REGISTERED
SPEED POST

F.No.195/1101/2011-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue 26/11/13

ORDER NO. 1383 /13-Cx DATED 25.11.2013 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 Act, 1944 against the order-in-appeal No. 86-CE/ALLD/11 dated 28.06.2011 passed by the Commissioner of Central Excise (Appeals) Allahabad
APPLICANT	:	M/s Rauzagaon Chini Mills, Faizabad
RESPONDENT	:	Commissioner of Central Excise, Allahabad

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ORDER

This revision application is filed by M/s Rauzagaon Chini Mills, Faizabad against the order-in-appeal No. 86-CE/ALLD/11 dated 28.06.2011 passed by the Commissioner of Central Excise (Appeals) Allahabad with respect to order-in-original passed by the Additional Commissioner of Central Excise, Allahabad.

2. Brief facts of the case are that the applicant is a unit of Balrampur Chini Mills Limited and is engaged in the manufacture of VP Sugar and molasses under Central Excise Tariff Heading 1701 99 90 and 1703 10 00 of the first schedule to the Central Excise Tariff Act 1985. The applicant filed 5 applications for remission of storage losses of molasses for the sugar season 2006-07 and 2007-08 as per details given below involving total duty of Rs.863343/- representing storage losses.

Sl. No.	Date of application	Tank No.	Sugar season	Date of Detection	Period of storage	Qty. as storage loss (in qtls.)	Duty involved
1.	26.11.07	03	2006-07	30.10.07	1.11.06 to 31.10.07	3449.00	2,66,436/-
2.	26.11.07	02	2006-07	13.08.07	1.11.06 to 13.08.07	2281.00	1,76,208/-
3.	26.11.07	01	2006-07	13.08.07	1.11.06 to 13.08.07	1719.00	1,32,793/-
4.	25.11.07	01	2007-08	30.06.08	1.11.07 to 30.06.08	1401.10	1,08,236/-
5.	25.11.07	03	2007-08	14.09.08	1.11.07 to 14.09.08	2325.82	1,79,670/-

Applicant was served with five show cause notices. The adjudicating authority –vide impugned order-in-original rejected the applications for remission of duty on the ground that the storage of molasses was in steel tanks and in some cases storage losses were more than 2% to the verified quantity and further that no shortage was reported at the time of verification by the State Excise Officer.

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, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds that

4.1 The appellate commissioner has not considered the plea that the adjudicating authority has gone by the verification done by the UP State Excise Authority and accordingly from the date of last verification done by them calculated the percentage loss to be in excess of 2%. It is patently contrary to the allegations in the show cause notice as this was not at all a ground for rejecting the remission application. Therefore, it is submitted that the adjudicating authority cannot take up a ground for rejecting the remission applications which is not alleged in the show cause notice. It is settled law in the following cases that the adjudicating authority cannot travel beyond the show cause notice and should confine himself to the four corners of the show cause notice and that the adjudication order cannot be based on the new grounds not cited in the show cause notice.

4.2 The finding in the Appellate Commissioner has failed to note the submission made in the Appeal Memorandum before the Commissioner (Appeals) on page 9 wherein it has been averred by the applicants that the loss was verified by the State Excise Department and the approved steel tanks were fully emptied-out and accordingly the percentage of storage loss was ascertained to be 1.3%, 1.66%, 1.58%, 1.65% and 1.57% respectively in respect of five remission applications filed by the applicant. The percentage of loss is always with reference to the quantities stored from the initial date of storage. Periodic inspection by the State Excise Department is only to ensure that the applicants do not clandestinely remove any molasses as such molasses are susceptible diversion for unauthorized uses. Verification is done by dip method which is not very accurate. The Appellate Commissioner has not considered the submission that the adjudicating authority could not have proceeded to calculate the percentage of storage loss from the last date of verification by the State Excise Authority and that has no relevance. Once certain quantity has been stored in tank and the same has been removed over a period of time and that when the steel storage tanks get emptied-out (i.e. no more molasses can be drawn out of the tank) the entire quantity removed becomes known, it is that stage quantity loss with reference to original quantity stored can at

all be ascertained. Therefore, basis adopted by the Adjudicating authority for arriving at a decision that storage loss was in excess of 2% is a labored exercise on his part not conforming to reason or rhyme or accepted principles of commercial accounting or practices. Therefore, it is submitted that the appellate commissioner upholding the adjudicating authority's order by simply reproducing the portion in Paras 9.1 to 9.5 of the order in original are entirely arbitrary, ill reasoned and unsustainable.

