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
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Mumbai- 400 005

F. No. 195/218/2015-RA/1554 Date of Issue: 16.05.2022

ORDER NO. 361 /2022-CX(WZ)/ASRA/MUMBAI DATED 26.04.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Indian Oil Corporation Ltd.
Gujarat Refinery,
P.O. Jawaharnagar,
Vadodara – 391 320

Respondent : Commissioner of CGST & Central Excise, Vadodara-I

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. VAD-EXCUS-001-APP-66/2015 dated 12.05.2015 passed by the Commissioner of Central Excise(Appeals), Vadodara.

ORDER

This revision application has been filed by M/s Indian Oil Corporation Ltd., Gujarat Refinery, P.O. Jawaharnagar, Vadodara – 391 320(hereinafter referred to as "the applicant") against Order-in-Appeal No. VAD-EXCUS-001-APP-66/2015 dated 12.05.2015 passed by the Commissioner of Central Excise(Appeals), Vadodara.

2.1 The applicant is engaged in the manufacture of petroleum products falling under chapter 27 and 29 of the CETA, 1985. From the scrutiny of the ER-1 Returns filed by them for the months from August 2010 to December 2013, it was observed that they had cleared various petroleum products viz. naphtha, LSHF(HSD), F.O. and ATF under bond(for export) to different locations as per the provisions of Rule 20 of the CER, 2002 read with CBEC Circular No. 579/16/2001-CX dated 26.06.2001 & CBEC Circular No. 581/18/2001-CX dated 29.06.2001. It was noticed from the AR3As and rewarehousing certificates given by the consignees that in certain cases there was short receipt of various petroleum products at the place of rewarehousing. It was further contended that after withdrawal of the warehousing facilities vide Board Circular No. 796/29/2004-CX dated 04.09.2004, duty was required to be paid on the quantity of petroleum products cleared from the refinery. It was also averred that in terms of Board Circular No. 804/1/2005-CX dated 04.01.2005, the assessee is required to pay duty on the shortages noticed on the basis of the rewarehoused AR3As. Likewise, in certain cases there was excess quantity received at the place of rewarehousing. The actual quantity cleared by them exceeds the permissible limit prescribed in the respective CT-2 certificates, hence the excess clearances were not valid duty free clearances and therefore the assessee is required to discharge the duty liability on such excess clearances at the factory/refinery end.

2.2 The assessee had been issued 26 SCN's for clearances of petroleum products namely naphtha, LSHF(HSD), F.O. and ATF made to various locations for exports but short received or excess received by the consignee

at the place of rewarehousing under bond worked out on the basis of rewarehousing certificates(AR3As) during the month of August 2010 to December 2013.

2.3 The Joint Commissioner took up the cases for adjudication. After discussing the issues in detail, the adjudicating authority found that the claim for condonation of loss of 1% shortage in warehousing at the export warehouses was not permissible and held that the assessee was liable to discharge duty liability of Rs. 59,55,837/-(Rs. 75,23,542/- - Rs. 15,67,705/-). He also found that the assessee was liable to pay duty of Rs. 1,22,25,400/- in respect of excess quantity cleared by them without making payment of duty. The adjudicating authority also held that the assessee was liable to pay interest on these amounts. He further found that the assessee had contravened the provisions of Rule 20 of the CER, 2002 with intent to evade payment of duty as they had failed to discharge the duty liability on the short quantity/excess quantity at the factory/refinery gate and therefore they were liable to be penalised under Rule 25(1)(d) of the CER, 2002. He therefore imposed a penalty of Rs. 1,81,81,237/- upon the assessee under Rule 25 of the CER, 2002. The 26 SCN's were adjudicated in such manner by the Joint Commissioner, Central Excise, Vadodara-I vide OIO No. 22 to 47/Dem/JC/D-IV/2014 dated 28.11.2014.

