F.No. 195/296(I-VII)/13-RA

REGISTERED SPEED POST

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
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F.No. 195/296(I-VII)/13/RA /181 Date of Issue: 12.01.2023

ORDER NO. 09-15 /2023-CX (WZ)/ASRA/MUMBAI DATED 16.1.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : - Revision Application filed under Section 35EE of the Central Excise Act, 1944 against OIA No. Sur-Excus/Vdr/App/64to70/2014-15(Final order) dated 31.03.2015 passed by the Commissioner of Central Excise Customs & Service Tax, Vadodara-I(Appeals).

Applicant : M/s Indian Oil Corporation Ltd.

Respondent: - Commissioner of CGST & CX , Vadodara.

ORDER

This Revision application is filed by M/s Indian Oil Corporation Ltd.(hereinafter referred to as 'Applicant') against the Order-in-Appeal No. Sur-Excus/Vdr/App/64to70/2014-15(Final order) dated 31.03.2015 passed by the Commissioner of Central Excise Customs & Service Tax, Vadodara-I(Appeals)

2. Briefly stated, the Applicant is engaged in the manufacture of petroleum products falling under Chapter 27 and 29 of the Central Excise Tariff Act, 1985. During the scrutiny of the periodical ER-1 for the months/ periods it was observed that they had cleared various petroleum products viz. Naptha and ATF under the bond for export to various locations as per the provisions of Rule 20 of the Central Excise Rules, 2002 read with CBEC Circular No,. 579/16/2001-CX dated 26.6.01 and No. 581/18/2001-CX dated 29.6.01. According to the prescribed procedure, the consignor should receive the duplicate copy of the warehousing certificate, duly endorsed by the consignee (AR3A), within ninety days of the removal of the goods or such extended period as the Commissioner may allow. As per Rule 20(4) of the Central Excise Rules, 2002, the consignor is liable to pay the appropriate duty leviable on such goods which, are dispatched for warehouse and not received at the said warehouse. During the period, the total duty on such short/excess receipt of goods at the place of destination comes to Rs. 2,00,49,399/-. The details are as:

Sr. No.	OIO NO. & Date	OIA No. and Date	Duty involved in short received (Rs.)	Duty involved in Excess received (Rs.)	Total Amount of Demand involved (Rs.)
1	15-24/DEM/ADC/D-IV/09 dated 23.03.2009	Sur-Excus/Vdr/App/64to70/2014-15(Final order) dated 31.03.2015	16920980	1559408	18480388
2	6/IOCL/Div-IV/VDR-I/10-11 dated 02.08.2010		36574	141399	177973
3	13/IOCL/D-IV/VDR-I/11-12		179382	229624	409006

	dated 28.06.2011				
4	11/IOCL/VDR-I/10-11 dated 30.09.2010		123249	29379	152628
5	14&15/IOCL/Dn-IV/VDR-I/11-12 dated 28.06.2011		339698	267468	607166
6	30/IOCL/Dn-IV/VDR-I/2011-12 dated 26.08.2011		42323	0	42323
7	01/Dn-IV/VDR-I/2010 dated 12.04.2020		179915	0	179915
Total			17822121	2227278	20049399

Accordingly, various show cause notices as mentioned impugned each Order-in-originals issued by Additional Commissioner, Central Excise & Customs, Vadodara-I and also various show cause notices issued by Assistant Commissioner, Central Excise & Customs, Division-IV, Vadodara-1 were issued to IOCL Vadodara, for recovering the total duty amount of Rs. 2,00,48,988/- along with interest.. All the show cause notices also proposed for imposing penalty under Rule 25 of the Central Excise Rules, 2002. After following the principles of natural justice the respective Adjudicating Authority vide impugned orders confirmed and ordered to recover the duty amount of Rs. 2,00,49,399/- along with appropriate interest and also imposed penalty of Rs. 2,00,49,399/- on the applicant. Being aggrieved by the aforesaid Order in Originals, the Applicant filed appeal before the Commissioner of Central Excise Customs & Service Tax, Vadodara-I(Appeals), who vide Order-in-Appeal No. Sur-Excus/Vdr/App/64to70/2014-15(Final order) dated 31.03.2015 rejected the appeal and upheld the OIO.

