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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  
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Mumbai- 400 005

F. No. 195/02/SZ/2021-RA / 1538  
F. No. 195/03/SZ/2021-RA

Date of Issue:- 25.04.22

ORDER NO. 358-359/2022-CX(SZ)/ASRA/MUMBAI DATED 20-4-2022  
OF THE GOVERNMENT OF INDIA, SHRI SHRAWAN KUMAR, PRINCIPAL  
COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE  
GOVERNMENT OF INDIA, UNDER, UNDER SECTION 35EE OF THE CENTRAL  
EXCISE ACT, 1944.

Applicants : M/s Tide Water Oil Company (India) Ltd.

Respondents : Commissioner of Central Excise (Appeals), Chennai.

Subject : Two Revision Applications filed, under Section 35EE of  
Central Excise Act, 1944 against the Orders-in-Appeal  
Nos. 84-85/2020 (CTA-I) dated 20-11-2020 passed by the  
Commissioner of GST & Central Excise (Appeals-I), Chennai

## **ORDER**

These are two Revision Applications filed by the M/s. Tide Water Oil Co. (1) Ltd., (hereinafter referred to as "the applicant") having office at Seshachalam Centre, 10<sup>th</sup> Floor, 636 Anna Salai, Chennai-600035 against Order-in-Appeal No. 84-85/2020 (CTA-I) dated 20-11-2020 passed by the Commissioner of GST & Central Excise (Appeals-I), Chennai

2. The brief facts of the case are that the applicants are manufacturers of Lubricating all and greases falling under Chapter heading No 27.10 of the Central Excise Tariff Act, 1985. The applicants have two units, one in Royapuram (hereinafter referred to as "Unit I) and another unit at Thiruvottiyur (hereinafter referred to as 'Unit II). During the annual stock taking by the applicant, variation between physical stock and book stock was noticed and the same was intimated to the department. Wherever shortages were noticed, demand of duty for the said quantities were proposed on both Royapuram and Thiruvottiyur units. The Applicants were issued with thirteen show cause notices covering the period from 2000-01, 2002-03 to 2009-10 demanding duty on the shortages of Lube oil and greases along with interest under Section 11 AB of the Central Excise Act, 1944 and penalty under Rule 25 of Central Excise Rules, 2002.

2.1 For the year ending 31.03.2002, on the shortages noticed show cause notice was issued vide SCN No. 303/2002 dated 26.08.2002 and demand confirmed vide OIO No. 02/2003 dated 26.02.2003. Aggrieved, the appellant went on appeal and Commissioner (Appeals) vide OIA No.80/03(MI) dated 06.08.2003 allowed the appeal. The Department filed a revision application against the above said order of the Commissioner (Appeals) to the Joint Secretary, Government of India who vide Order No. 127/04 dt. 30.04.2004 remanded the matter to the original authority for fresh consideration after considering the instructions of CBEC in this regard. The applicant filed a writ

petition against the above said order of the revisionary authority before the Hon'ble High Court of Madras. The Hon'ble High court of Madras vide order dt. 02.08.2017 while setting aside the order No. 127/2004 dt. 30.04.2004 remanded the matter to the revisionary authority with a direction to apply a percentage for spillage and loss during repacking by calculating an average which was adopted in the case of the appellant for the earlier three assessment years.

2.2 After due process of law, the impugned 13 show cause notices were adjudicated and the Joint Commissioner vide OIO NO.33-45/2020-CH.N (JC) dated 29-07.2000, dropped the proceedings in 11 show cause notices on the ground that the actual shortage was less than the average shortage percentage during the previous three years and also was less than the maximum condonable loss of 0.1% fixed by CBEC vide instructions in F.No.261/11-B/2/76-Cx-8 dt 04.10.1976. In respect of two show cause notices viz SCN No.5/2008 dated 19-11-08 and SCN No 26/2008 dated 17-11-2008 differential duty was confirmed along with interest under Section 11 AB of Central Excise Act, 1944, since the actual shortage was more than the average shortage percentage during the previous three years and also was more than the maximum condonable loss of 0.1% fixed by CBEC vide instructions in F.No.261/11-B/2/76-Cx-8 dt 04.10.1976.