3.1 Aggrieved by the OIO dated 28.11.2014, the applicant filed appeal before the Commissioner(Appeals). He found that before the provision for warehousing of non-duty paid goods was done away with in 2004, the provisions for export warehousing were different from those for domestic warehousing. Domestic warehousing facility was covered under Circular No. 579/13/2001-Cx dated 26.06.2001 whereas export warehousing facility was covered under Circular No. 581/18/2001-Cx dated 29.06.2001. While export warehousing facility was for duty free clearances, the clearance to domestic tariff area warehouse duty was to be paid. The point of clearance had been shifted from the factory gate to the warehouse. The assessment to duty of the goods at the domestic warehouse involved factors such as quantity, value and end use exemptions etc. To address the situation,

provision of transit loss/storage loss was made as during the assessment of the goods which were to be cleared but not available due to loss in transit or storage. However, in the case of goods warehoused for export, the goods were exempted and assessed accordingly at the factory gate itself. There was no provision for assessment or reassessment at the export warehouse. Hence, the provision of 1% transit or storage loss provided for domestic warehousing had no role in export warehousing.

3.2 Commissioner(Appeals) found that the intent of the legislature was evident from Circular No. 804/1/2005-CX dated 04.01.2005 which had been issued to clarify issues arising after the withdrawal of warehousing facility of specified petroleum products by way of Notification No. 17/2004-CE(NT) dated 06.09.2004. He averred that the circular was only clarifying the position of law and hence the argument of the applicant that circulars do not have a binding effect cannot stand. The goods cleared for export but not actually exported cannot be accorded the benefit of transit/storage loss which was provided for goods which are yet to be assessed such as the goods cleared to a warehouse for domestic clearances prior to 2004. He further found that the R.A. No. 195/193-194/07 filed by M/s Mangalore Refinery and Petro Chemicals Ltd., Mangalore against OIA No. 47-48/07 dated 13.02.2007 passed by Commissioner(Appeals), Mangalore involved facts where the goods had been cleared under bond without payment of duty to export warehouse under Rule 20. Thereupon, the Government had held that no transit loss was allowed and confirmation of demand was upheld in the light of Board Circular dated 04.01.2005. The Commissioner(Appeals) found that the ratio of this decision was directly applicable to this case. Similarly, in another R.A. No. 380/08/DBK/12 filed by the Commissioner of Central Excise, Surat-I against OIA No. RKA/461/Surat-I/2010 dated 28.08.2010 passed by Commissioner(Appeals), Surat-I in the case of M/s ONGC Ltd., the Government had vide its Revision Order No. 154/13-Cx dated 14.06.2013 upheld the confirmation of demand by the original authority as no transit loss/storage loss was permissible in such situations.

3.3 The Commissioner(Appeals) opined that this was the reason clearance beyond CT-2 quantity cannot be allowed. The quantity mentioned in the CT-2 would be the exempted goods at the time of assessment at the factory gate. The goods are assessed to duty at the factory gate as exempted on account of bond. The excess quantity was not exempted at the time of clearance from the factory as it was not covered by the CT-2. Such goods were not eligible to be cleared without payment of duty at the time of their clearance. He emphasized that the assessment is not carried out at the warehouse and hence the goods were liable to duty. He therefore held that the goods cleared beyond the CT-2 quantity were liable to duty at clearance and therefore the demand was justified. It was noted that the order of his office dated 10.08.2011 passed by his predecessor had subsequently been struck down by the Government in revision. The Commissioner(Appeals) therefore upheld the OIO vide his OIA No. VAD-EXCUS-001-APP-66/2015-16 dated 12.05.2015.

4. Aggrieved by the OIA No. VAD-EXCUS-001-APP-66/2015-16 dated 12.05.2015, the applicant filed revision application on the following grounds:

(a) The Circular No. 796/29/2004-Cx dated 04.09.2004 deals with facilities for removal of petroleum products without payment of duty from the refineries to domestic customers and not for export which had been admitted by the Joint Commissioner in his OIO. It was therefore contended that the benefit available for removal of petroleum products for export under CT-2 clearances on the basis of the circular is not applicable in the present case and therefore the impugned OIA is illegal, unjust and improper.

