

REGISTERED
SPEED POST



F.No. 195/1268/11-RA-Cx
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...18/12/13

ORDER NO. 1404/13-Cx DATED 13-12-2013 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 35EE of the
Central Excise Act, 1944 against the Order-in-Appeal
No. 154/CE/APPL/AIId/2011 dated 09.09.2011 passed
by the Commissioner of Central Excise (Appeals),
Allahabad.

APPLICANT : M/s Basti Sugar Mills Co. Ltd., U.P.

RESPONDENT : The Commissioner, Central Excise, Allahabad.

Order

This revision application has been filed by M/s Basti Sugar Mills Co. Ltd., U.P. against the order-in-appeal No. 154/CE/APPL/Alld/2011 dated 09.09.2011 passed by the Commissioner of Central Excise (Appeals), Allahabad, with respect to Order-in-Original, passed by the Assistant Commissioner of Central Excise, Allahabad.

2. Brief facts of the case are that the applicant are manufacturer of sugar and molasses falling under Chapter Head 17019990 and 17031000 of the schedule to the Central Excise Tariff Act, 1985. M/s Basti Sugar Mills Co. Ltd. filed remission application on 16.03.2005 under Rule 21 of Central Excise Rules, 2002 for remission of duty amounting to Rs. 1,47,991/- on 290.179MT of molasses on account of storage loss in their molasses due to natural cause. On scrutiny of applicant's application, it was observed by the original authority that they had filed remission application to simply enjoy the benefits of Board Circular No. 261/15-CC/180-CX-8 dated 06.02.1982, that the molasses were stored in Pucca pit which was so safe and secure and its delivery system so sound that loss so found is beyond imagination. The temperature of Steel Tank may reduce but it should not affect the actual weight. Accordingly, a Show Cause Notice was issued to the applicants on 10.03.2008 demanding the Central Excise duty amounting to Rs. 1,47,991/- along with interest and proposal for penalty. The adjudicating authority vide impugned Order-in-Original rejected the applicant's request for remission on the grounds that as per case law of Kesar Enterprises Ltd. Vs. Commissioner of Central Excise [2008(2221) ELT329(Alld)], the CBEC's Instructions cannot be interpreted as matter of right to write off 2% of the annual production as storage loss; that there is no explanation as to how huge storage loss occurred suddenly during 36 to 100 days in different tanks and that the party failed to intimate the jurisdictional Central Excise Officer within prescribed limit period thus will fully suppressed the fact of shortage of molasses

to avoid physical verification in order to evade Central Excise duty and hence i.e. extended period under proviso to section 11A is applicable. Penalty of amount equal to duty demand was also imposed.

3. Aggrieved by this order-in-original, the applicant filed an appeal with the 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 :-

4.1 There are several factors which are responsible for the loss of molasses. Due to its viscosity molasses stick to pipe lines and inner surface of steel tanks in which it is stored. Therefore it is difficult to take out entire quantity of molasses stored in the tank. In the bottom of tanks a goods quantity of sludge also accumulates which adds to shortage in actual quantity. A quantity of molasses is also lost during the course of handling at the time of clearance. Besides, molasses being volatile in nature, during high temperature evaporation of gases and water contents also results in weight loss. These facts have been accepted by various authorities including Tribunal and the literature available on this item 'Molasses'. It is in view of special phenomenon in the case of molasses that the Stage Government have also made provisions under Rule 8(4) of the U.P. Sheera Niyantaran Niyamavali, 1974. Similar order were issued by the Central Board of Excise & Customs as back as in the year 1983 (vide CBEC letter No. 261/15/82 CX 8 dated 18.7.1983 for condonation of storage losses upto 2% of the total molasses stored.

