

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. 195/01-02/12-RA

Date of Issue:

311-312
ORDER NO. /2020-CX (WZ) /ASRA/MUMBAI DATED 01.03.2020 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.
Wadilube Installation,
Wadibunder,
Mallet Road,
Mumbai 400 009

Respondent : Commissioner, Central Excise, Mumbai-II

Subject : Revision Applications filed, under section 35EE of the Central Excise Act,
1944 against the OIA No. YDB/78-79/M-I/2011 dated 07.10.2011 passed by
the Commissioner of Central Excise (Appeals), Mumbai Zone-I.



ORDER

The revision application has been filed by M/s. Bharat Petroleum Corporation Ltd., Wadilube Installation, Wadibunder, Mallet Road, Mumbai 400 009(hereinafter referred to as "the applicant") against OIA No. YDB/78-79/M-I/2011 dated 07.10.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I.

2.1 During the annual stock check of excisable goods carried out by the applicant, shortage of various grades of lubricating oils falling under CETH 2710 19 80 were noticed. These shortages of 13825.456 ltrs. And 12820.572 ltrs were declared in their monthly ER-1 returns for the month of April 2008 and April 2009 respectively. However, the applicant had not furnished any reasons/explanations for the shortages found in their excisable goods and also did not discharge the duty liability in respect of the said quantity of excisable goods found short and reported in their monthly return. The lubricating oils shown as found short in their returns were deemed to have been removed by the applicant without payment of central excise duty. Therefore, the applicant was issued SCN's dated 16.01.2009 & 16.12.2009 calling upon them to show cause why central excise duty of Rs. 1,68,507/- and Rs. 1,75,415/- as detailed in the annexures to the SCN's should not be recovered from them alongwith interest and why penalty should not be imposed upon them.

2.2 On taking up the SCN's for adjudication, the Deputy Commissioner observed that the SCN had been issued for total shortage of various lubricating oils falling under CETH 2710 19 80 but it has not taken into account the excess quantity. After taking into account the excess quantity, the net shortage when worked out as a percentage of gross stock works out to 0.006% and 0.003% respectively which was negligible and much lesser than the admissible limit of 0.1% of the total quantity handled during the financial year. It was further observed that there was nothing in the SCN's to show that these losses have occurred due to negligence or pilferage or to show that there was clandestine removal. The Deputy Commissioner, Division A, Central Excise, Mumbai therefore vide OIO No. 06/2010-11 dated 04.03.2011 and OIO No. 07/2010-11 dated 10.03.2011 held that the shortages were within the acceptable 0.1% condonable limit and therefore required to be condoned. Hence, ordered that no duty is demandable and dropped the demand. It was also held that no penalty was imposable.



3. The Department found that the impugned orders were not proper, legal and correct and directed filing of appeal before the Commissioner(Appeals). On taking up the appeals for decision, the Commissioner(Appeals) averred that the CBR Bulletin Central Excise Technical for January to March 1971 and OIO No. 15/M-I/2003 dated 31.07.2003 were relevant in case of clearances of goods from the refinery and not from the Depot or dealers premises. He further found that CBEC Circular F. No. 11-A/6/70/CX-8 dated 30.04.1971 fixed the limit of 0.1% for condoning shortage/loss of base oil whereas in the instant case the unit containers filled with lubricating oil were found short and therefore such loss cannot be treated as shortage loss as the container itself is removed. He further averred that the decision of CEGAT, East Regional Bench in the case of Indian Oil Corporation Ltd. vs. CCE, Calcutta[1984(15)ELT 479(Trb)] pertained to transit losses and therefore the rationale of the same cannot be applied to the instant case. Thereafter, he referred the Trade Notice No. 5(MP)/V.N.Oils/59 dated 09.01.1959 issued by the Collector of Central Excise, Bombay wherein it was stated that leakages of oils from tins, barrels or drums will be allowed only after satisfying the Range Officer in charge of the factory that the leakage of oil from the containers had taken place while in shortage. He also placed reliance on the judgments in the case of CCE, Vadodara vs. Dhiren Chemical Industries[2002(43)ELT 19(SC)] and Paper Products Ltd. vs. CCE[1999(112)ELT 765(SC)] and Indian Oil Corporation Ltd. vs. Commissioner of Customs, Calcutta[2004(165)ELT 257(SC)] holding that the authorities working under the CBEC are bound to follow the circulars issued by the Board. In the light of these findings, the Commissioner(Appeals) vide his OIA No. YDB/79-79/M-I/2011 dated 07.10.2011 held that the applicant had failed to follow the conditions stipulated in the Trade Notice issued by the Department. The Commissioner(Appeals) held that the OIO's could not be sustained, set aside the OIO's and allowed the Departmental appeals.

