REGISTERED SPEED POST AD

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, Cuffe Parade,
Mumbai- 400 005

F. No. 195/514/12-RA Date of Issue:

ORDER NO. 362/2020-CX (WZ) /ASRA/MUMBAI DATED 04-03-2020 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. Bharat Petroleum Corporation Ltd.
Mumbai Refinery,
Excise Documentation Cell,
Mahul, Mumbai – 400 074

Respondent : Commissioner, Central Excise, Mumbai-II

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the OIA No. US/167/M-II/2012 dated 14.03.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

ORDER

The revision application has been filed by M/s. Bharat Petroleum Corporation Ltd., Mumbai Refinery, Excise Documentation Cell, Mahul, Mumbai - 400 074(hereinafter referred to as "the applicant") against OIA No. US/167/M-II/2012 dated 14.03.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

2.1 It appeared that the applicant had made unaccounted clearances of Aviation Turbine Fuel(ATF) in the guise of storage loss to the extent of 0.5% of the production of such goods without payment of central excise duty. Reference was had to para 6.3 of Board Circular No. 804/1/2005-CX dated 04.01.2005 which stated that "it is hereby clear that no storage loss are permitted in the export warehouses/tanks whether intermediate or at AFS including those with such mixed storage. Further the export warehousing under Notification No. 46/2001-CE(NT) dated 26.06.2001 does not cover removal of goods from one export warehouse to another". Hence, it was averred that the applicant was liable to pay central excise duty on such unaccounted goods as per Rule 4 of the CER, 2002.

2.2 The applicant appeared to have contravened the provisions of Rule 4, Rule 5, Rule 6 and Rule 8 of the Central Excise Rules, 2002 with an intent to evade payment of central excise duty on the said goods as they had not properly accounted for the clearance of various petroleum products by claiming the same as storage loss in the refinery and not discharging duty on such unaccounted goods which resulted in short payment of central excise duty on unaccounted clearances claimed to be storage losses to the tune of Rs. 23,25,167/- for the period August 2009 to March 2010. The applicant had paid duty on the unaccounted clearances which they have claimed to be storage losses, which had been calculated on the quantum of loss over and above the unaccounted quantity of 0.5% in the case of ATF. It was further noticed that the applicant had submitted a consolidated figure of central excise duty paid in their ER-1 returns on unaccounted clearances claimed to be storage losses with an intention to camouflage the clearance of various petroleum products which were unaccounted with the intent to evade payment of duty. The applicant was therefore issued a SCN dated 07.09.2010 demanding central excise duty amounting to Rs. 23,25,167/-, imposing penalty and demanding interest.

2.3 On taking up the case for adjudication, the Additional Commissioner found that the Circular No. 804/1/2005-CX dated 04.01.2005 was not applicable to the applicant as their unit was a refinery and not a export warehouse. With regard to the applicants reliance on the Boards letter F. No. 26/23/CXM/54 dated 01.06.56 and F. No. 9/17/57-56CX-II dated 02.03.1959, Circular No. 55/89-CX.8 dated 15.12.89 and the decisions of CESTAT emphasizing that such losses are condonable, the adjudicating found that in all these cases the manufacturer had approached the competent authority for remission of duty involved on storage losses. He averred that the Board had no statutory authority to forego or exempt central excise duty on excisable goods. He found that the stand of claiming storage loss instead of resort to remission was an afterthought. The adjudicating authority therefore vide his OIO No. PK/01/ADC/M-II/2011 dated 08/09.06.2011 confirmed the demand of central excise duty amounting to Rs. 23,25,167/- alongwith interest and imposed equal penalty under Rule 25 of the CER, 2002.

3. On appeal by the applicant, the Commissioner(Appeals) examined the Board's letters F. No. 26/23/CXM/54 dated 01.06.56 and F. No. 9/17/57-CX.II dated 02.03.59 and drew the conclusion that these instructions were applicable only to Motor Spirit, Kerosene, Refined Diesel Oil and Light Diesel Oil. He inferred that since ATF is not covered under the said letter, condonation of losses envisaged under the Board's letters will not be available to ATF. The Commissioner(Appeals) therefore vide his OIA No. US/167/M-II/2012 dated 14.03.2012 upheld the OIO and rejected the appeal.

4. Being aggrieved by the OIA, the applicant has now preferred revision application on the following grounds:

(a) The SCN in these proceedings have been conceived in the light of para 6.3 of Board Circular No. 804/1/2005-CX dated 04.01.2005. They averred that since their Mumbai Refinery was a factory of production and not an Export Warehouse, the SCN invoking the said circular was misconceived and on this ground alone the proceedings should be dropped. The applicant observed that even the adjudicating authority had recorded a positive finding in this regard.

(b) The applicant averred that the adjudicating authority had confirmed the demand on the ground that the applicant had not filed for remission of duty and had thus travelled beyond the scope of the SCN.

(c) The applicant submitted that there was no requirement of filing remission application under Rule 21 of the CER, 2002 in respect of storage losses permitted by CBEC circulars/letters. It was further submitted that the CBEC circulars/letters were binding on the Departmental Officers.

(d) The applicant pointed out the language and the words used in the CBEC letters state "storage of end products such as Motor Spirit, Kerosene etc. in the tanks at Refinery's premises". They averred that the use of these words meant that the list was not exhaustive as the Refinery produces various products and that T.I. No. 7 includes ATF also. Therefore storage loss on ATF would also get covered under the aforesaid CBEC letter.

(e) They further contended that the powers of remission are delegated to different ranks of officers starting from the Inspector onwards till the Commissioner whereas the CBEC has per se permitted storage/transit loss on petroleum products without specifying any specific officer. Therefore, Central Excise Officer subordinate in rank to CBEC cannot refuse to condone such storage loss.

