



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F.NO.195/843/12-RA / 5890

Date of Issue: 12/12/19

ORDER NO. 292/2019-CX (WZ) /ASRA/MUMBAI DATED 06.12.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Rama petrochemicals Limited.

Respondent : Commissioner of Central Excise, Raigad.

Subject : Revision Applications filed, under section 35EE of the Central Excise ACT, 1944 against the Orders-in-Appeal No.BC/110/RGD/2012-13 dated 25.06.2012 passed by the Commissioner of Central Excise(Appeals), Mumbai-III.

ORDER

This revision application has been filed by M/s. Rama petrochemicals Limited (hereinafter referred to as "the applicant) against the Order-in-Appeal No. BC/110/RGD/2012-13 dated 25.06.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai- III.

2. Brief facts of the case are that the applicant are engaged in the manufacture of methanol falling under Chapter 29 and have procured Raw Naptha at a concessional rate under Notification No. 21/86. C.E. dated 10.02.86 under Chapter VII-A procedure i.e on AR3A from M/s BPCL. While re-warehousing the Raw Naphtha, shortages were found and hence two Show Cause Cum Demand Notices were issued to the applicant for recovery of differential duty under Rule 160 of the erstwhile Central Excise Rules, 1944.

3. Deputy Commissioner, Central Excise, Khopoli Division vide Order in Original No. Rgd/KPL/DC/09/11-12 dated 13.06.2011 confirmed the following demands in terms of Rule 160 of erstwhile Central Excise Rules, 1944 read with Rule 192 ibid and Section 11A of erstwhile Central Excise and Salt Act, 1944, namely;

(i) the demand of Rs. 3, 59,909/- (Rupees Three Lakh Fifty Nine Thousand Nine Hundred Nine only) raised vide Show cause Notice No. C.Ex/KPL-II/Rama/SCN/382 dtd. 01.03.1994 and

(ii) the demand of Rs.10,201/- (Rupees Ten Thousand Two Hundred one only) raised vide Show cause Notice No. C.Ex/KPL-II/Rama/SCN/657 dtd. 21/26.04.1994.

4. Being aggrieved by the Order in Original No. Rgd/KPL/DC/09/11-12 dated 13.06.2011, the applicant filed appeal before Commissioner of Central Excise (Appeals), Mumbai-III. The appellate authority after perusing the Annexures attached to Show cause Notice No. C.Ex/KPL-II/Rama/SCN/382 dtd. 01.03.1994 and Show cause Notice No. C.Ex/KPL-II/Rama/SCN/657 dtd. 21/26.04.1994 observed as under:-

"The percentage of loss as worked out in the Show Cause Notice dt. 1.3.94 ranges from 1.17% to 4.48%. Whereas the appellants, without quoting any Board circular in the grounds of appeal and without submitting any copies of such circulars on transit loss, evaporation loss, etc, argued that 1% of loss is condonable as a transit loss. However, the appellants in their appeal

memorandum at Para 8(ii) submit that the loss could be due to various factors like transportation, loading and unloading or due to difference in weighbridges. It shows that the appellants themselves are not sure of how the loss has occurred. Even going by the logic of 1% loss as condonable, the loss in the instant case varies from 1.17% to 4.48% which is a major variation. Further, the loss is to be condonable only if it is a transit loss and if the loss is within permissible limits. For example, if the loss is .90%, .50% or .80% i.e. well within limits of 1%, then the loss would be condonable. Whereas in the instant case the loss as admitted by the appellants themselves is more than the admissible limit and has occurred due to other factors i.e. handling, unloading and difference in weighing machines. Further, the appellants at the time of receipt of Raw Naphtha, would have noted down the reason for difference in the weight. But they have neither produced copies nor original documents to support their claim".

In view of his above observations and also with specific findings distinguishing judgments relied upon by the applicant, Commissioner of Central Excise (Appeals), Mumbai-III vide Order-in-Appeal No. BC/110/RGD/2012-13 dated 25.06.2012 (impugned Order) rejected the appeal filed by the applicant.

5. Being aggrieved by the impugned Order, the applicant has filed the revision application under section 35EE of Central Excise Act, 1944 before the Central Government mainly on the following grounds:

5.1 It is settled law that where there is no allegation and evidence of diversion of the goods, the shortage/difference in the quantity dispatched and the quantity received is attributable to transit/handling losses and the question of demanding duty thereon cannot and does not arise. Reliance is placed in this behalf on the following decisions:

- a) CC & CE, Hyderabad v Bharat Petroleum Corporation Ltd.
2016(344)ELT657
- b) Ultra Tech Cement v CCE 2015 (327) ELT 502
- c) JhunjhunwalaVanaspati Ltd v CCE 2015 (323) ELT 681
- d) CCE v Hindalco Industries Ltd 2017 (349) ELT 211
- e) CC v Suraj Industries 2006 (198) ELT 199
- f) CC v Suraj Industries 2010 (254) ELT 72
- g) Shree GopalVanaspati v CCE 2009 (234) ELT 274
- h) National Organic Chemical Industries Ltd v CC 2000 (126)
ELT.1072.

5.2 In the present case there is no allegation and evidence of diversion of the said goods i.e. Raw Naphtha. The Raw naphtha being highly **volatile in nature**, there is bound to be loss of some quantity due to **evaporation**. Moreover some **handling loss** during loading and unloading is inevitable.

5.3 Where there is no allegation and evidence of diversion of the goods, differences in the weights recorded at the end of BPCL and the weights recorded at the Applicant's end could also arise on account of inaccuracies/errors/differences in the weighing equipments at the two ends. Reliance is placed in this behalf on the following judgments:

- a) Neera Enterprises v CCE 1998(104)ELT382
- b) CCE v Sipta Coated Steel 2000 (125) ELT 578
- c) Mardia Chemicals v CCE 2003 (158) ELT 378
- d) Gharda Chemicals Limited v CCE 2004 (167) ELT 359

In the aforesaid judgments it is laid down that difference of 1% to 2% can be on account of margin of error in weighing equipments at the end of the supplier and at the end of the recipient of the goods.

5.4 In the present case as mentioned hereinabove, there is no allegation and evidence of diversion of the said goods. Therefore the differences in the weights recorded at the end of BPCL and the weights recorded at the Applicant's end can be attributable to the inaccuracies/errors/differences in the weighing equipments at the two ends.

Loss up to 1% in case of Petroleum Products/ Naphtha is considered to be within normal range and therefore condonable and marginal loss in excess of 1% also cannot result in demand for duty in absence of any allegation and evidence of diversion of goods.

5.5 It is laid down in the following decisions of the High Court and Tribunal that in case of Petroleum products such as Naphtha, transit loss up to 1% is considered to be normal:

- a) In HPCL v UOI- 2013 (3) TMI 481-Bombay High Court,
- b) In IOCL v CCE – 2007 (8) TMI 534-CESTAT,
- c) In Sukhna Automobiles Petrol Pump V Dept. of Income Tax-

It is submitted that apart from loss due to evaporation, which is accepted in various decisions to be normal up to 1%, a further marginal difference in weights recorded at two different ends can be on account of **inaccuracies/errors/differences in the weighing equipments** as held in the judgments referred to above. Thus, there can be no duty demand even for the marginal difference over 1% in absence of any evidence of diversion of any quantity as held in the case of CC & CE, Hyderabad v Bharat Petroleum Corporation Ltd 2016(344)ELT657.

