

**REGISTERED
SPEED POST**



F.No. 195/744, 745, 758 to 760, 1267, 1269/11 & 195/452/12-RA-Cx

**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)**

**14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066**

Date of Issue.....

29/01/13

ORDER NO. 70-77/13-Cx DATED 28-01-2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D. P. SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

SUBJECT : ORDER IN REVISION APPLICATION FILED, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944 AGAINST THE ORDERS-IN-APPEAL (as reflected in the table of this order) passed by the Commissioner of Central Excise (Appeals), Allahabad.

APPLICANTS : As per table on page-2.

RESPONDENT : The Commissioner, Central Excise, Allahabad.

ORDER

These revision applications have been filed by the applicants as per table below against the orders-in-appeal passed by the Commissioner of Central Excise (Appeals), Allahabad as detailed in the following table:-

Sr. No.	Revision Application No.	Name of the Applicant	Revision Application filed against order-in-appeal No. & Date
1	195/744/11-RA	M/s Mankapur Chini Mills Ltd.	77-CE/ALLD/2011 dt. 20.06.2011
2.	195/745/11-RA	M/s Mankapur Chini Mills Ltd.	75/CE/ALLD/2011 dt. 17.06.2011
3-5	195/758-760/11-RA	M/s Tulsipur Sugar Company.	78-80/CE/APPL/2011 dt. 20.06.2011
6.	195/1267/11-RA	M/s Tulsipur Sugar Company.	146/CE/APPL/ALLD/2011 dt. 05.09.2011
7.	195/1269/11-RA	M/s Balrampur Chini Mills Ltd.	145/CE/APPL/ALLD/2011 dt. 05.09.2011
8.	195/452/12-RA	M/s Balrampur Chini Mills Ltd.	63/CE/ ALLD/2011 dt. 31.03.2011

2. Brief facts of the cases are that the applicants filed remission application for remission of Central Excise Duty involved in molasses lost during storage. The original authority observed that huge quantity of storage loss occurred in short duration of time. Such losses were more than the permissible limit of loss of molasses during storage, as prescribed in Board's Circular No. 261/15-CC/SO-Cx-8 dated 06.02.1982. Accordingly, Show Cause Notices were issued to the applicants proposing rejection of impugned remission claims, proposing demand of duty along with applicable interest and also proposing imposition of penalty under rule 25 of the Central Excise Rules, 2002. Subsequently vide impugned Orders-in-Original the original authority rejected impugned remissions applications; confirmed demand of duty and also imposed penalty of amount equal to duty demanded.

3. Being aggrieved by the said Orders-In-Original applicants filed appeals before Commissioner (Appeal) who rejected the same.

4. Being aggrieved by the impugned orders-in-appeal, the applicants have filed these revision applications under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:-

4.1 The production, storage and clearance of molasses are under dual control of Central Excise as well as state excise department. The applicant are maintaining all records as prescribed under Central Excise laws which are examined by Central Excise officers. Similarly, the resident inspector of state excise exercises physical control over production, storage and clearance of molasses and maintains his own set of records as prescribed under State excise law. These records are periodically verified by State Excise officers and the same is recorded in MF-5 Pt-II register with date of their verification.

4.2 Central Board of Excise & Custom as back as in the year 1983 vide CBEC letter No. 261/15/80- Cx-8 dated 18.07.1983 allowed condonation of storage losses upto 2% of the total molasses stored. From the said provisions of law, it is clear that due to peculiar nature of molasses 2% of loss on total quantity manufactured and stored during a year is permitted and manufacturers need not to explain the reasons of this much of loss. If shortage exceeds 2% then applicant are liable to explain its reasons to avoid any penalty.