(f) The applicant pointed out that it had been the prevalent practice to not demand duty on condonable losses and referred OIO No. 12/Commr/M-II/08 dated 29.02.2008 passed by the Commissioner of Central Excise, Mumbai-II whereby the adjudicating authority had dropped the demand on storage/transit loss within the permissible limit and confirmed the duty on shortage in excess of condonable limit permitted by CBEC. They also referred OIO No. 26/2005 dated 16.03.2005 passed by the Joint Commissioner of Central Excise, Cochin which was on similar lines. They submitted that to the best of their knowledge these orders had not been challenged by the Department.

(g) The applicant averred that since they were not liable to duty, no interest would be recoverable. They further contended that no penalty would be imposable

on them as they were Government of India Undertaking. They also submitted that penalty would not be applicable in the absence of mens rea.

5. The applicant was granted the opportunity of personal hearing. Shri M. S. Iyer, DGM(Excise) and Shri Vinayak Dangare, Executive(Accounts) appeared on their behalf. They handed over written submissions during the personal hearing. They stated that the Circular No. 804/1/2005-CX dated 04.01.2005 had been issued in respect of export warehouses whereas theirs was a manufacturing unit. They also pointed out that they had been granted relief for the same issue in the subsequent period. They placed reliance upon the Tribunals decision in the case of Indian Oil Corporation vs. Collector of Central Excise[1993(66)ELT 464(Trb)].

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal. The issue involved for decision is whether condonation of storage losses to the extent of 0.5% is allowable in case of Aviation Turbine Fuel(ATF).

7.1 Government notes that the SCN raises the demand on the ground that the applicant had made unaccounted clearances of ATF in the guise of storage loss to the extent of 0.5% of the production of such goods without payment of central excise duty. To lend it further strength, the SCN relies upon Board Circular No. 804/1/2005-CX dated 04.01.2005 to contend that no storage losses are allowed. In this regard, the contention of the applicant that their Mumbai Refinery was a factory of production and not an Export Warehouse is tenable. It is also seen from the adjudication order that the adjudicating authority has taken note of this inconsistency. Thereafter, the adjudicating authority has proceeded to confirm the demand on the ground that the applicant had not filed for remission for the storage losses. This finding recorded by the adjudicating authority is again beyond the scope of the SCN issued as the demand has not been made out on this ground. To compound matters further, the Commissioner(Appeals) has held that the Board's letters on the issue do not mention ATF as one of the products on which storage losses are permissible and therefore the demand would sustain. Government notes that this ground again exceeds the scope of the SCN issued.

7.2 In the interest of justice and equity, Government now proceeds to examine the case on merits. It would perhaps be common knowledge that being volatile in nature,

petroleum products are prone to losses at every stage; be it storage, handling or transfer through pipeline. These losses are principally due to natural causes like evaporation, variation in temperature and density and in some cases due to pilferage. Other than pilferage, the causes of loss are beyond human control. The Board's letters F. No. 26/23/CXM/54 dated 01.06.56 and F. No. 9/17/57-CX.II dated 02.03.59 state that storage loss may be allowed on Motor Spirit, Kerosene, Refined Diesel Oil and Light Diesel Oil subject to a maximum ceiling of 0.5%. These letters had been issued when the Tariff Items for classification were in vogue. Thereafter, by the enactment of the Central Excise Tariff Act, 1985, the Central Excise Tariff has been instituted to classify excisable products. In this regard, Government observes that although these letters do not specifically mention ATF, ATF is of the same sub-classification as kerosene and LDO and falls under chapter heading no. 2710 19 of the CETA, 1985 at 2710 19 10 and 2710 19 20 respectively. As such, ATF is a kerosene based fuel. It would be relevant to note that these letters have been issued to notify cumulative loss allowance towards loss in storage of end products "such as Motor Spirit, Kerosene, etc.". The words "such as" preceding the names of petroleum products such as Motor Spirit, Kerosene signify that these allowances were intended for these products and similar such volatile products which are prone to evaporation, variation due to temperature, density and unavoidable human errors. Therefore, the product names mentioned are to only be considered as representative of the class of goods and not exhaustive.

7.3 Government further notes that after the issue of the letters F. No. 26/23/CXM/54 dated 01.06.56 and F. No. 9/17/57-CX.II dated 02.03.59, the CBEC had issued letter F. No. 261/6/28/80-CX.8 dated 19.10.1981 without mentioning any specific product names while stating 1% as standard permissible loss. The said letter further states that for condonation of losses upto the limit of 1%, there would be no need to enter into detailed scrutiny to verify the bona fide of the reported loss. In other words, losses upto 1% are to be condoned without detailed scrutiny. In the circumstances, in view of the admitted position in the SCN by the allegation that the applicant had claimed 0.5% as storage loss in the refinery, such loss is well within the permissible limits prescribed by the Board. Government observes that the OIO No. 04/RN/COMMR/M-II/2014-15 dated 31.07.2014 passed by the Commissioner, Central Excise, Mumbai had also allowed storage loss upto 0.5% in respect of ATF. The demand raised by the Department therefore does not sustain and is liable to be set aside.

8. Government hereby sets aside the impugned order and allows the revision application filed by the applicant.

9. So ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No.302/2020-CX (WZ) /ASRA/Mumbai DATED 04.03.2020.

To,
M/s. Bharat Petroleum Corporation Ltd.
Mumbai Refinery,
Excise Documentation Cell,
Mahul, Mumbai – 400 074

Copy to:

1. The Commissioner of CGST & CX, Navi Mumbai Commissionerate
2. The Commissioner of CGST & CX, (Appeals), Raigad
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy