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F.No.198/640/2011-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 23.9.13

ORDER NO. 1272 /13-Cx DATED 18-09-2013 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 Act, 1944 against the orders-in-appeal No. 283/VDR-I/11 dated 10.08.2011 passed by Commissioner of Central Excise (Appeals) Vadodara
APPLICANT	:	Commissioner of Central Excise, Vadodara-I.
RESPONDENT	:	M/s Indian Oil Corporation Ltd., PO – Jawahar Nagar, Vadodara

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ORDER

This revision application is filed by Commissioner of Central Excise, Vadodara-I against the order-in-appeal No. 283/VDR-I/11 dated 10.08.2011 passed by Commissioner of Central Excise (Appeals) Vadodara with respect to order-in-original No. 6-10/Dem/JC/Dn-IV /09 dated 02.02.2010 passed by Addl. Commissioner of Central Excise Vadodara-I.

2. The assesse viz. M/s IOC Ltd., PO – Jawahar Nagar, Vadodara (herein after referred to as assesse) are engaged in the activity of clearing Petroleum products under Bond as per provisions of Rule 20 of Central Excise Rules 2002 read with Circular NO. 579/16/2001-Cx dated 26.01.2001 and 581/18/2001-Cx dated 29.06.2001. A difference in the quantity cleared from the factory gate and the quantity received at the storage location was found which effectively meant that there was a transit loss/excess. Therefore, a show cause notice was issued to recover the duty of Rs.37,71,224/- on the difference in the quantity cleared from the factory gate and the quantity received at the storage location which was confirmed by the adjudicating authority vide OIO NO. 6-10/Dem/JC/Dn-IV/09 dated 02.02.2010 on the ground that subsequent to the withdrawal of the warehousing provision vide Notification No. 17/2004-CE(NT) dated 04.09.2004 read with circular No. 796/29/2004-Cx dated 04.09.2004, duty was payable at the factory gate and the assesse was liable to pay the duty on the quantity of goods cleared at the time of removal from factory gate. Therefore, they were liable to pay the duty Rs.37,71,224/- on the excess quantity of Naphtha & ATF cleared by them without payment of duty.

2.1 Being aggrieved by the impugned order dated 02.02.2010 the assesse filed an appeal before the Commissioner (Appeals) which was decided vide his order No. Commr (A) /283/VDR-1/2011 dated 10.08.2011 by setting aside the order-in-original on the ground that the assesse has followed the procedure laid down in Notification No. 46/2001-CE(NT) dated 26.06.2001. He has relied upon the Board's Instruction No.

261/6/20/82-Cx-8 dated 20.10.1985 and the circular No. 798/31/2004-Cx dated 08.09.2004 and decided that the warehousing provisions for domestic and export warehousing are different and transit loss / excess upto 1% can be allowed to the assesse.

3. Being aggrieved by the impugned order-in-appeal, the applicant department has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds :

3.1 The impugned order of the Commissioner (Appeals) is contrary to law and evidences and provisions contained in Central Excise Act, 1944 and Rules made thereunder therefore, the impugned order is required to be quashed and set aside on the following grounds :

3.2 That Central Excise duty is demanded under the provisions of Section 11A of the Central Excise Act, 1944 because the ATF and Neptha cleared duty free through various modes such as Tanks, Lorries, Rails etc. from their refinery to various export warehousing station under respective AR-3As were either short/excess received at the respective export warehousing destinations on which assesse is liable to discharge duty liability.

3.3 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".

3.4 That in pursuance of Sub-Rule (1) of Rule 20 of the Central Excise (No.2) Rules, 2001, vide Notification No. 46/2001-CE(NT) dated 26.06.2001, the facility of removal of any excisable goods falling under the First Schedule to the Central Excise Tariff, 1985 (5 of 1986) was extended from the factory of production or such other premises as may be approved by the Commissioner intended for storage in a warehouse registered at such place as may be specified by the Board and for export there from under the

provisions of Rule 19 of the said Rules i.e. without payment of duty, by such exporter or class of exporters as may be specified by the said Board. Accordingly the detailed procedure along with the class of exporters and places were specified by the Board vide Circular No. 581/18/2001-Cx dated 29.06.2001.