(b) It was further contended that the Commissioner(Appeals) had erred in not appreciating the clarifications given by the Board to not only allow storage in AFS but also store in mixed storage whereby duty paid goods can be stored alongwith non-duty paid excisable goods in the warehouse. He submitted that the losses

after the storage have not been allowed by CBEC and stated in the aforesaid circular that no storage losses are permitted in the export warehouse/tanks whether intermediate or at AFS including those with mixed storage and any transit loss after the first warehouse is not allowed because it has been stated that the removal of goods from one warehouse to the another warehouse is not covered in the above referred circular.

(c) Whereas the circular dated 04.01.2005 does not allow storage loss of export warehouse/tanks and transit losses while transferring goods from one export warehouse/tanks to another export warehouse/tanks, it does not bar transit losses suffered during transport of goods from refinery to any export warehouse/tanks. Hence it was very clear that losses other than storage losses still continued to be allowed that is starting from the handling losses at the refinery loading, transit losses after unloading etc. till the storage.

(d) The applicant placed reliance upon favourable orders passed by Deputy Commissioner, Central Excise Division, Dhubri, Assam vide OIO No. 08/Refund/08/2010 dated 07.04.2010, Deputy Commissioner, Central Excise, Division-IV, Vadodara vide OIO No. 26/Div.IV/VDR-I/08-09 dated 23.03.2009 and Commissioner(Appeals), Vadodara vide OIA No. Comm(A)/283/VDR-I/2011 dated 10.08.2011.

(e) It was submitted that they had already paid duty on the transit losses above 1%. The total amount of duty paid was Rs. 16,36,938/- alongwith interest amounting to Rs. 64,919/-. They stated that they had enclosed the challans. It was further submitted that the Department had while appropriating duty missed out by oversight duty amounts of Rs. 36,946/-, Rs. 2,122/-, Rs. 10,088/-, Rs. 25,721/- & Rs. 16,451/- paid for SCN No. V/CH.27(4)13/DEM/JC/2012 dated 03.01.2012, SCN

No. V.SCN/IOCL/46/D-IV/12-13 dated 25.10.2012, SCN No. V.SCN/IOCL/47/AC/D-IV/12-13 dated 26.10.2012, SCN No. V/SCN/IOCL/15/D-IV/13-14/4977 dated 06.11.2013 and SCN No. V/SCN/IOCL/26/AC/D-IV/13-14 dated 16.01.2014 respectively vide PLA entry dated 01.04.2011 to 06.05.2011 & challan dated 22.12.2011, 24.01.2012, 15.11.2013 and 22.01.2014. For two SCN's viz. SCN No. Ch. 27(4)19/DEM/JC/2012 dated 01.11.2012 & SCN No. V/SCN/IOCL/AC/26/D-IV/11-12 dated 17.04.2012 the amount of duty paid is wrongly considered as Rs. 6,62,114/- & Rs. 1,63,252/- respectively whereas the actual amount of duty paid is Rs. 6,39,969/- & Rs. 1,63,212/-.

(f) The applicant made certain submissions with regard to SCN No. V/SCN/IOCL/SUP/02/D-IV/11-12 dated 20.12.2011, SCN No. V/SCN/IOCL/15/D-IV/13-14/4977 dated 06.11.2013 and SCN No. V/SCN/IOCL/31/AC/D-IV/13-14 dated 24.03.2014 pertaining to shortage of LSHF(HSD) removed under bond at the destination. They stated that LSHF(HSD) was supplied as stores for consumption on board a vessel of the Indian Navy or Coast Guard under Notification No. 64/95-CE dated 16.03.1995 and exempted from basic excise duty. However, additional duty applicable under Section 133 of the FA, 1999 as amended by Section 160 of the Finance Bill, 2003 and Section 120 of the Finance Bill, 2005 was being paid. The movement of these goods was similar to the earlier Chapter X procedure; in that the recipient of these goods is required to obtain CT-2 certificate from their Range Office and forward the same to the manufacturer supplier. Since the goods had been removed for specific end user at concessional excise duty, proper accountal of the goods from the factory upto final receipt by the end user was necessary. It was further opined that the goods being

hydrocarbons are very volatile in nature and are subject to change in density and temperature.