3. Being aggrieved by the impugned Order, the applicant has filed the present revision application mainly on the following common grounds:

i. The applicant states that Hon'ble Commissioner (Appeals) has erred in rejecting the claim of 1% transit loss in the quantity of petroleum products

on the ground that the government has withdrawn domestic facility vide circular no 796/29/2004-CX dated 4.09.2004, without appreciating facts of the present case, which is illegal and unjustified. The circular referred above is pertaining to the facilities for removal of petroleum products without payment of duty from the refineries to domestic customers and not for export purpose and the same is being admitted by the Joint Commissioner in the impugned order. In such a situation, how can he deny the benefit available for removal of petroleum products for export under CT-2 clearances on the basis of the circular which is not applicable in the present case and therefore the order passed by the Hon'ble Commissioner (Appeals) is illegal, unjust and improper.

ii. The applicant states that the Hon'ble Commissioner (Appeals) has erred in not appreciating the clarifications given by the board looking to the nature of the product. The Board has given dispensation not only the storage upto AFS has been allowed but mixed storage has also been allowed thereby duty paid goods can be stored along with the non duty paid excisable goods in the warehouses. In para 6.3 of the circular no 804/1/2005-CX dated 4.01.2005 it has been specifically clarified that the Commissioner of Central Excise having jurisdiction over the warehouse may permit the registered person of the warehouse to store duty paid excisable goods or duty paid imported goods along with non duty paid excisable goods in the warehouse subject to conditions, procedure and manner of payment of duty prescribed by him. The Hon'ble Commissioner (Appeals) has lost sight that under the above dispensation, the losses after the storage have not been allowed by CBEC and stated in the aforesaid circular that no storage losses are permitted in the export warehouse/tanks whether intermediate or at AFS including those with such mixed storage and any transit losses after the first warehouses are not allowed because it has been stated that the removal of goods from one export warehouse to another warehouse is not covered in the above referred circular. Typically there could be three type of losses when goods are allowed to be stored in export ware house/tanks. These are (1) transit loss when transporting goods from factory to export ware house/tanks, (1) storage loss in export ware house/tanks and (ii) transit loss in transferring goods from first export ware house/tanks to another export ware house/tanks and all subsequent transfer. What the Circular, referred above, disallows is losses mentioned in clause (ii) and (iii) and not (i). In other words, whereas Circular referred above does not allow storage loss of export ware house/tanks and

transit losses when transferring goods from one export ware house/tanks to another export ware house/tanks, it does not bar transit losses suffered during transport of goods from refinery (factory) to any export ware house/tanks Hence it is very clear that the losses other than storage losses still continued to be allowed that is starting from the handling losses at the Refinery loading, transit losses thereafter unloading etc., till the storage. In such a situation, the order passed by the Hon'ble Commissioner (Appeals) is illegal and required to be set aside in the interest of justice.

iii. The OIO raises the issue of the Excess receipts at the destination. In this regard it is to submit that with regard to the Excess quantity warehoused the goods would be ultimately exported & hence no duty liability arises. It is also contended that the goods were not diverted. Further to the above, we have received favourable orders from: Commissioner (Appeals), Central Excise & Customs, Vadodara: vide Order in Appeal No. Commr (A)/283/VDR- 1/2011 dated 09.08.2011.

iv. The Applicants have followed the procedure specified in Circular No.581/18/2001-CX Dated 29.6.2001. The Applicants have therefore cleared goods for export warehousing from refinery against ARE-3 and under cover of invoice. The central excise officer in charge of the warehouse will issue certificate in duplicate of removal in the form CT- 2 indicating the details of general bond executed. Corresponding number of CT-2 is indicated in each ARE-3. For receipt of goods in warehouse procedure specified in Circular No.579/16/2001-CX Dated 26.6.2001 is followed.

