

REGISTERED  
SPEED POST



F.No. 195/59/12-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

Date of Issue...22/11/13

Order No. 1382/13-cx dated 22-11-2013 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.  
74-CE/ALLD/11 Dated 16-06-2011  
passed by Commissioner of Customs and Central  
Excise, (Appeals), Allahabad.

Applicant : M/s. K.M. Sugar Mills Ltd.,  
Moti Nagar, Faizabad-224201.

Respondent : The Commissioner, Central Excise,  
38, M.G.Marg, Civil Lines, Allahabad, (UP).

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ORDER

This revision application is filed by the applicant M/s. K.M. Sugar Mills Ltd., Faizabad against the Order-in-Appeal No. 74-CE/ALLD/11 Dated 16-06-2011 passed by the Commissioner of Central Excise (Appeals), Allahabad with respect to Order-in Original passed by the Assistant Commissioner of Central Excise, Division-II, Allahabad.

2. Brief facts of the case are that M/s. K.M. Sugar Mills Ltd., Moti Nagar, Faizabad are engaged in manufacture of V.P. Sugar & Molasses falling under Central Excise Tariff chapter heading No. 170119990 and 17031000 of Central Excise Tariff Act, 1985. They are also availing Cenvat Credit facility under Cenvat credit Rules, 2004. On scrutiny of records by team of Central Excise for the period of January 2005 to December 2005, it was found that the party has shown losses in Molasses in their stock register during October 2005 to the tune of 1860.70 qtls. and did not submit any duty remission application as required under Rule 21 of Central Excise Rules, 2002. Accordingly a demand cum show cause notice was issued proposing demand of amount of Rs. 1,42,344/- under section 11A along with the interest under section 11AB of the Central Excise Act, 1944 and also proposing imposition of the penalty under section 11AC of Central Excise Act, 1944. The original authority vide impugned Order-in-Original confirmed the demand of demand of duty of Rs. 1,42,344/- under section 11A of the Central excise Act, 1944 along with applicable interest on applicant and imposed penalty of Rs. 1,42,344/- upon section 11AC of the Central Excise Act, 1944 r/w rule 27 of the central Excise Rules, 2002.

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

4. Being aggrieved by the impugned Order-in-Appeal, Now the applicant initially filed appeal before CESTAT, Delhi who vide order dtd. 1912-2011 rejected the appeal on the ground of jurisdiction. 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 Demand of duty has been raised solely on the ground of non-filing of application for remission of duty on the quantity of molasses found short during the storage period. It is settled law that the actual quantity of shortage can be known only at the time of last clearance. In this case, in October 2005 on last clearance from tank no. 1,2,& 4 the lost quantity was determined and recorded in RG-1 register.

4.2 It was after filing of monthly returns for subsequent months that in January 2006 the audit party raised an objection that no application for remission of duty leviable on the lost/short quantity as shown in RG-1 register having been filed by party, duty thereon is payable/recoverable. Against this objection applicant/revisionist filed written objection that the shortage of molasses during the storage period being within the permissible limit of 2% no duty is payable. Apparently the department being satisfied with the said reply, no demand was raised or any communication sent for a period of two years. It was only in December 2007 the subject demand cum show cause notice was issued solely on the ground of non-filing of application for remission of duty leviable on the quantity of molasses found short during the storage period.

4.3 Shortage during the storage period was due to natural causes and within the permissible limit of 2%. There being no removal of any quantity of molasses, duty is liable to be remitted and demand is not sustainable. But demand has been confirmed by lower authorities on the ground that no remission application was filed, though immediately after discussion during personal hearing before adjudicating authority applicant/ revisionist had filed the application in prescribed format 355U-I next day after hearing.

4.4 The legislature has nowhere cast an obligation upon manufacturer to move an application for remission of duty on the quantity lost during storage period. Rather it

has empowered the competent authority including adjudicating authority raising the demand, to remit the duty if he is satisfied about the conditions laid in section of Central Excise Act, 1944 rule 21 of Central Excise Rules, 2002. No doubt the applicant./revisionist had not filed any remission application prior to issuance of demand notice, but they had specifically pleaded in their defence reply and appeal memo, also at the time of personal hearing, the above grounds laid by the legislature in the act and Rules. Unfortunately their merits have not been considered and demand was confirmed on the ground extraneous to provision of law. Commissioner (Appeals) has erred in ignoring the copy of remission application dt. 27-02-2008 annexed to appeal memo. Instead of relying upon the report dt. 27-01-2010 from jurisdictional Commissioner's office he ought to have requisitioned the remission application form divisional office where the inspector had acknowledged its receipt and decided it on merits before confirming the demand.

4.5 Central Excise Rule 4 provides that duty is payable only on removal. It is settled law that duty cannot be demanded unless alleged lost quantity has been removed/cleared from factory. In the present case goods (molasses) have not been removed from factory, even the show cause notice does not allege any removal of molasses. The demand of duty is not sustainable as held by Tribunals in number of cases.

4.6 Show cause notice itself admitted that in RG-1 register applicant/revisionist had showed the loss of molasses in the month of October 2005 on the basis of which audit party raised the objection vide letter dt. 20-02-2006 and asked the applicant/revisionist to deposit the duty amount involved on the lost quantity of molasses. Applicant/revisionist replied the loss being within permissible limit of 2% duty thereon is liable to be condoned. Thus all the facts were in the knowledge of department from the very beginning there was no suppression etc. According to the settled law, burden to prove this ingredient heavily lay upon the department. Besides, section 11AC is applicable when the duty has not been paid or levied. In the present case lost quantity has neither been cleared from the factory nor such allegation has been made in show cause notice. So invocation of section 11AC is

totally warranted. Demand has been raised with the same allegation invoking proviso to section 11A. But from the above narrated facts and legal position the show cause notice is hopelessly barred by one year period of limitation.

5. Personal hearing was scheduled in this case on 18-10-2013 was attended by Shri. Mayank Garg, advocate on behalf of the applicant who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of department.

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 on scrutiny of audit records of the applicant, it was observed that the applicant has shown losses in molasses in their stock register during October 2005 to the tune of 1860.70 quintals and also not submitted any remissions application as required under rule 21 of the Central Excise Rules, 2002. Accordingly, vide impugned Order-in-Original, the original authority confirmed demand of duty involved on lost quantity of molasses along with applicable interest and also imposed penalty upon applicants. Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. Government finds that the applicant has mainly contended show cause notice issued after one year is time barred. The applicant stated that in show cause notice itself it has been stated that the applicant had showed the loss of molasses in the month of October 2005, on the basis of which the audit party raised the objection vide letter dated 20-02-2006. However, show cause notice issued on 28-12-2007 is clearly time barred having issued after more than 1 year in terms of proviso to section 11A of the Central Excise Act, 1944.

8.1 Government notes that extended period of 5 years can be invoked for issuing show cause notice when short levy/non levy of duty has occurred due to reason of fraud, or collusion or any wilful misstatement or suppression of facts or

contravention of any of the provision of the Act/Rule with intent to evade payment of duty. Otherwise, the short paid duty can be demanded by issuing show cause notice within one year from relevant date. In this case, no such specified reason are mentioned in the show cause notice for invoking extended time limitation of 5 years. On the other hand, it is on record that losses were recorded in records in the month of Oct, 2005, audit pointed out short levy vide letter dated 20-02-2006 and the show cause notice was issued on 28-12-2007. In this case the show cause notice was required to be issued before Oct, 2006 or at the most 20-02-2007 i.e. within one year as there was no ground mentioned for invoking extended time period. Hence said show cause notice 28-12-2007 is time barred.

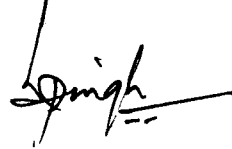
8.2 Government notes that Hon'ble Supreme Court in the case of CCE Vs. Chemphar Drugs and Liniments decided on 14-02-89, 1989 (40) ELT 276 (SC) has held that in order to make the demand of duty sustainable beyond a period of six months and upto a period of 5 years in view of the proviso to section 11A of the Act, it has to be established that the duty of excise has not be levied or paid or short levied or short paid or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provisions of the Act or Rules made there under with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer on conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability. Similar view is taken by Apex court in the case of Pahwa Chemicals Pvt. Ltd Vs. CCE Delhi 2005 (189) ELT 257 (SC).

8.3 In view of above said legal portion the said demand issued after one year is clearly time barred and liable to be rejected on this ground alone. The said demand being time barred is not sustainable. Government therefore drops the demand.

9. In view of above, without going into merit of the case, Government sets aside impugned orders on above said grounds and allows revision application.

10. Revision application thus succeeds in above terms.

11. So, ordered.



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

M/s. K.M. Sugar Mills Ltd.,  
Moti Nagar, Faizabad-224201.

ATTESTED



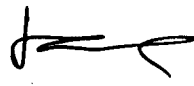
(टी. आर. आर्य / T.R. ARYA)  
अधीक्षक, आर.ए./Superintendent  
वित्त मंत्रालय, (राजस्व विभाग)  
Ministry of Finance, (Deptt.)  
भारत सरकार / Govt. of India  
नई दिल्ली / New Delhi

Order No. 382 /13-Cx dated 22-11-2013

Copy to:

1. The Commissioner, Central Excise, 38, M.G.Marg, Civil Lines, Allahabad, (UP).
2. The Commissioner (Appeals), Central Excise, 38, M.G.Marg, Civil Lines, Allahabad, (UP).
3. The Asstt. Commissioner of Central Excise Division-Faizabad.
4. Guard File.
- ✓ 5. PS to JS (RA)
6. Spare Copy

ATTESTED

  
T.R. Arya

Supdt.

(  
T.R. Arya  
)  
(REVISION APPLICATION)