4.2 Factually, when fresh molasses were stored in tank through the pipelines with the stream it entrapped a large number of air bubbles resulting in increase of volume. Due to this foam sometime the volume increases 10-15% of quantity

of molasses stored. These air bubbles subside very slowly. Due to crushing having continued upto April 2004 there was no question of any shortage in tanks due to heavy foam formation on earlier dates. Due to this reason State Excise authorities do not physically verify the stock of molasses but only verify the book balance recorded in register in a routine manner so no loss was shown in earlier verifications. But the adjudicating authority without considering all the above factual position in paras 14.6 & 14.7 of the order held that on perusal of MF5 PtII register U.P. Excise officers on time to time verified the stock on 01.03.2004, 16.03.2004 and 16.06.2004 no shortage was noticed but suddenly within 36 to 100 days a huge quantity of 2,901.79 qtls. In pucca tanks no. 1-5 and steel tank no. 1 was noticed. He further observed that if the loss was due to natural causes the same should have occurred gradually and not suddenly. With this observation he calculated the loss percentage on the basis of quantity stored during short interval of time (within 36 to 100 days) in pucca tanks no.1-5 and steel tank no. 1. he relied upon Kesar Enterprises case [2008 (221) ELT 329 (Allid)] wherein it has been held that 2% loss cannot be condoned as a matter of right.

4.3 Applicant/Revisionist pleaded in appeal that this method to calculate the loss %age is not correct method. It is to be calculated on the entire quantity of molasses stored during the whole sugar season. It is undisputed fact that the molasses is a commodity wherein several chemical reactions takes place due to which evaporation, foaming, etc., do occur. The percentage of evaporation and fermentation depends on the atmospheric condition. Due to evaporation of water contents and gases available therein during the fuggalling process as well as viscous character of molasses the loss in weight is bound to occur. Thus the contention of author of Show Cause Notice that temperature of steel tank should not affect the actual weight of molasses is not sustainable. Factually clearances were made continuously but no dip reading was taken by State Excise officer. They only verified the records of book balance in a routine manner. So no

shortage was shown in records on earlier dates. Even if stock verification would have been done by State Excise officer by dip reading method it would be only estimation not actual. The actual loss can only be ascertained when the tank is fully emptied which can only be ascertained at the end of sugar season. Thus the loss and percentage thereof is to be calculated on the entire molasses stored in a sugar season and not in piece-meal as calculated by the Assistant Commissioner.

4.4 It is an accepted fact that the loss in the molasses can be ascertained only by physical weighing when the entire molasses has been removed from the tank. No doubt the storage loss is a continuous process and occurs gradually but its ratio depends on the weather conditions/temperature as held by this Tribunal in a number of cases:-

- (i) Commissioner of Central Excise, Lucknow Vs. D.S.M. Sugar – 2010 (259) ELT 435 (Tri.Del.)
- (ii) Triveni Engg. & Industries Ltd. Vs. Commissioner of Central Excise, Meerut-I- 2009(236) ELT 517 (Tri.-Del.)
- (iii) Tikaula Sugar Mills Ltd. Vs. Commissioner of Central Excise, Meerut-I, (236) ELT 162 (Tri.-Del.)
- (iv) Mawana Sugar Works Vs. Commissioner of Central Excise, Meerut-2008 (227) ELT 438 (Tri.-Del.)
- (v) Tikaula Sugar Mills Ltd. Vs. Commissioner of Central Excise, Meerut-I – 2008 (224) ELT 303 (Tri.-Del.)
- (vi) Upper Doab Sugar Mills Vs. Commissioner of Central Excise, Meerut-I – 2008 (221) ELT 246 (Tri.-Del.)

4.5 The relied upon Kesar Enterprises case is not applicable being totally different facts. Even after High Court judgment in Kesar Enterprises the Tribunal has been invariably dropping the demand of duty on the storage loss of molasses after allowing the remission application.

4.6 Subject demand cum Show Cause Notice dt. 10.03.2008 after the remission application dt. 16.3.2005 filed for storage loss of molasses having been issued after the expiry of prescribed one year period is barred by limitation. For

invoking extended period of limitation author of Show Cause Notice has alleged that party failed to intimate the jurisdictional Central Excise officers within prescribed limit period. But he has not specified any provision under which the time limit has been prescribed. Factually no time limit for filling remission has been prescribed by any provision of Central Excise law. 24 hours intimation as prescribed by trade notice is applicable for the cases where losses occur due to unavoidable accident like theft, fire, flood, etc., to verify the loss/damage on spot, as held by Tribunal in a number of cases. But in the present case storage loss of molasses is a continuous process and occurs gradually as also admittedly mentioned in their order by lower authorities so the allegation of suppression to avoid physical verification in order to evade the duty is totally unwarranted. After final clearances of molasses from all the pucca pits/tank applicant filed the remission in form 335U(1) on 16.3.05 with all the details. Thus all the facts were in the knowledge of department. The allegation of suppression is made simply to cover up the delay to invoke extended period. Thus demand vide subject Show Cause Notice is hopelessly barred by limitation. Both the orders passed by lower authorities are silent on the issue of limitation.

