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SPEED POST



F.No. 195/441/12-RA-CX
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue.....01/10/15

ORDER NO. 86/2015-CX DATED 28.09.2015 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision application filed, under Section 35 EE of the Central Excise, 1944 against the Order-in-Appeal No.109-CE/MRT-I/2011 dated 28.12.2011 passed by Commissioner of Central Excise & Service Tax, (Appeals), Meerut-I.

Applicant : M/s DSM Sugar, Mansurpur.

Respondent : Commissioner of Central Excise, Meerut-I.

ORDER

This revision application is filed by M/s DSM Sugar, Mansurpur. (hereinafter referred to as applicant) against the Order-in-Appeal No. 109-CE/MRT-I/2011 dated 28.12.2011 passed by Commissioner of Central Excise & Service Tax, (Appeals), Meerut-I with respect to Order-in-Original passed by the Assistant Commissioner of Central Excise Division-I, Muzaffarnagar.

2. Brief facts of the case are that the applicant is engaged in the manufacture of sugar and molasses falling under Chapter Sub-Heading No. 1701.39 and 1703.10, respectively, of the First Schedule to the Central Excise Tariff Act, 1985. A team of Central Excise officers of Divisional Preventive, Division-I, Muzaffarnagar, visited the factory premises of the applicant on 27.09.2009. During the visit, the officers physically verified the stock of finished goods, viz sugar and molasses and detected shortages of 119.962 (MT) of Molasses involving Central Excise duty amounting to Rs. 92,671/- . Statement of Shri Roopesh Goel, Deputy Manager (Commercial) and Authorized Signatory of the applicant was recorded on the spot under Section 14 of the Central Excise Act, 1944. When asked about the reasons for shortage detected in the stock of molasses, he could not put forth any satisfactory reasons. However, he agree to the shortages detected during physical verification and deposited the duty of Rs. 92,671/- voluntarily vide PLA entry no. 03 dated 27.08.2009.

2.1. A Show Cause Notice dated 17.03.2010 was issued to the applicant for violating Rule 4,6,8,10 and 11 of the Central Excise Rules, 2002 and alleging therein as to why:

a. Central Excise duty amounting to Rs. 92,671/- should not be demanded and confirmed as they have already deposited this amount and it should not be appropriated against the said demand from them under Section 11 A of the Central Excise Act, 1944.

b. Penalty should not be imposed on them under Rule 25 of the Rules, read with Section 11 AC of the Central Excise Act, 1944 for contravention of the provisions of the above Rules.

2.2. The Assistant Commissioner, Central Excise, Division-I, Muzaffarnagar vide Order-in-Original No.50/AC/MZN-I/10 dated 14.10.2010 passed the following order:-

a. Confirmed the demand of duty amounting to Rs. 92,671/ under Section 11A of Central Excise Act, 1944, already paid and appropriating the same .

b. Imposed a penalty of Rs. 92,671/- under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944.

3. Aggrieved by the said order, the applicant filed appeal before the Commissioner(Appeals) Meerut-I, who vide Order-in-Appeal No.109-CE/MRT-1/2011

dated 28.12.2011 partially allowed the appeal by upholding the demand of duty confirmed and set aside the penalty imposed under Rule 25 of the Central Excise Rules, 2002 read with Section 11 AC of the Central Excise Act, 1944.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1. That the Commissioner (Appeals) while confirming the demand of duty on storage loss of molasses has wrongly relied on the judgement of Hon'ble High Court of Allahabad in the case of Kesar Enterprises Ltd. as the order is distinguishable on facts and circumstance with the present case. That the portion of the order confirming the demand of duty on storage loss of molasses due to natural causes, is unsustainable and liable to be set-aside.

4.2. That the Commissioner (Appeals) in his order has alleged shortages in the stock of molasses comes to nearly 0.39% of total production of molasses of 30715 MT of sugar season 2008-09. That he further held that storage loss less than 2% in respect of molasses due to natural causes i.e. evaporation etc. has been accepted by the Hon'ble Tribunal in many cases as well as in the Board's Circular. That it is on record that the clearance of molasses is under physical control of State Excise Authorities, hence he dismissed the charge of clandestine removal of molasses. That the Commissioner (Appeals) confirmed the demand on the ground that the applicant has debited the amount of duty involved at the time of visit of officers and relied on judgement of Hon'ble High Court of Allahabad in the case of Kesar Enterprises Ltd reported in 2008 (221)ELT-329. That the reasons given by the Commissioner (Appeals) while confirming the demand of duty relying on judgment of Hon'ble High Court of Allahabad in the case of Kesar Enterprises Ltd. is unsustainable, as the facts and circumstances of the above case are distinguishable as mentioned hereunder:-