4.3 Factually when fresh molasses were stored in tank through the pipelines with fine stream, it entrapped a large number of air bubbles resulting in increase of volume. Due to this foam sometimes the volume increases 10-15% of quantity of molasses stored. These air bubbles subside very slowly. Due to crushing having continued upto April 2008 there was no question of any shortage in tanks due to heavy foam formation on earlier dates. Due to this reason State Excise authorities do not physically verify the stock of molasses but only verify the book balance recorded in register in a routine manner so no loss was shown in earlier verifications. Applicant submitted and clarified the factual position at page 2 in para 5 of defence reply before

adjudicating authority. Thus the contention of author of Show Cause Notices that temperature of steel tank may reduce the value of sugar in molasses but should not affect the actual weight of molasses, is not sustainable. Because due to evaporation of water contents and gases available therein during the fuggalling process as well as viscous character of molasses, the loss in weight is bound to occur.

4.4 Applicant pleaded in appeals that the method to calculate the loss %age is not correct method. It is to be calculated on the entire quantity of molasses stored during the whole sugar season. It is undisputed fact that the molasses is a commodity wherein several chemical reactions takes place due to which evaporation, foaming, etc., do occur. The percentage of evaporation and fermentation depends on the atmospheric condition.

4.5 Factually clearances were made continuously but no dip reading was taken by stage Excise officer. They only verified the records of book balance in a routine manner. So no shortage was shown in records on 11.07.2006. Even if stock verification would have been done by Stage Excise officer by dip reading method, it would be only be estimation not actual.

4.6 In the case of applicant's sister unit i.e. M/s Balrampur Chini Mills Ltd., Balrampur, reported in 2002 (144) ELT 577 (Tri.Del), the Hon'ble Tribunal has held:

"To calculate percentage of loss, quantity of loss to be seen in relation to total quantity of goods stored from time to time and not in relation to figures intimated on budged day by dip reading method."

It is an accepted fact that the loss in the molasses can be ascertained only by physical weighthment when the entire molasses has been removed from the tank. No doubt the storage loss is a continuous process and occurs gradually but its ratio depends on the weather conditions/temperature as held by the Tribunal in a number of cases.

- (i) CCE, Lucknow Vs. D.S.M. Sugar – 2010 (259) ELT 435 (Tri.-Del.)
- (ii) Triveni Engg. & Industries Ltd. Vs. CCE, Meerut-I – 2009 (236) ELT 517 (Tri.Del.)
- (iii) Tikaula Sugar Mills Ltd. Vs. CCE, Meerut-I 2009(236) ELT 162 (Tri.-Del.)
- (iv) Mawana Sugar Works Vs. CCE, Meerut-I 2008(227) ELT 438 (Tri.Del.)
- (v) Tikaula Sugar Mills Ltd. Vs. CCE, Meerut-I 2008 (224) ELT 303 (Tri.Del.)
- (vi) Upper Doab Sugar Mills Vs. CCE, Meerut-I 2008 (221) ELT 246 (Tri.Del.)

4.7 It is settled law that duty cannot be demanded unless alleged lost quantity has been removed/cleared from factory. Thus this demand of duty is not sustainable as held by Tribunal in a number of cases.

5. Personal hearing scheduled in this case on 07.12.2012 was attended by Shri Bipin Garg, Shri Narinder Kumar Verma, Advocates on behalf of the applicant, who reiterated the grounds of revision application. They also relied upon G.O.I. order No. 1393-1395/11-Cx dated 13.10.2011. Nobody attended hearing on behalf of department.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal. Since, the issue involves in the cases are similar, all the cases are taken up together for final disposal.

7. From perusal of records, Government observes that in this case matter before taking up the issue for decision on merit, it has to be decided whether revision application No. 195/452/12-RA is filed within time limit specified in Section 35EE of Central Excise Act, 1944.