(g) The applicant submitted that dispatches of petroleum products such as LSHF HSD from IOCL, Gujarat Refinery were effected by tank wagons and tanker lorries under the cover of AR3As to various locations as per Board Circular F. No. 261/6/20/02-CX.8 dated 30.10.1985 and MOF's Order No. 93-104/91 dated 14.02.1991. Transit losses of upto 1% had been prescribed for condonation as per the aforesaid MOF letter. The assessee is allowed to transfer non-duty paid oil brought in railway tank wagon to a bonded storage tank and to determine the transfer quantity by taking dips in the storage tanks before and after the transfer on the condition that duty on transit shortage in excess of 1% would be paid.

(h) It was further clarified vide Circular No. 804/1/2005-CX dated 04.01.2005 that with respect to all supplies of petroleum products to vessels of Indian Navy or Coast Guard which are covered under end use based exemptions, the refinery would be liable to discharge duty on the quantity cleared from the refinery itself. The accountal of the product received by the consignee is also provided to Excise Authorities at their end. The applicant averred that since the goods are being removed for specific end user i.e. Indian Navy/Coast Guard and any gain observed at the destination due to the natural characteristics of the goods would be used by the same end user. The applicant stated that likewise, when there is any shortage in the product at the receiving end, they are not applying for remission of additional duty already paid at the time of clearance of the goods from the factory. They requested to drop the demands on minor gains reported at the receiving end in the petroleum products removed from the factory for specific use.

(i) With regard to SCN No. V/SCN/IOCL/91/D-IV/10-11 dated 26.07.2011(correct SCN No. V/SCN/IOCL/04/Div-IV/11-12 dated 26.07.2011), the applicant pointed out that they had clarified vide their letter Ref. JRF/A-17/SCN-166 dated 29.08.2011 that all removals mentioned in the SCN had been made against valid CT-2 certificates and detailed the actual position for utilisation against running CT-2 certificates. It was stated that when the CT-2 certificates issued for a particular warehouse with the validity of the whole financial year, it was obvious that no quantity in any CT-2 certificate would be left unused before switching to the next CT-2 certificate. They requested that the CT-2 certificates issued for a particular warehouse for a particular financial year should be seen in totality before concluding the demand. They pointed out that it could be seen from the breakup provided by them that they have cleared 1986.10 KL of ATF only against permitted quantity of 2000 KL of ATF against CT-2 No. 10/2010-11 dated 05.08.2010 and therefore there was no excess quantity cleared against CT-2 No. 10/2010-11 dated 05.08.2010 as alleged in the SCN. It was further contended that the issue of excess receipts at destination was pointless as the warehoused goods would ultimately be exported and hence no duty liability would arise. It was also contended that the goods had not been diverted. Reliance was placed upon the favourable OIA No. Commr(A)/283/VDR-1/2011 dated 09.08.2011.

(j) Under the erstwhile CER, 1944 if a product is specified in the notification issued under Rule 139, the provisions for warehousing would be applicable to that product. Likewise, when the product is deleted from the notification issued under Rule 139, warehousing provision would not be applicable to such product. The elaborate provisions for warehousing existing in the CER, 1944 have not been incorporated in the Central

Excise(No. 2) Rules, 2001 where Rule 20 deals with the warehousing provisions. The Notification No. 47/2001-CE(NT) dated 26.06.2001 issued under Rule 20 of the CER, 2002 specifies certain petroleum products to which the facility of removal of any excisable goods to which the facility of removal of any excisable goods from the factory of production to a warehouse, or from one warehouse to another warehouse without payment of duty was extended. With effect from 06.09.2004 after issue of Notification No. 17/2004-CE(NT) dated 04.09.2004 the facility of removal of specified petroleum products without payment of duty from the refinery to warehouse or from one warehouse to another warehouse was not available.