(i) That in para 5 of the above mentioned judgement the Hon'ble High Court has held –

" The Tribunal while rejecting this contention of the appellant has held that the appellant had set up a case that the shortage/loss was on account of "natural cause" but no evidence had been given by the appellant to show that such loss had occurred due to natural causes. On the other hand, the shortfall of 1200.6 quintals of molasses had occurred between 28.10.1998 (i.e. end of October) and 19.01.1999(i.e. mid January). That period being winter season, such large amount of shortage could neither be justified by foam formation due to natural heating nor evaporation to any appreciable extent. Thus, loss due to natural causes, as pleaded by the appellant during this period was not established and on the contrary was highly doubtful".

That in the above referred case, the Tribunal as well as the Hon'ble High Court has confirmed the demand of duty on shortages of molasses on the ground that the shortages of molasses of 1200.06 quintals occurred in a period of two and a half months and shortage to such a magnitude in short time is not supported by any evidence. That in applicant's case the storage loss of molasses has occurred due to natural cause during sugar season 2008-09 i.e during 04.12.2008 to 30.10.2009. That there are storage losses noticed by the factory on 24.10.2009 and 30.10.2009, the percentage of storage loss due to natural causes in entire sugar season 2008-09 comes to 1.07%. That the molasses being prone to evaporation and besides there occurs chemical reaction during storage which also causes losses, hence the storage loss of molasses in applicant's case occurred during a span of nine months, as such the applicant's defence is fortified with the factual aspect also.

(ii) That the CBEC vide Circular No. 261/15/82-CX 8 dated 18.07.1983 has allowed storage loss upto 2% in steel tanks. That in the present case, the storage loss due to natural causes in steel tanks is 0.39% which is much below the limit prescribed by the Board. That the Board seeing the practical difficulties faced by the sugar industries has prescribed the above limit, hence the storage loss due to natural cause being genuine is liable to be upheld.

(iii) That in the present case, the Commissioner (Appeals) in his order has clearly held that storage loss of molasses which the applicant has claimed has occurred during the sugar season 2008-09 and it comes to nearly 0.39% of total production. That it is on record that the clearance of molasses is under physical control of State Excise Authorities, hence he dismissed the charge of clandestine removal of molasses.

(iv) That the Hon'ble High Court has also held the producer has to show that they have taken precaution during storage of molasses and the storage loss occurred in stock could not be avoided. That in the present applicant's case, the applicant has established that they have taken due precautions while storing the molasses in steel tanks like

(a) during the peak summer season, the water spray outside the steel tanks is being done continuously 24 hours to control the high temperature because of high ambient temperature ,

(b) The circulation of molasses inside the steel tanks has been done regularly and precaution has been taken so that the circulating pumps remains operational. It helps in mixing molasses, thus reducing the temperature.

That there is no justification to confirm the demand as the applicant has taken due precaution while storing the molasses in steel tanks and the losses have been due to natural causes.

4.3. That in the present case, the Commissioner (Appeals) has clearly held that there is no evidence of clandestine removal, as such there is no intention to evade

payment of duty and in the present facts and circumstances of the case provisions of Rule 25 read with Section 11 AC of the Act are not applicable. That the confirmation of demand of duty on storage loss of molasses due to natural causes is unjustified and liable to be set aside.

4.4. That the applicant's case is fully covered by the CEGAT judgement in the case of Sarjoo Sahkari Chini Mills Ltd Vs CCE, Lucknow -2003(55)RLT 313 wherein it is held shortage-molasses loss upto 2% in molasses stored in pucca pit or steel tank due to evaporation- to be condoned-appeal allowed. Hence the Order-in-Appeal is liable to be quashed. That in judgement of CESTAT, New Delhi in the case of Upper Doab Sugar Mills reported in 2008(221) ELT-246(Tri-Del) has held- "Remission of duty-storage loss-condonation of-CBEC Circular no. 261/15/CC/I/82/CX.8 dated 06.02.1982-Fact that storage loss of molasses is less than 2% is not disputed and appellants has reported to authorities regarding loss of molasses well in time-remission justified-Rule 21 of Central Excise Rules, 2002. That the demand of duty is liable to be set aside and appeal may kindly be allowed".

