

**REGISTERED
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F.No. 195/572/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue.....11.07.13

Order No. 1073/13-cx dated 30-07-2013 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, under section 35 EE of the Central Excise Act, 1944.

Subject : Revision Application filed,
under section 35 EE of the Central Excise,
1944 against the Order-in-Appeal No.
M-I/RKS/118/2011 dated 29.03.2011
passed by Commissioner of Central Excise,
(Appeals), Mumbai-I.

Applicant : M/s. Bharat Petroleum Corp. Ltd.,
Mumbai.

Respondent : Commissioner of Central Excise,
Mumbai.

ORDER

This revision application is filed by the applicant M/s. Bharat Petroleum Corp. Ltd., Mumbai against the Orders-in-Appeal No. M-I/RKS/118/2011 dated 29.03.2011 passed by Commissioner of Central Excise (Appeal), Mumbai-I with respect to Order-in-Original No. A/05/2007-08 dt. 12-12-2007 passed by the Assistant Commissioner, Central Excise, Mumbai-I.

2. Brief facts of the case are that the applicant are engaged in the manufacture of various grades of lubricants falling under Chapters 27 and 34 of the First Schedule to the Central Excise Tariff Act, 1985. M/s BPCL in their monthly ER-1 return for the month of April 2006, indicated a shortage of 10,233.384 liters of various grades of Lubricating Oils, falling under Central Excise Tariff Heading 2710.90, which was noticed/found during the course of annual stock taking carried out on 31-03-2006. However, in the said return, they did not furnish any reason/explanation towards the shortages of excisable goods nor discharged the duty liability with respect to shortages noticed during stock-taking. A Show Cause - Cum-Demand-Notice dated 12-2-2007, was therefore, issued to the applicant inter alia, for demand and recovery of Central Excise duty amounting to Rs. 1,05,667/- (Basic Rs. 1,03,595/- + Education Cess Rs. 2,072/-) under Section 11A of the Central Excise Act, 1944 in respect of quantity of 10233.384 of Liters of Lubricating Oils of various grades, found short, taking into consideration the value of Rs.6,47,471/- of identical grades of lubricating oil cleared by the applicant and for recovery of interest under Section 11AB of the Central Excise Act, 1944. Further, imposition of penalty under Rule 25 of the Central Excise Rules, 2002 was also proposed for contravention of Rules 4 & 8 of Central Excise Rules, 2002. The adjudicating authority, vide impugned Order-in-Original, had confirmed the demand of Rs. 1,05,667/- under Section 11A of the Central Excise Act, 1944 read with Rule 4 and 8 of Central Excise Rules, 2002, along with interest under Section 11AB of Central Excise Act 1944. He has further imposed a penalty of Rs 1,05,667/- on the applicant under Rule 25 of Central Excise Rules 2002. The adjudicating authority, vide impugned Order-in- Original has inter alia held that the excess/shortage have

been found in packed goods entered in RG-I and 'that the packings of lubricating oil grades in which shortages were found are different from the packing of lubricating oil grades in which the excess has been found therefore the excess quantity cannot be adjusted against the shortages. He has further held that, the shortage was due to handling with forklifts, conversion of one grade to another grade, leakage etc. which are manmade and not natural. Further, the applicant had not declared that damaged goods are available and the applicant has not declared, that such goods are unfit for consumption and marketing. No unavoidable accident was reported by the applicant and therefore the instant case is not coming under the purview of rule 21 of the Central Excise Rules, 2002.

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals), who upheld the impugned Order-in-Original.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The applicant submit that Adjudicating Authority has while passing the impugned Order-in-Original has confirmed the demand under Section 11A of the Central Excise Act 1944. In this regard the Applicants would like to rely on the decision of Madras High Court in the case of Carborundum Universal Ltd. Vs. Union of India as reported in 1992(58) ELT 403 wherein the High Court has held that "The provisions of Section 11A will be attracted only in cases where the goods manufactured were removed or cleared and as a consequence there had been a resultant non-levy or non-payment or short levy or short payment or in case of erroneous refund". Whereas in the instant case it is not the case of the department that the disputed goods have been removed or cleared without the payment of applicable duty of excise but the demand has been confirmed on the quantities found short at the time of stock taking. Therefore the provisions of Section 11 A cannot be invoked in the present case. Thus the impugned order should be set aside on this ground itself. Further in the instant case the annual stock taking was carried