4.3 It is not the department's case nor can it be, that molasses do not suffer natural losses, such loss occurs due to the inherent chemical properties of molasses. Viscosity of the molasses also increases in proportion of air entrapped in the form of fine bubble in the molasses and that molasses stored between 30°C and 35°C loses 2% to 3% of its fermentable sugar. All these happen in spite of the efforts by every sugar factory to keep the temperature down in the molasses storage tank by sprinkling water. Therefore, inherent nature of the molasses is that there are inevitable storage losses due to change in temperature. It is only because of this fact that the Board has clarified based upon the representation by the Sugar industry that 2% storage loss shall be allowed. Not only in molasses but even in respect of petroleum products, storage losses up to a specified percentage are allowed. Therefore, it is incontrovertible that storage losses are inevitable in respect of storage of molasses and such a loss cannot be prevented. Therefore, the percentage of storage loss claim being less than 2% the Appellate Commissioner should have allowed the same. Failure to do so renders the order passed by Appellate Commissioner bad and unsustainable.

4.4 The storage losses of 2% or less in respect of molasses have been allowed by the CESTAT in a number of rulings only at the stage when the tank is emptied-out. The tank gets emptied out when it is not able to draw out any molasses from the tank. It is at that stage the tank gets completely washed. The washed tank is thus readied for storing full quantity once again in the next season. Therefore, the successive inflow of molasses into the tank and the chemical reaction duty to temperature variance leads to an inevitable situation of storage losses. Keeping in view this peculiar situation, the Hon'ble Tribunal has allowed remission of duty in respect of storage loss of 2% or less in the various cases.

4.5 There is no iota of evidence of molasses having been clandestinely removed to the extent of shortage of which remission of duty has been claimed by the applicants. It is rather admitted by the department by issuing a show cause notice that there was a storage loss by applicants but there was no clearance in clandestine manner. Payment of duty on the molasses which was lost due to natural causes cannot be stated to be removal of goods from the factory; removal is always a positive and voluntary act whereas storage loss due to temperature variance is not a positive act. Storage loss is inherent in the nature of goods. The applicants cannot be said to have originally created loss. In fact in the earlier period as well as in the subsequent period the authorities have been granting remission of duty on the storage loss reported in identical set of facts. Specimen copies of the order passed will be placed in the paper book to be filed for perusal. Therefore, it is submitted that on same set of facts, for some period it cannot be held that storage loss did occur whereas for certain period (in the present appeal) storage loss did not occur. Therefore, it is submitted that rejection of the appeal by the Appellate Commissioner is bad, the Order-in-appeal deserves to be set aside.

4.6 The Commissioner has not appreciated the percentage of storage loss has to be 2% with reference to the quantity initially stored in steel tank. It cannot be calculated based upon latest date of verification of stock by the State Authorities by dip method in as much as the dip method itself is not a scientific method of deriving the total quantity inside the huge tank. Also shortage or loss is with reference to the original quantity stored. When the storage loss was detected even the records maintained for State Excise purposes reflected duly the shortage and these are on record of the case. The Hon'ble Tribunal has held in number of cases that dip method is not very accurate duly approved method of verification of quantity in a tank especially where liquid storage in susceptible tank where due to variance of temperature, density etc. the stock level varies. It is a fact that certain quantity of molasses becomes dough and ceases to be molasses and is unfit for use. Dough is formed from the molasses only and is inevitable giving rise to loss in quantity of molasses.

4.7 It is further submitted that show cause notice while invoking the provisions of Section 11 AC does not specifically refer to any of the facts pointing to suppression

of facts with intention to evade payment of duty. Nothing has been stated in the show cause notice; rather it has been issued in routine in the standardized format by simply invoking the provisions of Section 11 AC of the Central Excise Act, 1944. It is settled law that there must be a factual evidence of deliberate deception by an assessee in order to allege suppression of facts with intention to evade payment of duty as per the ruling of the Hon'ble Supreme Court in UNION OF INDIA V. RAJASTHAN SPINNING AND WEAVING MILLS LTD. - 2009-238-STR-3 (SC). The show cause notice nowhere recites any such deliberate acts of deception on the part of the applicants. Therefore, imposition of penalty under Section 11 AC is totally bad in law or on facts.

5. Personal hearing scheduled in this case on 17.11.2013 was attended by Shri R.Krishnan, 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 available in case file, oral & written submissions and perused the impugned order-in-original and order-in-appeal.

7. On perusal of records, Government observes that the applicant filed five applications for remission of duty on storage loss of molasses for the sugar season (year) 2006-07 & 2007-08. The original authority held that loss of quantity occurred in very short span of time and such quantity was more than 2% of quantity last verified by State Excise Authorities and confirmed the demand of duty involved in said lost quantity of molasses and also imposed penalty equal to duty demand. Commissioner (Appeals) upheld impugned Orders-in-Original. Now, the applicant has filed these revision applications on grounds mentioned in para (4) above.