5.6 Delay of seventeen years in passing adjudication order vitiates the Order and the Order is liable to be set aside on this ground itself:

Without prejudice to the above submissions, it is submitted that there has been an inordinate delay of seventeen long years in adjudication on part of the Department after the issuance of the Show Cause Notices and filing of the replies. The said Notices were issued and the replies were filed in the year 1994, whereas the order-in-original was passed by the Deputy Commissioner in 2011. The delay of seventeen years on the part of the Department is itself a ground which would justify quashing of the Order of the Deputy Commissioner. It is settled law that in absence of any period of limitation, every authority is to exercise the power within a reasonable period on the failure of which the authority would cease to have jurisdiction by lapse of time. Reliance in this behalf is placed on the following decisions:

Premier Ltd v Union of India 2017 (354) ELT 365
 Universal Generics P. Ltd v UOI 1993 (68) ELT 27
 Cambata Industries P. Ltd v Addl Dir. 2010 (254) ELT 269
 Hindustan Lever Ltd v UOI 2011 (264) ELT 173.

Therefore in view of the aforesaid decisions, the Order-in-Original passed by the Deputy Commissioner is liable to be quashed on ground of delay.

6. A Personal hearing in this case was held on 03.09.2019 which was attended by Ms. Shamita J. Patel, Advocate on behalf of the applicant who reiterated the submissions filed in the revision application, written submissions along with case laws and pleaded that OIA be set aside and RA filed by them be allowed.
7. Government has carefully gone through the relevant case records, written / oral submissions and perused the impugned order-in-original and order-in-appeal.
8. Government observes that the issue to be examined is whether the losses claimed to be incurred by the Applicant are within standard condonable limits or whether the losses claimed to have incurred by the applicant in excess of the prescribed standard limits had been scrutinized before rejecting the claim of remission of duty on such losses.
9. The CBEC has issued several instructions, in the form Circulars, on storage and handling losses in respect of petroleum products for condonation and remission of duty. Board Circular *F.No.261/6/28/80/CX-8 dated 19/10/1981*, states that when the remission of duty on storage or other losses claimed by the assessee exceeds 1%, the department has to closely scrutinize the case and satisfy themselves that the claim is genuine. The said Board Circular which is relevant in this matter is reproduced below:-

Storage Losses

F.No.261/6/28/80/CX-8

"Subject: Storage Losses-Condonation of – Regarding

As assessee has to properly account for any storage or processing loss to the satisfaction of the proper office, before duty thereon is remitted, because every storage loss or deficiency found in stock cannot always be attributed to natural or permissible causes, like evaporation or pilferage losses.

What should be the percentage of the storage & processing losses, depends upon the facts and circumstances of each individual case. However in relation to goods where evaporation or pilferage can take place CBE & C has prescribed 1% as a standard permissible loss (Para 4 CBE & C Bulletin for the period January – March 1965) Vol.XI Page No.55).

For condonation of loss up to the limit of 1% the authorities need not enter into detailed scrutiny to verify the bonafide of the reported loss. However, when a claim for the condonation of loss above 1% is made the officers concerned have to very close scrutinize the case and satisfy themselves that the claim is genuine. Technical advice may also be sought.

When the remission of duty on storage or other losses claimed by the assessee does not appear to be genuine, the Department has to issue a Show Cause Notice before rejecting the claim."

10. Government further finds that Board in its Circular No. 55/89-CX.8, dated 15.12.1989 has clarified that the storage loss and handling losses should be taken up for condonation on month wise accumulative basis as per guidelines prescribed in Board's F.No.26/23/EXM/54, dated 1.6.1956 and F.No. 9/17/57-CX.2 dated 2.03.1959 as may be seen in para 69 of Petroleum Products Manual (Corrected up to 31/01. 1985).

11. It is noticed that the original authority did not accept applicant's contention that the loss up to 1% can be condoned as the loss involved in the instant cases were ranging from 1.17% to 4.48%. The original authority also observed that the reason for such shortages cannot be ascertained as the issue was very old pertaining to year 1993-94. As it could not be ascertained in these cases that the loss was falling in the category of "Natural causes / circumstances beyond the control of the assessee / unavoidable accidents" the Original authority held that allegation made in two Show Cause Notices that shortages do not seem due to the reason of Natural causes/ circumstances beyond the control of the assessee / unavoidable accidents are proved.