3.5 That the procedure and provisions is termed as 'Export Warehousing Facility'. This facility is meant for exporters who want to export the goods through export warehouses. The movement of goods from these exports warehouses either for export purpose or even for diversion to domestic sector as the case may be is to be taken care of by the jurisdictional Central Excise Officer under whom these export warehouses falls as the exporters have to execute General Bond for export as well as procuring the goods from the factory / refinery under CT-2 procedure as prescribed in Para 5 of the Circular No. 581/18/2001-Cx dated 29.06.2001. The removal of goods from factory/refinery duty free against CT-2 certificate and the receipt of the goods in such export warehouses are governed by the procedures as specified in above CBEC Circular No. 579/16/2001-Cx dated 26.06.2001 (in the case of domestic warehousing facility).

3.6 That the domestic warehousing facility was withdrawn for petroleum products vide Notification No. 17/2004-CE(NT) dated 04.09.2004 w.e.f. 05.09.2004. The implication of this withdrawal of domestic warehousing facility was explained vide Board's Circular No. 796/29/2004-Cx dated 04.09.2004 wherein it is mainly stated consequent upon withdrawal of warehousing facility the excise duty is liable to be paid by the refineries at the time of removal w.e.f. 06.09.2004 on the assessable value determined under Section 4 of the Central Excise Act, 1944 i.e. for factory gate clearances the assessable value would be transaction value under section 4(1)(a) ibid and for depot sales, the mode of valuation applicable to the goods sold at depot would be adopted for discharge of duty liability. Thus for discharging of duty liability the time of removal from refinery / factory gate is made the basis which has an impact in the form that the condonation of various loses i.e. transit /storage losses etc. at warehouse under permissible limit of 1% or 0.25% etc. as were prescribed under various circulars. Now the duty on the losses or damages after time of clearance from the refinery

/factory gate is not remittable as all the clearance whether for domestic consumption or for warehousing against CT-3/CT-2 certificate or for end use based exemption against Annexure etc. would be leviable to duty at factory / refinery gate.

3.7 That the procedure of export warehousing facility at the export warehouses still continued in respect of all excisable goods including petroleum products governed against CT-2 certificates and re-warehousing procedures as prescribed in CBEC Circular No. 579/16/2001-CX dated 26.06.2001. This continuation of export warehousing facility under Notification No. 46/2001-CE(NT) and Circular No. 581/18/2001-CX dated 29.06.2001 has been clarified by the Board's Circular No. 798/31/2004-CX dated 08.09.2004.

4. A show cause notice was issued to the respondent under Section 35 EE of Central Excise Act 1944 to file their counter reply. Respondent has filed following cross objection vide letter dated 19.12.2011 :

4.1 The grounds of Revenue to deny the benefits of condonation of transit losses is solely on the reason that the domestic warehousing facility was withdrawn for petroleum products vide Notification No. 17/2004-CE(NT) dated 04.09.2004 read with Circular No. 796/29/2004-Cx dated 04.09.2004 wherein it was held that consequent upon the withdrawal of warehousing facility, the excise duty is liable to be paid at the time of removal w.e.f. 06.09.2004. However the above circular was with reference to domestic warehousing only. The clarification for export warehousing was issued later vide circular No. 798/31/2004-Cx dated 08.09.2004 wherein it was clearly stated that "the facility of removal of petroleum products without payment of duty for export warehousing continues to be available vide Notification No. 46/2001-CE(NT) dated 26.06.2001. Board vide circular No. 581/18/2001-Cx dated 29.06.2001 has interalia, specified conditions, procedures, class of exporters and places of warehouses under sub rule (2) of Rule 20 of the Central Excise Rules, 2002 for warehousing of excisable goods for the purpose of export. Thus from the above, it is clear that the procedures to be

followed for domestic warehousing and export warehousing are governed by different circulars.

4.2 Revenue is relying upon the CBEC Circular No. 804/1/2005 dated 04.01.2005 stating that the Board has denied abatement on account of losses whether transit/storage etc. in case of end use based exemption / export warehousing in warehouse / tanks whether intermediate or otherwise by emphasizing that the duty liability to be discharged after the withdrawal of domestic warehousing facility requires the discharge of duty liability at the factory / refinery gate.