(k) The applicant submitted that despite these changes, warehousing facility was available for goods cleared for export under Notification No. 46/2001-CE(NT) dated 26.06.2001 read with Circular No. 581/18/2001-CX dated 29.06.2001 as amended by Circular No. 798/31/04-CX dated 08.09.2004 and the procedures specified therein were to be followed. Therefore, warehouse could be established and registered as export house in terms of Notification No. 46/2001-CE(NT) dated 26.06.2001 and they were entitled to clear petroleum products without payment of duty for export from their manufacturing unit and from such warehouse for export. The applicant claimed that they had followed the procedure specified in Circular No. 581/18/2001-CX dated 29.06.2001 and cleared goods for export warehousing from refinery against ARE-3 under cover of invoice. The procedure specified in Circular No. 579/16/2001-CX dated 26.06.2001 was being followed for receipt of goods in the warehouse.

(l) They further submitted that transit losses upto 1% were condonable in view of circulars issued from time to time and

that the removal of warehousing provisions for petroleum products w.e.f. 16.09.2004 was not relevant for the purpose of condonation of losses upto 1%. They averred that the storage tanks(export warehouses) were to be treated as bonded warehouse and non-duty paid stock is allowed to be kept. As per the procedure to maintain accounts of receipts in the tank, they were bound to make monthly statement of short/excess receipt at the warehouse. Considering the volatile nature of the product in question, the CBEC had prescribed norms from time to time for dealing with such losses and the extent to which such losses can be condoned.

(m) Board vide letter F. No. 21/13/66-Cx.III dated 25.03.1967 and letter F. No. 11-A/9/70-CX.8 dated 27.03.1973 dealt with the question of condonation when different petroleum products are transported through pipe line or by any other means resulting in inevitable mixture and there may be shortage or gain in different products. The Board had clarified therein that the mix-up of two oils was inevitable while switching over from one tank to another which contains oil of different grades and the benefit of offsetting gains noticed in such process was to be allowed. Losses in storage, pipeline deliveries and transit losses during in-bond removals other than pipelines were considered by the Board vide letter F. No. 26/23/CXM/54 dated 01.06.1956 and letter F. No. 917/57/CX.II dated 02.03.1959 and losses upto certain percentage for specified products was allowed. Similarly, the Board vide letter F. No. 6/36/70-CX.8 dated 08.12.1970 considered allowance of losses for pipeline transfer from one installation to another or from an installation back to the refinery. In respect of losses due to pilferage, the Board had clarified vide letter dated 02.03.1959 that duty should invariably be collected on all losses due to pilferage. For cases of transit loss, the Board has clarified vide letter F. No.

26/21/CXM/54 dated 01.06.1956 and F. No. 8/7/57-CX.III dated 27.03.1957 and F. No. 11A/25/70-CX-8 dated 12.01.1972 that loss upto a maximum of 1% of motor spirit is allowable if distance covered is more than 50 kms. The applicant referred letter F. No. 261/6/20/82-CX.8 dated 30.10.1985 issued by the Board to clarify that duty is to be paid on transit shortages in excess of 1% in the case of non-duty paid oil brought in railway wagon tanks.

(n) On the basis of these clarifications, the applicant averred that transit losses upto a certain percentage had been allowed by the Board for petroleum products from time to time. Such condonation of losses had been allowed considering the volatile nature of the petroleum products since there can be various natural and inevitable reasons for losses of petroleum products during transfer from manufacturing premises to bonded warehouse or from one warehouse to another warehouse. It was further submitted that such condonation by the Board was not in terms of any statutory provision but on account of the nature of the product. It was reiterated that the applicant had already discharged duty liability alongwith interest in respect of any loss in excess of 1%. They pointed out that the Joint Secretary to the Government of India had vide Order No. 93-104/91 dated 14.02.1991 allowed condonation upto 1% in their own case and that this order had been accepted by the Department.

