

REGISTERED
SPEED POST



F.No. 195/1002,1009-1011/11-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...5/12/13

Order No. 1398-140/13-cx dated 28-11-2013 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 Nos.
92/CE/Ald./2011 dated 05-07-2011,
95/CE/Ald./2011 dated 06-07-2011,
93/CE/Ald./2011 dated 07-07-2011 &
94/CE/Ald./2011 dated 08-07-2011
passed by Commissioner of Customs and Central
Excise, (Appeals), Allahabad.
- Applicant : M/s. Simbholi Sugar Ltd.,(Unit Chilwana),
14th K.M. Bahraich, Gonda-Bahraih Road,
Chilwaia-271801,
Distt,. Bahraich (UP).
- Respondent : The Commissioner of Central Excise,
38, M.G.Marg, Civil Lines,
Allahabad, (UP).

ORDER

These revision applications are filed by the applicant M/s. Simbholi Sugar Ltd.,(Unit Chilwana), 14th K.M. Bahraich, Gonda-Bahraih Road, Chilwaia-271801, Distt,. Bahraich (UP) against the Order-in-Appeal Nos. 92/CE/Alld./2011 dated 05-07-2011, 95/CE/Alld./2011 dated 06-07-2011, 93/CE/Alld./2011 dated 07-07-2011 & 94/CE/Alld./2011 dated 08-07-2011 passed by the Commissioner of Central Excise (Appeals), Allahabad with respect to Orders-in Original Nos. passed by the Additional Commissioner of Central Excise, Division-II, Allahabad as detailed below:-

2. Brief facts of the case are that the applicant M/s. Simbholi Sugar Ltd.,(Unit Chilwana), filed applications for remission of Central Excise duty in the prescribed proforma along with supporting documents to Assistant Commissioner, central Excise Division Faizabad. The said remission applications were filed under Rule 21 of Central Excise Rules, 2002 for storage loss of molasses stored in Steel tanks due to natural cause. On scrutiny of the remission applications, the Assistant Commissioner of Central Excise, Faizabad had found that the party had claimed remission of Central Excise duty in order to enjoy the benefit of Board's Circular No. 261/15CC/1/80-Cx-8 dt. 06-02-82, that The molasses was stored in Steel Tanks, which were safe and secure and their storage and delivery system was so sound, that it was beyond imagination as to how such a huge quantity of molasses got lost during period of storage in steel tanks. The variation in temperature during in steel tank may reduce the volume of the molasses but such variation in temperature does not affect the actual weight of the molasses and that too within such a short duration of storage. The adjudicating authority rejected the remission claims of Central Excise duty amounting to Rs. 8,61,527/- by the impugned Orders-in-Original and also imposed penalty of amount equal to duty demanded.

3. Being aggrieved by the said Orders-in-Original, applicant filed appeals before Commissioner (Appeals), who upholds the Orders-in-Original.

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

4.1 Rule 21 of Central Excise Rule 2002 provides for remission of duty where the goods have been lost or destroyed by natural causes. Further, Rule 8 of UP Sheera Niyantal Niyamawali 1974 permits wastage in the storage of molasses to the extent of 2% of the total quantity stored. Following the said principles, the CBEC vide its circular No. 261/15CC/1/80-Cx-8 dt. 06-02-82 and 261/15/82/CE-13 dt. 186-07-83 has clarified that losses upto 2% may be condoned.

4.2 The Commissioner (Appeals) while upholding the Order-in-Original has observed that for the period more than 8 months or 12 months, no loss was reported and all losses as reported relates to a very short period of time of few weeks. As a result the loss worked out during the remaining period comes to a percentage in excess of 2%. It also refers to MF-5 part II for the relevant period to contend that stock taken had been done on several occasion by dip method and it appears the applicants measured the stock by the same method when they claimed remission and therefore it was not open to them to say that when shortages were not detected earlier by dip measurement method was not accurate and hence not acceptable. These losses as claimed for remission are apparently also based on dip reading as there is nothing in records to indicate that these losses were arrived at after physical weighment and such weighment was verified by any officer. The reliance in this connection on verification by the District Excise Officer/sector Excise Officer during 2002-03 is also misconceived in as much as the officer had only verified the records. It is not possible to weigh the stock of molasses contained in a molasses tank.