v. Transit losses upto 1% are condonable in view of circulars issued from time to time in this regard. Removal of warehousing provisions for Petroleum products w.e.f. 16.9.2004 is not relevant for the purpose of condonation of losses upto 1% of Petroleum products removed from factory to export warehouses. This condonation of losses has been granted considering the volatile nature of petroleum products and considering the fact that there can be various natural and inevitable reasons for losses of petroleum product from manufacturing premises to bonded warehouse or from one warehouse to another warehouse. This condonation by the board is not pursuant to any statutory provision but is on account of the nature of product.

vi. As can be seen from Circular Dated 30.10.1985 condonation upto 1% has been allowed in respect of transportation from wagon. Whereas circular of 1956 provides condonation upto 1% if distance is more than 50 kms,

Therefore, condonation of losses upto 1% as claimed by the Applicant is on account of the fact that the petroleum products were transported in Tank wagon/Truck tanks for the purpose of export warehousing. On any any loss in excess of 1% the Applicants have already discharged duty liability along with interest.

vii. The Applicant therefore submit that condonation of loss upto 1% as claimed by the Applicants is not under the warehousing provisions under Central Excise Rules or notifications issued thereunder but is on account of the fact that it has been practice since ages to allow such condonation considering the nature of product in which Applicants are dealing. In the Applicants own case vide Order No.93-104/91 Dated 14.2.1991 the condonation upto 1% has been allowed by the Joint Secretary, Government of India and same has been accepted by the department. Therefore, the impugned order to the contrary is liable to be quashed and set aside.

viii. The Applicant submits that in the present case, in view of the Circulars issued from time to time and in view of the decision of the Government of India in the Applicants transit loss upto 1% was condoned for movement of goods from refinery to warehouse/export warehouse and no duty was paid by them. The Applicants as admitted in the facts of the present case has already paid up duty along with interest in case where transit losses are in excess of 1%.

ix. In view of the above, there is a practice to allow variation in measurement by weight/volume to the extent specified, in respect of certain commodities. Such variations in measurement fall within the purview of permissible errors. In view of the above, in the present case, the transit loss upto 1% will fall within the purview of permissible errors and no duty demand can be raised.

x. For the reasons submitted above, the Applicants submit that duty demand on excess quantity cannot be raised. As explained such shortage and gains can be on account of number of reasons and it cannot be alleged against the Applicant that they were involved in clandestine removal activity and more so when they are a Public Sector undertaking.

xi. In view of the above, the applicant requested to set aside the Impugned OIA dated 05.06.15 with consequential relief.

4. Personal hearing in this case was scheduled on 08.10.2021,14.10.2021,22.03.2022 and 29.03.2022. However, neither the

applicant nor respondent appeared for the personal hearing on the appointed dates, or made any correspondence seeking adjournment of hearings despite having been afforded the opportunity on more than three different occasions and therefore, Government proceeds to decide these cases on merits on the basis of available records.

5. Government has carefully gone through the relevant case records, written submissions and perused the impugned letters, Order in Original and Order-in-appeal.

6. On perusal of records, Government finds that issues involved in the instant case are:

i. Whether the duty has been rightly demanded on the excess quantity cleared by the Applicant and received by the consignee at the place of re-warehousing under bond.

ii. Whether transit loss upto 1% in case of export goods is admissible to the Applicant.

iii. Whether the penalty has been rightly imposed.

7. As far as the issue of demand on excess quantity received by the consignee, the same has been elaborately discussed under para 27 to 29 of the OIA passed by the appellate authority before concluding that Applicants are not liable to pay duty on such transit gains. The relevant paras of the OIA are reproduced as:

"27. Now regarding the excess quantity received by the consignee, I find that the Appellants have stated that Marginal Transit Gains recorded in the re-warehoused AR3As may occur when petroleum products are handled in bulk due to temperature / density variations. Any gains recorded in AR3As are also accounted in the stock register at the consignee end which are reported to their jurisdictional range in their monthly returns. Storage tanks of Naphtha at Kandla is registered as "Export Warehouse". Even though the sourcing of Bonded Naphtha at Kandia is from various refineries, entire quantity is exported and no diversion to DTA is taking place. As the sourcing of the goods is from various refineries and exports are in bulk quantities it is very difficult to maintain quantity wise correlation of receipts & exports source wise.