7.1 Government notes that applicant has filed the revision application No. 195/452/12-RA on 14.05.2012 against the Order-in-Appeal dated 31.03.2011, received on 05.04.2011 after a delay of one year and 50 days. The application for condonation of delay has been filed on the ground that they had erroneously filed appeal before CESTAT on 04.07.2011. Hon'ble CESTAT dismissed the appeal as beyond jurisdiction vide order dated 16.04.2012, received by the applicant on 02.05.2012. The said revision

application was required to be filed before Central Government in terms of Section 35EE of Central Excise Act, 1944.

7.2 Government notes that as per Section 35EE of Central Excise Act, 1944, revision application can be filed within 3 months of the communication of Order-in-Appeal and Government can condone the delay upto 3 months if justified reasons exist for the same. Hon'ble High Court of Gujarat in W.P. No. 9585/11 vide order dated 15.09.11 in the case of M/s Choice Laboratories and High Court of Delhi in W.P.No. 5529/11, vide order dated 04.08.11 have held that period consumed before wrong forum i.e. Tribunal for perusing appeal bonafidely is to be excluded in terms of Section 14 of limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944. Now, the time taken by applicant in this persuing the said revision appeal may be calculated as follows:-

(a) Date of receipt of Order-in-Appeal	04.04.2011
(b) Date of filing appeal in CESTAT	04.07.2011
(c) (i) Date of CESTAT Order	16.04.2012
(ii) Date of Receipt of CESTAT order	02.05.2012
(d) Date of filing revision application	14.05.2012

After excluding time consumed in persuing appeal before CESTAT during the period 04.07.2011 to 02.05.2012 applicant has consumed the time between 05.04.2011 to 03.07.2011 i.e. 3 months and between 03.05.2012 to 13.05.2012 i.e. 10 days.

Government notes that as per Section 35EE ibid, a delay upto 3 months can be condoned. The said Revision Application has been filed with a delay within 3 month condonable period. As such the delay of 10 days in filing revision application No. 195/452/12-Cx is condoned and the case is taken up for decision on merit.

7.3 Government observes that original authority rejected remission claims on the ground that the loss of molasses for which remission was sought found to be much higher than limit prescribed in Board Circular No. 261/15-CC/80/Cx-8 dated 06.02.1982. The original authority also confirmed demand of duty on such goods claimed to be lost and also imposed penalty upon applicants. Commissioner (Appeals) upheld impugned Orders-in-Original. Now, applicant has filed these revision applications on grounds mentioned in para (4) above.

8. Government observes that the original authority has rejected remission applications mainly on the ground that the shortage/loss of molasses for which remissions were sought were much higher than prescribed limit of 2% within short span of time. On the other hand, the applicant has contended that such loss of more than 2% arrived by the department as pertaining to period less than one month is actually for one full year. In this regard, Government observes that in these cases, the storage loss is recorded for a period less than one month exceeding 2%. The state excise authorities in their verification conducted from time to time has not recorded any such loss. Though applicants claimed that the losses are recorded in ER-1/RG. But on perusal of copies of said document, it is seen that at the end of one month only the losses are shown. Applicants claim that state excise has not physically verified the stock can not be accepted since the said verification report by a state agency is a valid evidence. The applicants could not explain such big losses occurring in very short span of time and hence, they failed to prove that losses occurred due to natural causes.

8.1 Government finds that the applicants have contended that the losses should be calculated over the year and not on short span of time. In this regard, Government finds that the applicant was required to show their tank-wise molasses losses on monthly basis in their ER-1 returns. However, on sample perusal of some of the copies of ERs-1 submitted before Revisionary Authority, Government finds that such losses were not shown on regular monthly basis and suddenly losses were shown in last 1-1/2 months time. As such, the evidences submitted by the applicants fail to prove that the

losses occurred due to natural causes, as in case of loss due to natural causes, the loss occurs gradually over the period of time and not in disproportionat manner in short span of times as happen in this case.

9. Government observes that remission of duty is governed by rule 21 of the Central Excise Rules, 2002, which reads as follows:-

"Remission of duty. — Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing:

.....
.....
....."