out by the Applicants themselves and not at the instance of the Jurisdictional Commissioner as envisaged in the Rule 223A of the erstwhile Central Excise Rules 1944. Therefore the Applicants submit that in the instant case even Rule 223A cannot be invoked and thus there is no legal standing of the impugned order passed by the respondent. The Applicants further submit that, in the matter which came for decision before the Madras High Court, shortages were lying between 2%-3% of the annual clearances and even these were condoned by the Hon'ble High Court. In the instant case the shortages are merely 0.048% of the total quantities handled by the LOBP which deserves to be condoned.

4.2 In the impugned order the Appellate Commissioner has also stated that Board's Circular No. 11-A/6170/Cx.4 dated: 30.04.1971 allows for condonation of 0.1 % for storage loss on Lubricating Oil Base Stock whereas in the present case the loss is with respect to the Lubricating Oils manufactured and packed in unit containers. Therefore the rationale of the aforesaid Circular cannot be applied to the instant case. The Appellate Commissioner has also ignored the reliance placed by the Applicants on the decision of CEGAT, East Regional Bench in case of Indian Oil Corporation Limited V s. Collector of Central Excise Calcutta as reported in 1984(15) EL T 479 (Tribunal), wherein, while dealing with the case of transit loss and gains of Jute Batching Oil, it was held that "It is true that neither the Central Excise Act nor the Rules made there under provide for condonation of loss of this nature. Just because there is no specific provision to condone the cases of this type, the authorities are not to act mechanically but duty is cast on them to examine as to whether the contention of the Applicants are correct or not".

4.3 The Applicants further submit that though the board has already issued the Circular condoning the storage loss in respect of Lubricating Oil Base Stock this would equally apply to finished lubricating oils also since LOBS content in each grade of lubricating oil would be in the range of 90% and 95%. Therefore, relying on the aforesaid judgment of the CEGAT and as per the aforesaid CBEC circular, losses upto the extent of 0.1 % should be condoned. The Applicants further submit

that the total shortages suffered as to the quantity of the Lubricating Oils amounts to only 0.004% of the total quantity.

4.4 The Appellate Commissioner has in the impugned Order stated that the Applicants have added up the quantities of Lubricating Oils falling under different Chapter Headings which is not allowable under the law. The Applicants submit that the contention of the Appellate Commissioner that losses in respect of the products classified under different Tariff headings cannot be clubbed together for determining total loss suffered for applying the condonation percentages also does not hold good because all the products manufactured at their LOPB is subject to the same operational exigencies and handling process which is the main culprit for the losses suffered by the Applicants. Simply because some products handled at the LOBP are classified under different Tariff Heading does not mean that the losses will not be suffered in respect of them. Therefore the Applicants submit that the impugned order be set aside and consequential relief be given to the Applicants.

4.5 The Appellate Commissioner in his impugned order has also stated that the gain in the quantities of Lubricating Oils observed at the time of stock taking was not reflected in the stock register and ER-I return has been adjusted against the losses observed to determine the actual shortages. The Applicants submit that various grades of lubricating oils manufactured are for the basic purpose of lubrication i.e. to avoid friction in metallic parts, the use of these grades by and large is identical. Therefore, there is always compatibility in the various grades and in order to meet the market requirement immediately certain grades are re-branded or re-processed and sold in the market. However, at the time re-processing or re-branding, necessary entries in the stock registers to show a "stock out" and "stock in" in the respective grades are not made resulting in loss under one product and gain in another.

4.6. The Appellate Commissioner in his impugned order in para 11(C), it has stated that in the instant case, out of 50 types of packages in which such shortages was noticed in 17 cases, the shortages is 100%. In this regard we submit herewith

that in all the cases, losses are due to leakages, off-spec decantation of products done and reprocessed in the family blend, etc. Moreover Lubricating oils so packed in small containers, pails barrels etc. are kept in open space in the LOBP and are exposed to the vagaries of the weather. This results in damages to the containers or the external appearance of the containers is so bad that the market may reject the same.