28. I find that the provision of sub-rule (4) of Rule 20 of Central Excise Rules, 2002 is unambiguous and clear which states as under:

"(4) if the goods dispatched for warehousing or re-warehousing are not received in the warehouse, the responsibility for payment of duty shall be upon consignor".

29. As per the records placed before me, I find that in respect of transit gains, maximum amount demanded in show cause notices pertains to transit gains in respect of Naptha and in

respect of ATF it is comparatively very low. In the instant case, it is implied that the amount shown in respect of gains for which duty has been demanded has been reflected in the warehousing certificate and the" department came to know about the gains as the same were reflected in the records. The Adjudicating Authority in paras of the impugned order has held that the issue whether the goods are finally exported or diverted for home consumption after warehousing, is for the Jurisdictional Central Excise Authorities of the respective export warehouses to decide. Thus, even if the Appellants want to clear the product in domestic market, it cannot be done without completing the excise procedures and duty would have been recovered at their end. Thus it is evident that there is no clandestine removal and there is no mens rea or intention to evade payment of duty. Further, the department has not been able to prove any case of clandestine removal or the intention of the Appellant to evade payment of duty: It is also seen that the transit gains recorded are not a regular feature in all the consignments cleared. Therefore, the grounds advanced by the Appellants that transit gains occur when petroleum products are handled in bulk and due to temperature/density variations, seems convincing enough. Further, when the entire quantity has been exported, the question of recovering duty does not arise. I, therefore hold that the Appellants are not liable to pay duty on such transit gains."

Government agrees with the above observations recorded in impugned OIA by the Appellate Authority. Government notes that since the entire quantity in respect of the transit excess involving duty amounting to Rs. 22,27,278/- has been exported, the question of recovering duty on this ground does not arise. Thus, Government drops the demand raised in respect of the transit excess to the tune of Rs. 22,27,278/- and sets aside the impugned OIA on this count.

8. With regards to the issue of demand on the transit loss up to 1%, Government observes that Appellate authority has set aside the appeal relying on the GOI order 1272/2013-CX dated 18.09.2013 vide which Revisionary Authority decided the case in Applicant's own identical issue. While rejecting the appeal of the Applicant vide the aforesaid order, Revisionary Authority held that the transit loss is not allowed in absence of any explicit provisions in the law. The said case was not challenged by the Applicant and had attained finality. Furthermore, Applicant has also not brought any case law to the notice of the Government that challenges the facts of the case concerned. In the absence of any new facts emerging, this issue warrants no further intervention. Therefore, Government upholds the Appellate authority order on this count.

9. With regards to the imposition of penalty under rule 25 of Central Excise Rules 2002, Government finds that Adjudicating Authority has imposed penalty equivalent to the duty found recoverable. Rule 25 is reproduced as under:

" Rule 25. Confiscation and penalty. -

(1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, -

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notification issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousand], whichever is greater.

(2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice."

On examination of the fact, as discussed above, Government finds that conduct of Applicant, a public sector enterprise, does not call for imposition of equal penalty. No evidence has been brought forthwith to establish intent to evade of the Applicant. Payment of duty on losses of petroleum products subsequent to clearance from refinery has been an issue for a quite long time. Given the above, Government reduces the penalty to Rs.5 Lakhs.

10. In view of above, OIA No. Sur-Excus/Vdr/App/64to70/2014-15(Final order) dated 31.03.2015 is modified to the extent discussed in paras above.

11. The Revision Application is disposed off on above terms.

16/1/23

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

ORDER No. 09-15 /2023-CX (WZ) /ASRA/Mumbai Dated 16.01.2023

To,

1. M/s Indian Oil Corporation Ltd., Gujrat Refinery, P.O. Jawaharnagar, Vadodara – 391320.
2. The Commissioner of CGST, Central Excise Building, Ist Floor, Annexe, Race Course Circle, Vadodara – 390007.

Copy to:

1. The Commissioner of Vadodara(Appeals-I), 4th Floor, Central Excise Building, Opp. Gandhi Baugh, Chawk Bazar, Surat-395001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard file.