(o) The applicant further submitted that some error is inherent in every weighment process and especially when the manufacturing process is gigantic and volume of material handled is huge. It was contended that as long as the method of weighment and maintenance of records is reasonable, fair and practical, it should be acceptable. Hence, credit in respect of such differential quantity cannot be disallowed. The applicant then made reference to Rule 13(3) of Standards of Weights and

Measures(General) Rules, 1987, Rule 2(i) of the Standards of Weights and Measures(Packaged Commodities) Rules, 1977 and Rule 27 of the Standards of Weights and Measures(Packaged Commodities) Rules, 1977. Attention was drawn to CBEC Circular No. 4/73/70-CX.6 dated 12.04.1971 and Circular No. 22/78-CX.8 dated 26.10.1979 wherein losses had been allowed in the case of iron and steel items. The applicant contended that since the various oils are more susceptible to loss during storage and transportation than the items like iron and steel, the circulars issued by the Board would be applicable with greater force in their case. The applicant also drew attention to the Circular dated 12.01.1960 and Circular dated 02.09.1972 whereby the CBEC had allowed losses in respect of various goods. It was also pointed out that Circular dated 30.06.1999 allowed permissible error of 9% by weight declared on packages/pouches of pan masala. The applicant submitted that even the Customs Appraising Manual provided that when actual weight does not reveal an excess over the declared weight of more than 1%, then the declared weight should be accepted.

(p) The applicants submitted that the duty demand on excess quantity cannot be raised as such shortage and gains can be on account of a number of reasons and it cannot be alleged against the applicant that they had indulged in clandestine removal merely on that basis. They also emphasized on their status as a Public Sector Undertaking.

5. The applicant was granted a personal hearing in the matter on 20.08.2021. Shri Chandan Kumar, General Manager(Finance) appeared online and reiterated their earlier submissions. He submitted that gain or loss of goods while transporting them to their warehouse was part of the industry due to the nature of the goods.

6. Government has carefully gone through the relevant case records, the submissions filed by the applicant and perused the impugned OIA and OIO. The issue involved is the liability to central excise duty of the shortage/excess received at the export warehousing destinations of the applicant. The applicant has contended that transit losses upto 1% are condonable in terms of the various circulars/letters cited by them. With regard to excess quantity receipts, the applicant avers that since the goods were being cleared to specific end users like Indian Navy/Coast Guard, any gains would be used by the same end user. So also excess receipts at destination would ultimately be exported and hence no duty liability would arise. The applicant contends that in this view no duty liability should arise in respect of excess receipts at the export warehousing destinations.

7. Before delving into the issue of transit losses, it would be pertinent to note that the Central Excise Act, 1944 or the Central Excise Rules, 2002 do not specify any limits for condonation of transit losses or even make provision for grant of such reprieve. The limits of condonable losses were prescribed through various letters issued by the Board. It is observed that the applicant has placed reliance upon Board Circular No. 261/6/20/82-CX.8 dated 30.10.1985, MoF's Order No. 93-104/91 dated 14.02.1991, Board's letter F. No. 21/13/66-Cx.III dated 25.03.1967, Board's letter F. No. 11-A/9/70-CX.8 dated 27.03.1973, Board's letter F. No. 26/23/CXM/54 dated 01.06.1956, letter F. No. 917/57/CX.II dated 02.03.1959, Board's letter F. No. 6/36/70-CX.8 dated 08.12.1970, Board's letter F. No. 26/21/CXM/54 dated 01.06.1956, letter F. No. 8/7/57-CX.III dated 27.03.1957 and letter F. No. 11A/25/70-CX-8 dated 12.01.1972 to contend that the Board had always provided for condonation of transit losses. Government notes that it is exclusively on the basis of these clarifications that the applicant has made out their case for condonation of losses. However, it would be pertinent to note that all of these clarifications have been issued prior to the withdrawal of warehousing facility in respect of petroleum products on 06.09.2004.

8.1 Government finds that these contentions of the applicant overlook the changes effected by Notification No. 17/2004-CE(NT) dated 04.09.2004. The facility of removal of petroleum products without payment of duty from the factory of production to a warehouse or from one warehouse to another warehouse was withdrawn w.e.f. 06.09.2004. However, the CBEC clarified vide Circular No. 798/31/2004-CX. dated 08.09.2004 that the facility of removal of petroleum products without payment of duty for export warehousing was continued in terms of Notification No. 46/2001-CE(NT) dated 26.06.2001 read with Circular No. 581/18/2001-CX, dated 29.06.2001.