4.7 Equal penalty has been imposed under section 11AC of Central Excise Act for violation of rule 4,8,10 & 11 of Central Excise Rules. As per Central Excise rule 4 duty is payable on removal. Whole of the quantity of molasses has been cleared on payment of duty. All records are properly maintained and returns filed timely. There is no such allegation either in the Show Cause Notice or in Order-in-Original that applicant has cleared molasses without payment of duty. Shortage being due to natural causes within permissible limits law down by not only legislature but also CBEC and State Excise Department, demand of duty and imposition of penalty is totally uncalled for. All precautions were to be taken to minimize the shortages but due to special feature of molasses some shortage is bound to occur. So, invocation of section 11AC is totally unwarranted.

5. The personal hearing scheduled in this case on 17.10.2013 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 respondent department.

6. Government has carefully gone through the relevant case records/available incase files, 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 application for remission of duty amounting to Rs. 1,47,991/- on 290.179 Mts of molasses on account of storage loss in their molasses due to natural cause. The original authority rejected the application for remission and also confirmed Central Excise duty amounting to Rs. 1,47,991/- along with applicable interest by invoking extended period under proviso to section 11A. Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has filed this revision application 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/losses 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 such loss of more than 2% as arrived by the department is actually for one full year. In this regard, Government observes that in these cases, the storage loss exceeding 2% is recorded for a period of less than one month. 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 can not be brushed aside without any valid reasons. The applicants could not explain such big losses occurring in very short span of time and hence, lower

authorities have rightly held that they have 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:

.....
.....
....."

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 of molasses over a period of time which can prove that such losses have happened due to natural causes. 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 write off of 2% storage/losses as a matter of right irrespective of facts and circumstances of the case. The permissible limit of 2% of losses 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 causes. As such said losses of such a high proportion are rightly held as not condonable.

10. The applicant has contended that show cause notice for demand of duty, was issued after the lapse of period of more than 1 year and therefore in terms of proviso to section 11A of the Central Excise Act, 1944, the said Show Cause Notice was time barred.

10.1 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 with 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 the remission of duty application was filed on 16-03-2005 and the show cause notice was issued on 10-03-2008. In this case the show cause notice was issued after one year and no ground was mentioned for invoking extended time period. Hence said show cause notice is time barred.

10.2 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 with holding of information when the manufacture new otherwise, is required before it in

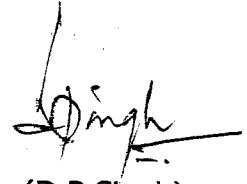
saddled with any liability. Similar view is taken by Apex court in the case of Pahwa Chemicals Pvt. Ltd Vs. CCE Delhi 2005 (189) ELT 257 (SC).

10.3 Since, the show cause notice is barred by time limitation, the said duty demand cannot survive and under such circumstances imposition of penalty under section 11AC is also not legally sustainable. In view of above position, the said demand being time barred and penalty imposed under section 11AC is set aside. However for the lapse on the part of applicant penalty of Rs. 10,000/- is imposed under rule 25 of Central Excise Rule 2002.

11. In view of above discussions, Government modifies the impugned Order-in-Appeal to the extent discussed above.

12. Revision Application is disposed off in above term.


13. So, ordered.



(D P Singh)
Joint Secretary(RA)

M/s Basti Sugar Mills Co. Ltd.,
Distt.-Basti (U.P.)

(Attested)



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

Order No. 1404/13-Cx dated 13.12.2013

Copy to:-

1. The Commissioner, Central Excise, 38, Mahatma Gandhi Marg, Civil Lines, Allahabad, UP
2. The Commissioner (Appeals) Central Excise, 38, Mahatma Gandhi Marg, Civil Lines, Allahabad, UP)
3. The Additional Commissioner Central Excise, 38, Mahatma Gandhi Marg, Civil Lines, Allahabad , UP.
4. Shri Mayank Garg, Advocate, B-1/1289-A, Vasant Kunj, New Delhi 110070.
4. PS to JS(Revision Application)
5. Guard File
6. Spare Copy.


(Bhagwat P. Sharma)
OSD (Revision Application)