From perusal of above provision, it becomes quite clear that remission of duty on lost or destroyed goods may be allowed provided if such loss/destruction caused by natural causes or by unavoidable accident and such causes are to be shown to the satisfaction of the jurisdictional Commissioner. In this case, no records/documentary evidences produced before the original authority showing gradual loss over a period of time to make a strong case that such losses happened due to natural cause. Further the Hon'ble Allahabad High Court in the case of kesar Enterprises Ltd. Vs. CGE, Meerut-II reported as [2008(221) ELT 329(All.)] has held that the assessee cannot claim 2% write off as storage losses as a matter of right irrespective of facts and circumstances of the case. If can be implied from the said judgment of Hon'ble High Court that 2% permissible limit of loss of molasses for claiming remission is not absolute in nature and such remission claims should be weighed and examined in the context of the facts and circumstances of the each case. As mentioned in para above, the applicants could not produce any substantial and documentary evidences to show that there have been gradual loss of molasses over the period of time so as to logically conclude that such losses happened due to natural cause. As such said losses of such a high proportion are

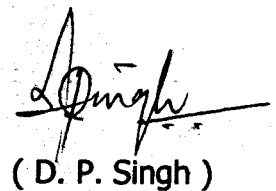
not condonable. Further, Government finds that both original authority and appellate authority allowed remission in some cases where losses were shown to be within permissible limit over the period of time. As such, Government observes that lower authorities judiciously scrutinized details of each case and accordingly rightly decided the issue keeping in mind facts and circumstances of each case.

10 Government further notes that the applicants have claimed that state excise authorities has verified only book balance and not ascertained the quantity physically. The applicants also questioned veracity of dip reading measurement used for ascertaining quantities. In this regard, Government observes that in catena of judgements court has held that dip reading method is a reliable method for calculating quantum of shortage of molasses. Government further agrees with findings of appellate authority that since applicants also appeared to have measured their stock from same dip reading method for claiming their impugned remission claims and hence, their plea that dip method is not reliable, is not acceptable. Applicant has relied upon G.O.I. Revision Order No. 1393-1395/11-Cx dated 13.10.11. Government notes that in the said case, the molasses storage losses were found below 2% and therefore demand was set aside. As such the ratio of said order can not be made applicable to this case.

11. In view of above discussion, Government donot find any infirmity in orders of Commissioner (Appeals) and hence, upholds the issue.

12. Revision Applications thus rejected being devoid of merit.

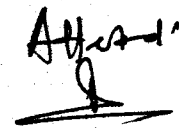
13. So, ordered.



(D. P. Singh)

Joint Secretary to the Government of India

- (1) M/s Tulsipur Sugar Company,
Tulsipur, Dist. Balarampur, U.P.
- (2) M/s Balrampur Chini Mills Ltd.,
Balrampur, Distt.- Balrampur (UP)
- (3) M/s Mankapur Chini Mills Ltd.,
(Unit of Balrampur Chini Mills Ltd.)
Mankapur, Distt. Gonda, U.P.




(Anil Kumar)
Assistant Commissioner
CBEC-OSD (Revision Application)
विश्व मन्त्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev)
भारत सरकार, Govt. of India
New Delhi

Order / No. 70-77/2013-Cx dated 28-01-2013

Copy to:-

1. The Commissioner , Central Excise , 38, M.G. Marg, Civil Lines, Allahabad, UP,
2. The Commissioner (Appeals), Central Excise, 38, Mahatma Gandhi Marg, Civil Lines, Allahabad.
3. The Additional Commissioner Central Excise, 38, Mahatma Gandhi Marg, Civil Lines, Allahabad.
4. Shri Bipin Garg, Advocate, B-1/1289-A, Vasant Kunj, New Delhi – 110070.
- ✓ 5. PS to JS(Revision Application)
6. Guard File
7. Spare Copy.


(Bhagwat P. Sharma)
OSD (Revision Application)