4. The applicant has now filed revision application on the following grounds:

- (a) They submitted that lubricating oils are highly viscous in nature and are prone to variations due to natural reasons of clingage to the containers/packages due to which losses occur at the time of handling the product and storage of the same. The activity of handling, storing, movement within the premises, loading, unloading and dispatches of the filled containers/packages are done with the help of forklifts. During



movement of the containers using forklifts within the premises, breakages, damages of the containers/packages are unavoidable. The lubricating oils packed in small containers, pails, barrels are sometimes kept in the open space in LOBP and are exposed to the vagaries of weather.

(b) With regard to the finding that the applicant has wrongly relied upon CBR Bulletin Central Excise Technical for January to March 1971 and OIO No. 15/M-I/2003 dated 31.07.2003 that they are relevant only to clearance of goods from refinery and not from depots or dealers premises, the applicant pointed out that the cases pertain to clearance from Lube Oil Blending Plant which is a manufacturing plant and duly registered with Excise Authorities as manufacturing unit.

(c) With regard to the finding of the Commissioner(Appeals)-relating to CBEC Circular F. No. 11-A/6/70/CX-8 dated 30.04.1971 that it relates to condonation of losses on base oil in bulk quantity and not to quantity packed in unit container, the applicant submitted that any lubricating grade consists of around 90%-95% base oil. Therefore the CBEC Circular would also equally apply to finished lubricating oil. They averred that the circular for condoning lubricating oil base stock would equally apply to finished lubricating oils also.

(d) The applicant placed reliance on the Order No. 139/09 dated 04.06.2009 passed by the Revisionary Authority condoning losses upto 0.1%, OIO No. 25/2001 dated 09.02.2001 passed by Additional Commissioner, Mumbai dropping the demand for loss below 0.1%, OIO No. 15/M-I/03 dated 31.07.2003 condoning the loss of 0.1% and confirming the demand on excess loss of duty confirmed and paid, OIA No. CPA(3200-3201)7-8/M-I/2007 dated 17.05.2007 passed by Commissioner(Appeals) dropping the demand since the loss was below 0.1%.

(e) They further submitted that since the Department did not challenge any of the said orders, it was not open to the Department to refuse to follow the principle laid down therein to adjust the gain against shortages; subject to condonation of 0.1% loss. They submitted that if this formula were to be applied in the present case, the demands would not sustain.



- (f) The applicant placed reliance upon the decisions in the case of Eicher Motors Ltd. vs. CCE, Indore[2001(129)ELT 734(Tri-Del)] which has been approved by the Hon'ble Supreme Court, CCE, Vadodara vs. Gujarat State Fertilisers & Chemicals Ltd.[2008(229)ELT 9(SC)], Indian Oil Corporation Ltd.[1984(15)ELT 479(Trb)].
- (g) In so far as the finding recorded by the Commissioner(Appeals) holding that the case laws pertain to transit losses and are therefore not applicable, the applicants submitted that in any adjudicating/appellate proceedings the cases cited or referred are only for the sake of guidance and for helping the adjudicating/appellate authorities to arrive at a decision based on the stand taken by authorities at different levels of adjudication and appeal proceedings.
- (h) The applicant submitted that the reference made to Trade Notice No. 5(MP)/V.No.Oils/59 dated 09.01.1959 issued by the Collector of Central Excise, Bombay by the Commissioner(Appeals) stating that the leakages of oil from tins, barrels or drums would be allowed only after satisfying the Range Officer about the actual leakage of oil from the containers has taken place while in shortage.
- (i) The Commissioner(Appeals) has also recorded a finding that the Trade Notice No. 5(MP)/V.N.Oils/59 dated 09.01.1959 issued by the Collector of Central Excise, Bombay had not been followed. In this regard, the applicant submitted that relying on an age old Trade Notice to say that it was not followed and hence the dropping of the demand is not legal and proper and is without any basis and illegal.

5. The applicant was granted personal hearing on 04.10.2019, 05.11.2019 and 20.11.2019. However, none appeared on their behalf. ARX Bizness Advisors LLP has submitted an unsigned letter dated 24.07.2015 on behalf of the applicant. The thrust of the submissions is that penalty is not imposable.

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 condonation of shortage in the stock of various grades of lubricating oils. The Department has at the first stage allowed the shortage as condonable loss. However, on appeal by the Department, the



Commissioner(Appeals) has found that the CBEC Circular F. No. 11-A/6/70/CX-8 dated 30.04.1971 pertains to Lubricating Oil Base Stock in bulk and not to lubricating oil packed in unit containers and held that the shortages were not condonable.