8. Government observes that the original authority has rejected remission applications mainly on the ground that the shortage/loss of molasses for which remissions were sought were much higher than prescribed limit of 2% within short span of time. On the other hand, the applicant has contended that department has wrongly calculated the losses, that the losses are for the whole sugar season and the same are with reference to quantities stored from initial stage of storage, that department has erred in calculated such loss on the quantity last verified by state

Excise that actual losses can be ascertained only when the storage tank is emptied out at the end of season. They have claimed that the storage losses with reference to total quantity stored in whole season in these tanks No.1,2,3 comes out to be 1.3%, 1.66%, 1.58%, 1.65% and 1.57%. In this regard, Government observes that in these cases, the storage loss is recorded for a period less than one month exceeding 2%. The state excise authorities in their verification conducted from time to time has not recorded any such loss. Applicant's claim that state excise has not physically verified the same, cannot be accepted since the said verification report by a state agency is a valid evidence. The applicants could not explain such big losses occurring in very short span of time and hence, they failed to prove that losses occurred due to natural causes.

9. Government observes that remission of duty is governed by rule 21 of the Central Excise Rules, 2002, which reads as follows:-

*"**Remission of duty.** — Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing:*

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From perusal of above provision, it becomes quite clear that remission of duty on lost or destroyed goods may be allowed provided if such loss/destruction caused by natural causes or by unavoidable accident and such causes are to be shown to the satisfaction of the jurisdictional Commissioner. In this case, no records/documentary evidences produced before the original authority showing gradual loss over a period of time to make a strong case that such losses happened due to natural cause. Further the Hon'ble Allahabad High Court in the case of kesar Enterprises Ltd. Vs. CCE, Meerut-II reported as [2008(221) ELT 329(All.)] has held that the assessee cannot claim 2% write off as storage losses as a matter of right irrespective of facts and circumstances of the case. If can be implied from the said judgment of Hon'ble High Court that 2% permissible limit of loss of molasses for

claiming remission is not absolute in nature and such remission claims should be weighed and examined in the context of the facts and circumstances of the each case. As mentioned in para above, the applicants could not produce any substantial and documentary evidences to show that there have been gradual loss of molasses over the period of time so as to logically conclude that such losses happened due to natural cause. As such said losses of such a high proportion exceeding 2% in such a short time are not condonable in terms of CBEC Circular.

10. Government finds that the show cause notices for demand of duty are issued after one year in three cases by invoking the extended time period clause of proviso to section 11A of the Central Excise Act, 1944. Government notes that as per proviso to Section 11A 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 wilfulful 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 with one year from relevant date as per Section 11A In this case, cases mentioned at Sr.No.(1), (2) & (3) of table in para (2) above, 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 August 2007 and October 2007 and the show cause notice was issued on February 2009. In this case the show cause notice was required to be issued within one year as there was no ground mentioned for invoking extended time period. Hence said show cause notices issued in respect of three remission applications as mentioned in Sr.No.(1), (2) & (3) of table of Para (2) are time barred and demand of duty is not sustainable. 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 wilfulful misstatement or suppression of facts or contravention of nay 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 with holding of information when the manufacture new otherwise, is required before it in 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).

11. In view of above said legal portion the said demands issued after one year in above said three cases at Sr.No.1,2, and 3 of table in para (2) above are clearly time barred and liable to be dropped on this ground. Government therefore drops the demands in respect of said three cases. However, in respect of remaining two cases at Sr.No.4 and 5 of table in para (2) above, Government agrees with the findings of lower authorities and hence, upholds confirmation of said demands.

12. As regards penalty imposed under Section 11AC of Central Excise Act 1944, Government notes that in these cases the short levy has not occurred for the reason of fraud or collusion or willful misstatement or suppression of facts or contravention of any provisions with intent to evade duty and therefore provision of Section 11AC are not attracted. As such penalty imposed under Section 11AC is set aside. However, penalty under Rule 25 of Central Excise Rules 2002 is imposable. Government therefore imposes penalty of Rs.10000/- in each of these 5 cases under Rule 25 of Central Excise Rules 2002.

13. In view of above discussion, Government modifies the impugned order-in-appeal to the extent discussed above.

14. Revision application is disposed off in above terms.

15. So, ordered.

(D.P.Singh)
Joint Secretary (Revision Application)

M/s Rauzagaon Chini Mills
(A unit of Balarampur Chini Mills Ltd.)
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Distt. Faizabad

(टी॰ आर॰ आर्य / T.R. ARYA)
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Order No. 1383 /13-Cx dated-25-11-2013

Copy to:

1. Commissioner of Central Excise, 38 Mahatma Gandhi Road, Civil Lines, Allahabad-211011
2. Commissioner of Central Excise (Appeals), 38 Mahatma Gandhi Road, Civil Lines, Allahabad-211011
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5. PA to JS(RA)
6. Guard File.
7. Spare Copy

ATTESTED

T. R. Arya

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Supdt. (Revision Application)