2.4 Aggrieved by the Impugned Orders, the applicant filed the two appeals before Commissioner Appeal against the amount confirmed only. Commissioner Appeal vide his OIA No. 84-85/2020 (CTA-I) dated 20.11.2020 upheld the Joint Commissioner's Order in Original and rejected the applicant's appeal.

3. Aggrieved by the Commissioner Appeal's Order, the applicant filed the instant two Revision Applications on the following grounds:

i. The applicant submitted that the Commissioner (Appeals) ought to have noted that the Tiruvottiyur Unit (Unit II) receives the duty paid goods only from Royapuram Unit (unit I) and duty is paid at 110% of cost of production on the applicable rate.

ii. When repacking is done at Unit II, the shortage results on account of spillage during re packing (process loss) of raw material (oil and Grease are raw material for Unit II, Tiruvottiyur). Therefore the quantity lost is duty paid quantity of lubricating oils/greases

iii. The Unit II holds Central Excise Registration because repacking is deemed as manufacture and duty has to be paid for the value determined under Sec 4A of CEA, 1944, for the repacked goods. The Commissioner CE(A) in the light of the above ought to have noted that only when repacked goods are cleared from Unit II duty has to be paid and cannot demand duty on goods lost (as process loss) inside Unit II as in respect of Unit II is packed or repacked goods.

iv. The duty demand is on non-existing quantity and the duty on the said quantity is already paid by Unit I when the same was removed to Unit II on stock transfer for repacking.

v. The Madras High Court in WP NO 18276/2004 has not considered the loss at Unit II and therefore the said judgement is not relevant. The Commissioner CE(A) ought to have noted the orders in appeal, revision order and judgement of the Madras High Court referred in the proceedings only deals with the non duty paid( RG1 quantity), quantity at Royapuram Unit-I, lost during repacking. CBE & C Cir F.No-261/11-B/2/76.CX.8 dated 04.10.1976 is also about the loss of non duty paid stock only.

vi. The Commissioner CE(A) further ought to have appreciated even MODVAT/CENVAT rules did not recover (Input credit availed) when such inputs were lost in the course of manufacture. In this case the loss at Unit II is in the course of manufacture (repacking) as repacking is deemed as manufacture and only on this view Unit II has registered themselves for payment of duty on repacked duty paid lubricating oils and greases.

vii. The Applicant requested to set aside the Order in Appeal Quash the demand confirmed in the order noted above

4. The personal hearing was held on 12.11.2021. Shri T.S. Balasubramaniam, Advocate appeared online on behalf of the applicant and submitted that negligible process loss of inputs during the manufacturing does not attract any duty. He requested to drop the demand which has been raised without any basis or evidence.

5. Government has carefully considered the orders-in-original, orders-in-appeal, the Revision applications and the submissions made at the time of Personal Hearing. The issue involved for decision is charging of duty on shortage noticed in the stock of different grades of lubricating oils and greases during Annual stock taking.

6. Government finds in this case that the applicant are manufacturers of Lubricating Oil and greases falling under Ch hdg 27.10 and has two units viz one at Royapuram (Unit I) where base oil is mixed with additives and then repacked into bulk packs and other at Triruvottiyur (Unit II) where the bulk packs are repacked into retail packs of small quantities. During the AST, shortages were noticed and 13 SCNs were issued for the respective year demanding duty on the shortages noticed. The Adjudicating authority vide OIO No33-45/2020-CH.N(JC) dated 29.07.2020 has confirmed two SCNs out of 13

SCNs on the grounds that the shortage % of the stock in those two cases (SCN No.5/2008 dated 19-11-08 and SCN No 26/2008 dated 17-11-2008) were more than the maximum condonable loss of 0.1% and dropped the remaining 11 SCNs as the shortage % were found to be less than the condonable loss. Commissioner Appeal has upheld the Joint Commissioner's Order. The duty confirmed is in respect of the Unit-II.

7. The applicant has contended that for their Unit II, Lubricating Oil and Grease received from Unit-I in tanks and barrels are inputs as repacking amounts to manufacture. During the process of repacking, loss due to spillage can occur. To understand the situation better Government observes the manufacturing process of Unit II, in this case Unit II receives duty paid goods from Unit-I for repacking through Tankers and 210 ltr barrels for lube Oil and 180kg barrels for Grease. The flow chart shows that the Oil/Greases received from the tanker/barrels are repacked into smaller packs manually in Unit-II. In such a situation there are all the chances of loss due to handling or spillage and the same is inevitable.