12. The aforementioned observations of the Original authority, are inconsistent with the Board instructions on storage and handling losses and its condonation for remission of duty. The Board Circular No F.No.261/6/28/80/CX-8 categorically states that "For condonation of loss up to the limit of 1% the authorities need not enter into detailed scrutiny to verify the bonafide of the reported loss". It is a well-known fact that petroleum products are prone for evaporation and issuance of clarification on the subject by the Board, by issuance of various circulars, reflect the acceptance and consideration of such losses. From the findings of the Original Authority it can be gleaned that he has neither condoned the permissible prescribed limit nor scrutinized the applicants claim in excess of the condonable limit of 1%. Government notes that in the instant case the Original authority has neither closely scrutinized the case nor satisfied itself that the claim of the applicant was not genuine.

13. From the copies of Annexures attached to Show cause Notice No. C.Ex/KPL-II/Rama/SCN/382 dtd. 01.03.1994 and Show cause Notice No. C.Ex/KPL-II/Rama/SCN/657 dtd. 21/26.04.1994 it is found that the differential duty has been worked out on the basis of shortages noticed AR3A wise as against the Board Circular No. 55/89-CX.8, dated 15.12.1989 which clarifies that the storage loss and handling losses should be taken up for condonation on month wise accumulative basis

14. It is also clear from the Order in Original that the Original authority has conceded that reason for such shortages cannot be ascertained as the issue was very old pertaining to year 1993-94. In spite of this, Original authority has arrived at the conclusion that the allegation made in the said two Show Cause Notices that shortages do not seem due to the reason of Natural causes / Circumstances beyond the control of the assessee / unavoidable accidents are proved. Therefore, Government is of the considered view that that the Order in Original is passed by the Original authority abruptly, without discussing the reasons for the storage losses or mentioning any reason for the conclusion arrived at. Therefore, the Order in Original confirming the demand of differential duty calculated only on the basis of shortages noticed AR3A wise and also without considering /allowing losses (both storage and processing losses) upto 1% in terms of Board Circular F.No.261/6/28/80/CX-8 dt.19.10.1981, cannot be held to be just and proper.


15. Government further observes that there is nothing on record to suggest that the applicant had delayed any proceedings pending adjudication nor the Original

authority in his Order in Original has alleged any malice on the part of the applicant. Under the circumstances the blame for non-ascertaining the reason for such shortages, being the issue was very old, cannot be placed on the applicant. The facts clearly disclose that the delay in adjudication of the Show Cause Notices is inordinate and arbitrary and a serious lapse.

16. In view of the aforesaid discussion and observations, Government sets aside the impugned Order-in-Appeal Nos. BC/110/RGD/2012-13 dated 25.06.2012 passed by Commissioner of Central Excise (Appeals), Mumbai- III and remands the matter back to the adjudicating authority for taking up matter in terms of the instructions issued by the Board circulars discussed supra. The Adjudicating Authority shall pass the order, after affording a reasonable opportunity of hearing to the applicant, within 8 weeks from the date of receipt of this order.

17. The revision application is disposed of in the above terms.

18. So, ordered.


(SEEMA ARORA)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No 292/2019-CX (WZ) /ASRA/Mumbai DATED 06.12.2019

To,
M/s Rama Petrochemicals Limited,
51-52, Free Press House, 215, Nariman Point,
Mumbai 400 021.

Copy to:

1. The Commissioner of CGST & CX Raigad, Kendriya Utpad Shulk Bhavan, Plot No.1, Sector,17, Khandeshwar, Navi Mumbai 410206
2. The Commissioner CGST & CX (Appeals), Raigad,
3. The Assistant / Deputy Commissioner CGST & CX, Kendriya Utpad Shulk Bhavan, Plot No.1, Sector,17, Khandeshwar, Navi Mumbai 410206
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.