8.2 Thereafter, the CBEC vide its Circular No. 804/1/2005-CX. dated 04.01.2005 specifically addressed the issues raised by the field formations and oil companies. While clarifying regarding a situation where the petroleum products have been routed through an installation which caters to more than one end-user and the oil company is not aware of which consignment would eventually be supplied under end-use based exemption, the circular advised that the oil company should opt for provisional assessment with an undertaking that they would discharge the duty on the quantity cleared from the refinery itself. The text of the clarification is reproduced below for the sake of lucidity.

> *"(iii) The refinery shall be liable to discharge the duty on the quantity cleared from the refinery itself. Hence, there will be no question of any abatement with regard to any losses subsequent to removal from refinery. Accordingly, the duty shall be paid on any differential quantity between the quantity cleared and actually received by the eligible end-user."*

8.3 The import of the text is that there would be no abatement with regard to losses subsequent to removal from the refinery and that duty would be payable on any differential quantity between quantity cleared and quantity received by the eligible end user. The words "Hence, there will be no question of any abatement with regards to any losses subsequent to removal from refinery." make it clear that the losses being referred here are those which occur after removal from the refinery. These losses would include any

kind of losses post removal from the refinery; viz. transit losses, storage losses, evaporation losses etc. and there would be no condonation of losses. The words "The refinery shall be liable to discharge the duty on the quantity cleared from the refinery itself." make it clear that immaterial of the subsequent losses, the quantity cleared from the refinery would be the deciding factor for assessing the duty payable.

8.4 What can be gathered from the Circular dated 04.01.2005 issued by the CBEC is that even for being unable to identify the consignment which would eventually be cleared under exemption, the assessee would be required to resort to provisional assessment and also pay the duty liability on the losses subsequent to removal from the refinery. The inference that would follow from this clarification is that if an assessee opting for provisional assessment is required to pay duty on the losses subsequent to removal from the refinery to any of their installations, then an assessee self-assessing the goods would also be required to pay duty on the losses in such situation. There is no reason why an assessee who is self-assessing the goods cleared by them should be at an advantage and allowed condonation of losses when an assessee who has complied with the formalities for provisional assessment by furnishing a bond with surety/security is ineligible for such condonation inspite of subjecting the details of his clearances to greater scrutiny before the Assistant/Deputy Commissioner for finalisation of the assessment of goods cleared.

8.5 Moreover, the CBEC in para 2(ii) of the Circular No. 804/1/2005-CX., dated 04.01.2005 has clarified on the issues faced by oil companies supplying ATF to domestic and international flights in installing multiple storage tanks at the airport. While allowing mixed storage of duty paid and non-duty paid goods at AFS(Aviation Fuel Stations) at airports, the Board has made it clear that no storage losses are permitted in the export warehouses/tanks, whether intermediate or at AFS including those with mixed storage. It is therefore evident that the Board has made it abundantly clear that losses arising due to any reason whatsoever are uncondonable.

9. Government finds that the limits for condonation of losses had been prescribed by way of executive instructions such as circulars, letters issued by the Board from time to time. As noted at the very outset, there are no statutory provisions in the CEA, 1944 or the CER, 2002 which allow condonation of losses of petroleum products. It is apparent from the text of CBEC Circular No. 804/1/2005-CX. dated 04.01.2005 that the Board has consciously decided that condonation of losses of petroleum products after removal from the refinery is not to be allowed. The conclusion that can be drawn from these observations is that the losses prescribed under the various circulars, letters cited by the applicant are not applicable in the period after withdrawal of warehousing for petroleum products w.e.f. 06.09.2004. As such, there is no discretion vested in Central Excise authorities to condone such losses. Therefore, in the absence of any executive instructions in the form of circulars, letters etc., condonation of losses post clearance of petroleum products from the refinery is not allowable during the period after 06.09.2004.