7. Government observes that at various places including the revision applications filed by them, the applicant has fairly admitted that the lubricating oil was packed in containers/packages. This factual aspect would have bearing upon the condonability of these storage losses. The Board was seized of the fact that petroleum products being volatile in nature are prone to losses due to natural causes like evaporation, fluctuation in volume due to temperature, density, processing loss etc. There are also other causes of loss like spillage, pilferage. Taking all these factors into consideration, the Board has issued circulars from time to time to allow condonation of losses at certain percentages for different products. These percentages were the set standards above which losses could not be condoned and the assessee was required to pay duty beyond such limit. With the improvement in technology being used by refineries, the possibility of losses have diminished.

8. Government notes that once lubricating oil is packed in containers/packages, they would have been entered into the RG-1 register as finished stock. Any commercial enterprise would ensure that packed, finished goods would not be exposed to the elements. It therefore escapes understanding as to how the applicant can claim that they "are some times kept in open space in the LOBP and are exposed to the vagaries of the weather."—The applicant has also submitted that the lubricating oil in containers/packages is moved around with the help of forklifts which results in breakages, damages. The Commissioner(Appeals) has correctly pointed out that CBEC Circular F. No. 11-A/6/70/CX-8 dated 30.04.1971 covers base stock and not lubricating oil itself. On carefully going through the various circulars, it is observed that none of them provide for storage loss in respect of lubricating oil. It would therefore follow that the 0.1% percentage specified as allowable storage loss would not apply to lubricating oil. The contentions of the applicant based on the composition of the lubricating oils being around 90% - 95% base oil is not tenable. The authorities have



correctly identified the goods which are subject to storage loss and specified the limits. There is no room for conjecture on the basis of the composition of the product to include it within the list of products which have been identified as prone to storage loss.

9. Government observes that the applicant has relied upon certain case laws to argue that the Department cannot re-open an issue which they have already conceded. In this regard, the Government observes that the case law of IOCL[1984(15)ELT 479(Trb)] dealt with the subject of transit loss on jute batching oil. Neither the circumstances resulting in loss nor the product involved bear any resemblance to the facts of the case on hand. In so far as the Order No. 138/09 dated 04.06.2009 passed by the Revisionary Authority, OIO No. 25/2001 dated 09.02.2001 passed by the Additional Commissioner, OIO No. 15/M-I/03 dated 31.07.2003 passed by Commissioner and OIA No. CPA(3200-3201)7-8/MI/2007 dated 17.05.2007 passed by Commissioner(Appeals) in their own case which are stated to have been accepted by the Department are concerned, it is observed that the Government of India has decided a case involving the same facts in the case of the same applicant vide Order No. 1006/2011-CX., dated 09.08.2011[2012(281)ELT 455(GOI)]. In the said case, Government has distinguished the Order No. 138/09 dated 12.06.2009 passed by the Revisionary Authority as a case where there was loss from bulk quantity of lubricating oil manufactured by the applicants. In the said decision, the Government has categorically held that Circular F. No. 11-A/6/70/CX.8 dated 30.04.1971 condones storage loss of base oil and not lubricating oil found short in unit containers. On the basis of detailed findings, the Government has rejected the revision application filed by the applicant as being devoid of merits. In this light, the proposal for recovery of duty on the shortage of lubricating oil in the present case is sustainable.

10. In so far as the penal provisions invoked in the SCN are concerned, Government observes that the Commissioner(Appeals) has not imposed any penalty. However, Government notes that no evidence has been adduced by the Department to prove that the goods found short have been cleared from the factory. Moreover, this practice of annual stock taking has been in vogue since many years and the Department has routinely been issuing SCN's for recovery of duty on the losses on the basis of the figures declared in the ER-1 returns by the applicant. Therefore, intent to evade duty cannot

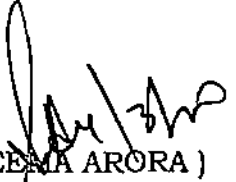


be ascribed to the applicant. Government therefore refrains from imposing any penalty on the applicant.

11. Government follows the ratio of the decision in Order No. 1006/2011-CX., dated 09.08.2011[2012(281)ELT 455(GOI)] and upholds the impugned OIA No. YDB/78-79/M-I/2011 dated 07.10.2011.

12. The revision applications filed by the applicant are rejected.

13. So ordered.



(SEEMA ARORA)

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

34-312
ORDER No. /2020-CX (WZ) /ASRA/Mumbai DATED 04.03.2020

To,
M/s. Bharat Petroleum Corporation Ltd.
Wadilube Installation,
Wadibunder,
Mallet Road,
Mumbai - 400 009

Copy to:

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