In the above circular the Board has examined the various issues and various decisions of oil companies. The first issue clarified in circular is in respect of cases where at the time of removal of petroleum products, the refinery is unable to identify consignment which would ultimately be received by an eligible end user, they can opt for provisional assessment. In the instant case, the assesse has not opted for provisional assessment hence the clarification is not relevant for the present context.

The second clarification which is given in the context of supplies of ATF to foreign going aircrafts, it is seen that the Board has clarified that ATF cleared for export warehouse maybe allowed to be stored in the intermediate storage tanks subject to the condition that such intermediate tanks are used exclusively for storing goods. The details of such intermediate tanks including their physical location in the concerned installation should be intimated to the jurisdictional Central Excise Officer. Mixed storage of duty paid and non-duty paid goods at the Aviation Fuel Station at the airports may be allowed subject to the condition that a tank wise regular account shall be maintained about the receipt and discharge of duty paid and non-duty paid stock of ATF. It has been further clarified that the no storage losses are permitted in the export warehouses / tanks whether intermediate or at AFS including those with such mixed storage. From the clarification given, it is clear that storage losses are not allowed but the circular is silent on the transit losses. We have applied for condonation for transit

losses and not for storage losses which the Revenue is considering in the understanding of the circular.

4.3 As the goods for export warehousing are cleared in terms of the provisions of Notification No. 46/2001-CE(NT) dated 26.06.2001 in the absence of any clarification on the transit losses for export warehousing in the CBEC Circular No. 804/1/2005-Cx dated 04.012.2005, it is implied that the such losses are to be allowed in terms of the Board's instruction vide F.No. 261/20/82/CX-8 dated 30.10.1985.

5. Personal hearing scheduled in this case on 7.8.2013 at Mumbai was attended by Shri Chandan Kumar, SFM, IOCL on behalf of the respondent who reiterated the grounds of revision application.

6. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

7. On perusal of records, Government observes that M/s IOC Ltd. cleared petroleum products, Naphtha & ATF without paying of duty from the refinery to bonded storage location under rule 20 of Central Excise Rules, 2002. Adjudicating authority confirmed the duty demand of Rs.37,71,224/- involved on the goods found short at the storage location. In appeal, Commissioner (Appeals) allowed the appeal and dropped the demand by setting aside the order of original authority. Now applicant department has filed this revision application on the grounds state above.

8. Government observes that the original authority has held that the applicant has violated the condition 2(iii) of the Board's Circular No. 804/1/2005-CX dated 04.01.2005 and hence liable to pay duty in terms of rule 20(4) of the Central Excise, 1944. The applicant has also relied upon various circulars in favour of their contentions.

Government finds it proper to discuss various statutory provisions in this regard.

8.1 Rule 20 of the Central Excise Rules, 2002 reads as under:

"(1) The Central Government may by notification, extend the facility of removal of any excisable goods from the factory of production to a warehouse, or from one warehouse to another warehouse without payment of duty.

(2) The facility under sub-rule (1) shall be available subject to such conditions, including penalty and interest, limitations, including limitation with respect to the period for which the goods may remain in the warehouse, and safeguards and procedure, including in the matters relating to dispatch, movement, receipt, accountal and disposal of such goods, as may be specified by the Board.

(3) The responsibility for payment of duty on the goods that are removed from the factory of production to a warehouse or from one warehouse to another warehouse shall be upon the consignee.

(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 the consignor."

The said rule 20(1)stipulates that Central Government by notification may provide facility of removal of goods from factory of production to warehouse or from one warehouse to another warehouse without payment of duty.

8.2 The CBEC issued two notification viz. notification No. 46/2001-CE(NT) dated 26.06.2001 and No. 47/2001-CE(NT) dated 26.06.2001. The notification No. 47/2001-CE(NT) extended the facility of removal of all excisable goods including specified Petroleum products from the factory of production to warehouse, or from one warehouse to another warehouse without payment to duty. The notification No. 46/2001-CE (NT) extends the similar facility from the factory of production to warehouse for subsequent export under rule 19 of the Central Excise rules. As such the notification No. 46/2001-CE(NT) is specific for removal of goods from production to export warehouse for subsequent exports.