10. In so far as the issue of excess receipts at the export warehouse is concerned, Government finds that the authority under which the goods are removed without payment of duty from the refinery is the CT-2. The CT-2 specifies the commodity and quantity of goods which can be removed duty free from the refinery to be warehoused at another place for export. In the absence of the CT-2, the goods cannot be cleared out of the refinery without payment of duty. Duty payment is a pre-requisite for clearance of manufactured goods out of the refinery. In the present case, the Department has detected instances where the applicant has been found to have cleared quantities of their manufactured goods in excess of the quantity specified in the CT-2 and the receipt of such goods has been acknowledged at the end of the recipient. Clearance of excisable goods without the cover of CT-2 and without payment of duty is impermissible. The applicant is therefore required to pay central excise duty on such goods. The contention of the applicant that the issue of excess receipts at the destination is pointless cannot be countenanced. The actions of the applicant in clearing excisable

goods without the cover of CT-2 cannot be ratified by contending that the goods would ultimately be exported. The procedure of issuing CT-2 and the movement of goods under its cover is the procedure instituted to ensure that excisable goods do not escape the levy of central excise duty unless they are utilised for purposes which are eligible for exemption from duty. In the present case, the excess quantity cleared by the applicant was not required to be cleared under CT-2 and not entailed for export at the time of clearance. The argument of the applicant that these excisable goods would eventually be exported disregards the purpose of the CT-2 procedure instituted and the law. Similarly, the argument that the excisable goods would be utilised by the same end user and therefore the demand cannot sustain undermines the laid down procedures and renders them redundant. The applicant would therefore be required to pay central excise duty on the excess receipts at the warehouse and hence the central excise demands raised are sustainable.

11. Government observes that the same issue has been decided in revision vide Order No. 1272/2013-CX. dated 18.09.2013 In Re : Indian Oil Corporation Ltd.[2014(311)ELT 988(GOI)]. In that case, the order impugned was set aside and OIO was restored holding that transit loss is not condonable. The applicant has filed Special Civil Application No. 4041 of 2014. The said SCA was ordered to be heard with SCA No. 2952 of 2014 which had been filed by ONGC. However, the SCA No. 2952 of 2014 has been withdrawn by ONGC as they had chosen to settle this case under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019.

12. The demands raised by the Department are sustainable in principle as transit losses are not allowable after 06.09.2004 and the clearances of excisable goods without payment of duty in excess of quantity specified in CT-2 is untenable. However, it is observed that the applicant has pointed out certain instances in the revision application and recorded in para 4(e) and para 4(i) hereinbefore where the Department had missed out duty amounts paid by the applicant on losses or quantified excess receipts without taking into account the quantities combined together from more than one CT-2. In all fairness, these grounds raised by the applicant are

required to be verified by the original authority and the demands must be requantified correctly.

13. Government also observes that the penalty of Rs. 1,81,81,237/- imposed under Rule 25 of the CER, 2002 by the original authority and upheld by the Commissioner(Appeals) is excessive. It is not the case of the Department that the applicant has indulged in clandestine clearances. The applicant is availing the facility of export warehousing for petroleum products which they are supplying to ports, airports. The applicant is a Public Sector Undertaking. Since there are no malafides on the part of the applicant resulting in the losses/excess of the petroleum products which have been warehoused, a penalty of Rs. 50,000/- under Rule 25 of the CER, 2002 would suffice to meet the ends of justice and also act as a deterrent to ensure that the applicant improves the checks and procedures being followed for clearance of these goods and ensures clearance of correct quantity of excisable goods without any losses/excess receipts.

14. Government does not find any merit in the revision application insofar as the liability to duty on the losses/excess clearances to their export warehouse. However, the original authority is hereby directed to requantify the demand by taking cognizance of the issues raised by the applicant in the revision application regarding the inaccuracies in computing the demand on losses/excess receipts after granting the applicant an opportunity to be heard. The matter is remitted back to the original authority for this limited purpose. The exercise of requantifying the demand may be completed within eight weeks of receipt of this order.

Shrawan 26/4/22

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 361 /2022-CX(WZ) /ASRA/Mumbai DATED 26.4.2022

To,
M/s Indian Oil Corporation Ltd.
Gujarat Refinery,
P.O. Jawaharnagar,
Vadodara – 391 320

Copy to:

1) The Commissioner of CGST & Central Excise, Vadodara-I
2) The Commissioner (Appeals), Vadodara
3) Sr. P.S. to AS (RA), Mumbai
4) Guard file