under R.A. No. 195/320/14-RA has already been decided by the Government in revision proceedings. What is now before the Government for decision is the sustainability of the demand which has been confirmed by the lower authorities in pursuance of the Order No. 128-130/2013-CX dated 14.02.2013. Without prejudice to the findings on merits recorded hereinbefore, the rebate sanctioned to the applicant would be recoverable from them in view of the rebate having been held to be inadmissible by the order of the Revisionary Authority. Although the applicant has filed a Writ Petition before the Hon'ble Bombay High Court against the Order dated 14.02.2013, the Hon'ble Court has not stayed the proceedings.

18. Government finds no reason to modify the OIA No. P-I/MMD/202/2012 dated 17.10.2012 and OIA No. PD/45/Th-I/2014 dated 27.06.2014. In the result, the OIA's impugned in these proceedings are upheld.

19. The revision applications filed by the applicants are rejected.

7/9/21

(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 305-306 /2021-CX (WZ) /ASRA/Mumbai Dated 07.09.2021

To,
M/s. Parle Products Pvt. Ltd.,
North Level Crossing, Vile Parle (East),
Mumbai – 400 005.

Copy to:

1. Commissioner of Central Goods & Services Tax, Thane Rural, 4th Floor, Central GST Bhawan, Plot No 24-C,Sector-E, Bandra Kurla Complex, Bandra (E), Mumbai-400051.
2. Commissioner of Central Goods & Services Tax, Thane Appeals, 12th Floor, Lotus Info Centre, Near Parel Station (East), Mumbai-400012.
3. Principal Commissioner of Central Goods & Services Tax, Pune-I
   GST Bhavan, ICE House, Opp. Wadia College, Pune-411001
4. Commissioner of Central Goods & Services Tax, Pune Appeals-I, GST Bhavan, F Wing, 3rd Floor, 41-A,Sassoon Road, P.B. No. 121, Pune-411001
5. Sr. P.S. to AS (RA), Mumbai
6. Guard file
7. Spare Copy.