4.3 The show cause notice is not issued by the adjudicating authority as per CBEC circular dated 01-10-2003, which stated as under:-

“ Regarding issue of show cause notice it is clarified that in respect of all cases, whether or not fraud, collusion, wilful mis- statement, suppression of fact or

contravention of Central Excise Act/Rules with intent to evade duty and/or where extended period has been invoked i.e cases falling under any category (A), (B) or (C) of para 3 above, the show cause notice shall be approved in writing and signed by the officer competent to adjudicate the said show cause notice. This instruction will come into effect prospectively i.e. from the date of issue of this circular. "

Admittedly in the present case, the notice has not been issued by an officer who had to adjudicate the same. The notice has been issued by the Assistant Commissioner but the adjudication has been done by the Additional Commissioner it is therefore submitted that the show cause notice issued by the Assistant Commissioner answerable to the Additional Commissioner is void abinitio. The entire proceedings are liable to be dropped on this ground alone.

4.4 In these cases the extended period of time limitation is not invocable. The show cause notice proposes to invoke the extended period of limitation on the ground that the applicant failed to intimate to the sector officer/range officer within 24 hrs of such occurrence of losses (para 263 of basic manual corrected upto 1989) and thus have wilfully suppressed the fact from the department with intent to evade payment of duty and filed the remission application simply to take the benefit of Board circular No. 261/15/CC/1/80-Cx dt. 06-02-1982. The impugned order is non speaking on the issue of invoking extended period of limitation. It is an admitted in the show cause notice that the storage loss of molasses had been disclosed in ER-1 return. Since there is no case for invoking extending time limitation the penalty under section 11AC is not imposable.

4.5 As regards losses in excess of 2% the Commissioner has erred in law by holding that loss should be considered with reference to the last three months of sugar season. It is submitted that percentage of loss should be arrived at bases on total quantity considering the opening balance and quantity received. Reliance in this connection is place on the tribunal decision in the case of Commissioner, Central Excise, Allahabad Vs. India Glycols Ltd reported in 2010 (258) ELT 531.

4.6 In series of decisions, the Tribunal has been pleased to grant remission of duty on storage loss of molasses when the loss was 2% reliance in this connection is placed on following decisions:-

- i) Sarjoo Sahkari chinni Mills Ltd. Vs. CCE reported in 2003 (161) ELT 826.
- ii) Shakumbari Sugar & Allied Inds Ltd. Vs. CCE reported in 2004 (171) ELT 286.
- iii) Titwai Sugar Complex Vs. CCE reported in 2004 (172) ELT 119.
- iv) Seksaria Biswan Sugar Factory (P) Ltd. Vs CCE reported in 2005 (179) ELT 363.

4.7 There is no allegation of clandestine removal of molasses or removal without payment of duty. The West Regional Bench in its judgment in the case of Shri Dudhgangn-Vedanganga Sahkari Karkhana Ltd. Vs The Collector of Central Excise reported in 1987 (29) ELT 22, has held that no duty can be demanded without the removal of goods.

4.8 In the similar circumstances, the revisionary authority vide order dt. 15-06-2011 in the case of Seksaria Biswan Sugar Factory (P) Ltd. has allowed the revision application.

5. Personal hearing was scheduled in this case on 21-02-2013 & 15-10-2013. Hearing held on 15-10-2013 was attended by Shri Kapil Vaish, Counsel 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 Orders-in-Original and Orders-in-Appeal.

7. The applicants filed various revision applications for claiming storage loss below 2%. The original authority held that loss of quantity was occurred in very short spen of time and such quantity was more than 2% of verified quantity and

accordingly, rejected application for remission of duty. The demand of duty involved in said lost quantity of molasses was confirmed and penalty of amount equal to duty demand was also imposed. Commissioner (Appeals) upheld impugned Orders-in-Original. Now, the applicant has filed these revision applications on grounds mentioned in Para (4) above.

8. The applicant has contended that such loss of more than 2% as arrived by the department as pertaining to period of one or two months is actually for one full year, and cannot be treated on loss in one month. Government observes that the state excise authorities in their verification report recorded from time to time upto last verification has not recorded any such loss. It is only after about 1-2 month of the last such verification, the state excise authority has entered the quantity of months found short. It means that the shortages have occurred after last verification of state excise authority. Applicants claim that state excise has not physically verified the same, can not 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.