4.7. The Appellate Commissioner in his impugned order in para 12 has alleged that due to absence of any explanation for the losses found during the course of stock taking, the quantity of goods which has been found short are deemed to have been removed without payment of duty. In this regard we submit that in all the forum i.e. beginning from adjudicating authority to appellate authority we were stressing that these are the genuine losses which occurred due to various reason.

4.8 The Applicants also wishes to rely on the decision of CEGAT, East Regional Bench in the case of Indian Oil Corporation Limited Vs. Collector of Central Excise Calcutta as reported in 1984(15) EL T 479 (Tribunal) while dealing with the case of transit loss and gains of Jute Batching Oil wherein it has been held that" Since the Department does not intend to make unlawful gain or unjust enrichment, it would not be proper for them to take into consideration only the losses and not the gains particularly when there is no allegation of mala fide or wanton negligence". The Applicants submit that it is not the case for the Department that the Applicants with mala fide intention have removed the goods without the payment of duty and hence the gain should be adjusted with the loss for determining the net lost quantity.

4.9 The GOI Revision order No. 138/09 dt. 04-06-2009, 98/01 dt. 19-10-01 and 63/95 dt. 07-04-1995 in their own case were relied upon.

5. Personal hearing was scheduled in this case on 05-03-2011 & 27-06-2013. Nobody appeared for the hearing. The applicant has requested for decide the case as per submissions made in their revision application.

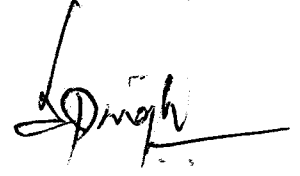
6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that during the course of stock taking on 31-03-2006, carried out by the applicants in their factory premises, a shortage of 10233.384 liters of various grades of lubricating oils falling under Central Excise Tariff heading 2710.90 was found, which was declared by them in their ER-1 return for the month of April 2006. Vide impugned Order-in-Original, the original authority confirmed the demand of duty of Rs. 1,05,667 along with applicable interest and also imposed penalty amount equal to duty demanded under rule 25 of Central Excise Rules, 2002. Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has cited this revision applicant on grounds mentioned in para (4) above.

8. Government notes that excess/shortage have been found in Lubricating oil packed and entered in RG-I register. The packages of the lubricating oil grades in which shortages are found are different from the packages lub.oil grades in which excess quantity has been found. The different packages are ranging from 20ml pouches to 20 litre containers for retail sale and in 50 litre containers to barrel for bulk sale. The lubricating Oil was in unit containers of various sizes and grades and there are no valid reasons for shortages of 10233.384 ltrs. quantity. The original authority and appellate authority has discussed in detail the contentions raised by applicant and has rightly not found them acceptable. Government agrees with these findings. As regards CBEC circular of dtd. 30-04-1971 Government notes that the said circular relates to lubricating oil base stock (LOBS) and not to lubricating Oil packed in unit containers. Therefore said circular is not applicable in the instant case. The GOI Revision orders cited by applicant can not be made applicable in this case since in those case the issue did not relate to lub. Oil packed in unit containers. In view of above position, Government do not find any infirmity in the impugned Order-in-Appeal and therefore upholds the same.

9. The revision application is rejected being devoid of merit.

10. So, ordered.



(D.P. Singh)

Joint Secretary to the Govt. of India

M/s. Bharat Petroleum Corporation Ltd.,
Wadilube Installation, Mallet Road,
Mumbai-400009.

ATTESTED



(टी. आर. आर्य / T.R. ARYA)

अधीक्षक, आर.ए./ Superintendent RA

वित्त मंत्रालय, (राजस्व विभाग)

Ministry of Finance, (Deptt. of R.)

भारत सरकार / Govt. of India

नई दिल्ली / New Delhi

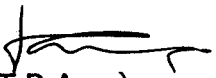
Order No. 1073 /13-CX dated 30-7-2013

Copy to:

1. The Commissioner of Central Excise, Mumbai-I, Commissionerate, 115, Central Excise Building, Maharshi Karve Road, Mumbai-400020.
2. The Commissioner of Central Excise (Appeals) Mumbai Meher Building, Dadiseth Agyari Lane, Chowpatty, Mumbai-400007.
3. The Assistant Commissioner, Div.-A, Mumbai.

- ✓ 4. PS to JS(RA)
5. Guard File.
6. Spare Copy

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(T.R.Arya)

SUPRINTENDENT (REVISION APPLICATION)