8. Government observes that the applicant has contended that there was no difference in the RG1 stock and the finished goods cleared i.e. all the quantity repacked by them and entered in the RG1 (production) are cleared after payment of appropriate duty under Section 4A. They have submitted a copy of one of their ER1 Return and also a Tabular statement for the year 2007-08 and 2008-09 showing that the total quantity of production of goods and clearance is the same. This clearly shows that the shortages mentioned in the SCN/OIO would be the difference between amount of Oil/grease received in the Unit II and the amount of repacked goods which could be accounted as processing loss. Hence the shortage noticed in Unit II is due to processing loss.

9. Government observes in this case that shortage during the impugned financial year cannot be taken as actual shortage for the reason that process of repacking manually is such that there are always chances of process loss. It is not the case of department that such shortage has been cleared clandestinely. There is no disposal otherwise of this shortage. Further, Lube Oil & Grease received from Unit-I are duty paid goods. The Government, therefore, observes that the actual loss in respect of the products in these two confirmed cases had already suffered duty. Also, the loss is very marginal compared to the total production.

10. In a similar case [*Commissioner v. IOC Ltd. - 2014 (308) E.L.T. A121 (All.)*] the Allahabad High court held as under:

*“The Commissioner (Appeals), by his order dated 31 January, 2006, held that (i) in the present case, the appellant was receiving lubricating oil in bulk, either on the payment of duty or under bond and quantity was stored in its storage tanks; (ii) from the bulk quantity, retail packs were ... packed; (iii) the adjudicating authority had confirmed the demand holding that the assessee has failed to furnish any plausible explanation for the loss and hence there was a clandestine removal of goods; and (iv) in the present case, the loss varied from 0.44% to 1.78%, whereas the tolerance between 1.4% to 1% was allowed under the Standard Weights and Measures (Packaged Commodity) Rules, 1977. Hence, it was held that the loss was explained as a process loss and there was no positive evidence of clandestine removal.*

*The Tribunal has confirmed the findings of fact which have been recorded by the Commissioner (Appeals). The loss on account of shortage was duly explained and there was no evidence on record to show that the shortage/wastage was used by the assessee in the manufacture of final products which were cleared without payment of duty.*

*Having regard to the pure finding of fact, no substantial question of law would arise. The appeal is, accordingly, dismissed.”*

*The Appellate Tribunal in its impugned order had held that difference on account of loss or shortage of lubricating oil were to the tune of*

*0.44% to 1.78%, whereas tolerance range is 1.4% to 1%. There is no evidence of clandestine removal in absence of which no duty can be demanded on the waste or loss."*

11. In view of discussion in forgoing paras, the Government notes the percentage of loss on account of process / handling and spillage in respect of the shortage of Lube Oil and Grease and observes that the same was duty paid. Consequently, Government sets aside the Order in Appeal No. 84-85/2020 (CTA-I) dated 20.11.2020 to the extent of confirming the SCN No.5/2008 dated 19-11-08 and SCN No 26/2008 dated 17-11-2008 and allows the applicant's impugned appeals.

12. The revision application is disposed off on the above terms

*Shrawan*  
*20/11/22*  
(SHRAWAN KUMAR)

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

ORDER No. /2022-CX (SZ)/ASRA/Mumbai DATED  
To

M/s Tide Water Oil Co. (India) Ltd.,  
Seshachalam Centre,  
10<sup>th</sup> Floor, 636/1, Annasalai Nandanam  
Chennai- 600 035.

Copy to :

1. The Principal Commissioner of CGST & Central Excise, Chennai North Commissionerate, No.26/1, Mahathma Gandhi Road, Chennai - 600 034.
2. The Commissioner of CGST & Central Excise (Appeals), No.26/1, Mahathma Gandhi Road, Chennai - 600 034.
3. The Assistant Commissioner, CGST, E-Division, Chennai-I Commissionerate, 121, Uttamar Gandhi Salai, Nungambakkam, Chennai - 600 034.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Notice Board.