8.1 The applicants have contended that the losses should be calculated over the period of full sugar season and not on short span of time after last verification date. In this regard, Government finds that the applicant was required to show their tank-wise molasses stock/losses on monthly basis in their ER-1 returns. However, on sample perusal of some of the copies of ERs-1 submitted before Revisionary Authority, such losses were not shown regularly and suddenly losses have surfaced in last 1-1/2 months time. As such, the evidences submitted by the applicants cannot prove that the losses occurred due to natural causes, since losses due to natural causes, the loss occurs gradually over the period of time and not in disproportionat manner it happened in this case.

9. The 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:

From perusal of above provision, it becomes quite clear that remission of duty on lost or destroyed goods may be allowed provided such loss/destruction is 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 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. In these cases the losses are more than 2% as held by original authority and are not covered by CBEC circular for condonation. Applicant has relied upon G.O.I. Revision Order No. 733-735/11-Cx dated 10.06.11 with case of Sekseria Biswan Sugar Factory Ltd. Sita Pur (UP). Government notes that in the said case, the molasses storage losses were found below 2% and therefore demand was set aside. As such the ratio of said order can not be made applicable to this case. Similarly the other case laws cited by applicant can also not be made applicable since in those cases the losses were below 2%.

10. Applicant has contended that show cause notices are issued after one year by invoking extended time period clause in terms of proviso to section 11A. But there is no grounds for invoking extended period. Since they had filed ERI monthly returns and the losses are shown therein. Moreover the show cause notices are issued after one year of their filing duty remission applications. Government notes that case wise detail of issuing show cause notice is as under:-

Sr. No.	Revision Application No.	Remission Application filed on	Date of issuing SCN	Amount of duty involved (Rs.)	Order-in-Appeal No./Date	Period of storage
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	195/1002/11-RA	12-02-2004	06-07-2007	230480	92/11 dt. 05-07-2011	01-02-2003 to 23-12-2003
2	195/1009-11/11-RA	21-01-2005	06-07-2007	120903	95/11 dt. 06-07-2011	23-11-2003 to 25-12-2004
3	195/1009-11/11-RA	29-11-2006	06-07-2007	277787	93/11 dt. 07-07-2011	12-11-2005 to 28-11-2006
4	195/1009-11/11-RA	29-12-2005	06-07-2007	232357	94/11 dt. 06-07-2011	10-11-2004 to 04-12-2005

From above said table, it is quite clear that show cause notices in cases at Sr. No. 1,2, and 4 are issued after one year.

11. 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 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 with one year from relevant date as per Section 11A. In this case, cases mentioned at Sr.No.(1), (2) & (4) of table 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) & (4) of table 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 wilful 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).

12. 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 4 of table 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 one case at Sr.No.3 of table above, Government agrees with the findings of lower authorities and hence, upholds confirmation of said demands.

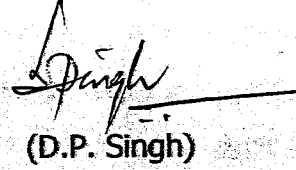
13. As regards penalty imposed under Section 11AC of Central Excise Act 1944, Government notes that in these cases the short levy has not occurred for the reason of fraud or collusion or willful misstatement or suppression of facts or contravention of any provisions with intent to evade duty and therefore 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 4 cases under Rule 25 of Central Excise Rules 2002.

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

15. Revision application is disposed off in above terms.

16. So, ordered.

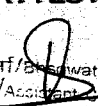


(D.P. Singh)

Joint Secretary to the Govt. of India

M/s. Simbholi Sugar Ltd.,(Unit Chilwana),
14th K.M. Bahraich, Gonda-Bahraich Road,
Chilwaia-271801, Distt., Bahraich (UP).

ATTESTED



(भागवत शर्मा/Bhaswati Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C - O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

1398-1401
Order No. /13-Cx dated 28-11-2013

Copy to:

1. The Commissioner of 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 Additional Commissioner of Central Excise, Allahabad, (UP).
4. Guard File.
5. PS to JS (RA)
6. Spare Copy

ATTESTED



(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)