8.3 Further, vide notification No. 17/2004-CE(NT) dated 06.09.2004 by amending notification No. 47/2001 the facility of removal of specified petroleum product was withdrawn. But, the facility of removal of specified petroleum products from the production to export warehouse without payment of duty as stipulated in notification No. 46/2001-CE(NT) has not been withdrawn, and the notification 46/2001-CE(NT) continued to be in existence.

8.4 The Circular No. 804/1/2005-CX dated 04.01.2005 was issued to clarify some issues after withdrawal of warehouse facility of specified petroleum product by way of notification No. 17/2004-CE(NT) dated 06.09.2004. The relevant portion of the said circular dated 04.01.2005. is reproduced as under:-

"I am directed to say that as you are aware the facility of removal of specified petroleum products without payment of duty from the factory of production to a warehouse or from one warehouse to another warehouse was withdrawn w.e.f. 6th September, 2004 vide notification No. 17/2004-CE (N.T.) dated 4th September, 2004 . The facility of removal of petroleum products without payment of duty for export warehousing continues to be available vide notification No. 46/2001-CE (N.T.) dated 26th June, 2001 . Board vide Circular No. 581/18/2001-CX dated 29th June, 2001 has interalia, specified conditions, procedures, class of exporters and places of warehouses under sub-rule (2) of rule 20 of Central Excise Rules, 2002 for warehousing of excisable goods for the purpose of export."

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From wordings of above circular, it in unambigously clear that facility of removal of petroleum products without payment of duty from factory of production to export warehousing continues to be available vide Notification No. 46/01-CE(NT) dated 26.06.2001. The said circular has specifically stated that no storage losses in export warehouses will be allowed. The para 2 (iii) of circular dated 4.1.2005 states that refinery shall be liable to discharge the duty on the quantity cleared from factory itself and there will be no question of any abatement with regard to any losses subsequent to removal from refinery. This clarification pertains to clearance of goods on payment of duty. However, in case goods, are cleared under bond without payment of duty, the same clarifiction will also apply since there is no explicit mention of allowing transit losses for such clearances. As per said circular storage losses in export warehouse are not permitted, and therefore there is no reason to allow transit loss in the absence of any explicit provision.

9. This authority had earlier decided a revision application No. 195/193-194/07 on same issue filed by M/s Manglore Refinery and Petro Chemicals Ltd. Manglore against order-in-appeal No. 47-48/07 dated 13.02.2007 passed by Commissioner of Central

Excsie (Appeals) Manglore. In the said case goods were cleared without payment of duty under bond to export warehouse under rule 20 and vide G.O.I. Revision order No. 199-200/10-Cx dated 09.02.2010, no transit loss was allowed and confirmation of demand was upheld in the light of CBEC Circular dated 04.01.2005. The ratio of said decision is squarely applicable to this case. Similarly, in another reiviosn application No. 380/08/DBK/12 filed by Commissioner of Central Excise Surat-I in the case of M/s ONGC Ltd. w.r.t. order-in-appeal No. RKA/461/Surat-I/2010 dated 18.08.2010 of Commisioner of Central Excise (Appeals), Surat-I, Government vide GOI Revision Order No. 154/13-Cx dated 14.06.13 has upheld the confirmation of demand by original authority as no transit loss / storage in such cases were permissible.

10. In view of above discussion, Government sets aside the impugned order-in-appeal and restores the impugned order-in-original.

11. Revision Application thus succeeds in terms of above.

12. So, ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

Commissioner of Central Excise, Vadodara-I
Central Excise & Customs Building, Race Course Circle,
Vadodara – 390 007

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
दिल्ली / New Delhi

Order No. 1272 /2013-Cx dated 18.09.2013

Copy to:

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2. Assistant Commissioner of Central Excise & Customs, Division-IV, Vadodara-I Commissionerate, Central Excise & Customs Building, Race Course Circle, Vadodara – 390 007
3. M/s Indian Oil Corporation Ltd., Gujarat Refinery, Koyali, P.O. Jawaharnagar, Vadodara
4. PA to JS(RA)
5. Guard File.
6. Spare Copy

(B.P. Sharma)
OSD (RA)