5. Personal hearing scheduled in this case on 05.08.2015 was attended by Shri Aalok Arora, Advocate, on behalf of the applicant who reiterated the grounds of revision application. Nobody attended the hearing on behalf of the department. A written submission was also made by the applicant during course of hearing as under:-

5.1. That Commissioner (Appeals) in his order dated 28.12.2011 has clearly held that there is no corroborative evidence of clandestine removal of goods with intent to evade payment of duty therefore provisions of Section 11 AC of the Act are not applicable and accordingly he has set aside equal penalty imposed under Rule 25 read with Section 11 AC of the Act. That the said findings of the Commissioner (Appeals) remain unproved. Thus, the demand of duty on alleged shortage of molasses is unsustainable as there is no clandestine removal of goods.

5.2. That the applicant had produced and stored 30715 MT of molasses and against the same have made clearances of 24894.275 MT upto 27.08.2009. That there had been storage loss of 119.962 MT of molasses during the season 2008-09 and the storage loss comes to 0.39% which has been due to natural cause - evaporation etc. and the losses have been due to peak summer during May, June and July 2009 when the atmospheric heat is the maximum. That the applicant has taken all the precaution during storage of molasses i.e. Spraying water outside steel tank to control high temperature as well as circulation of molasses in the steel tanks regularly. That the storage loss of molasses being beyond control and has occurred due to natural causes as such no demand of duty on such losses is sustainable.

5.3. That the CBEC vide Circular No. 261/15/82-CX dated 18.07.1983 has allowed condonation of storage loss of molasses upto 2%. That in their case the storage

loss being 0.39% and not 2.06% as mentioned in the Order of the Commissioner (Appeals) as such the confirmation of demand of duty on molasses loss due to natural causes is unsustainable and liable to be set aside.

5.4. The applicant in support of the above plea have relied upon on the following case laws:-

- Balrampur Chini Mills Ltd Vs. CCE, Allahabad -2011(274) ELT 587
- Seksaria Biswan Sugar Factory Ltd Vs CCE, Lucknow-2012 (286) ELT 631
- Upper Doab Sugar Mills Vs CCE, Meerut-I-2013 (298) ELT 444
- CCE, Allahabnad Vs U.P. State Sugar & Cane Dev. Corpn.Ltd -2014 (312)ELT 789.

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.

7. On perusal of records, Government observes that in the instant case issue relating to demand of duty on goods found short during preventive check by the jurisdictional Central Excise Authorities. On visit of team of Central Excise officers of Divisional Preventive, Division-I, Muzaffarnagar, in the factory premises of the applicant on 27.09.2009, physically verified the stock of finished goods, viz sugar and molasses and detected shortages of 119.962 (MT) of Molasses involving Central Excise duty amounting to Rs. 92,671/- . Statement of Shri Roopesh Goel, Deputy Manager (Commercial) and Authorized Signatory of the applicant were recorded on the spot under Section 14 of the Central Excise Act, 1944. When asked about the reasons for shortage detected in the stock of molasses, he could not put forth any satisfactory reasons. However, he agreed to the shortages detected during physical verification and deposited the duty of Rs. 92,671/- voluntarily vide PLA entry no. 03 dated 27.08.2009. A Show Cause Notice was issued to the applicant for violating Rule 4,6,8,10 and 11 of the Central Excise Rules, 2002 and demanding Central Excise duty amounting to Rs. 92,671/- and confirming the same and appropriating against the said demand from them under Section 11 A of the Central Excise Act, 1944, and why penalty should not be imposed on them under Rule 25 of the Rules, read with Section 11 AC of the Central Excise Act, 1944 for contravention of the provisions of the above Rules. The Assistant Commissioner, Central Excise, Division-I, Muzaffarnagar vide Order-in-Original No.50/AC/MZN-I/10 dated 14.10.2010 confirmed the demand of duty amounting to Rs. 92,671/ under Section 11A of Central Excise Act, 1944, already paid and appropriating the same, imposed a penalty of Rs. 92,671/- under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) Meerut-I, who vide the impugned order partially allowed the appeal by upholding the demand of duty confirmed and set aside the penalty imposed under Rule 25 of the Central Excise

Rules, 2002 read with Section 11 AC of the Central Excise Act, 1944. Now the applicant has filed this revision application on the grounds stated in para 4 above.

8. Government further observes that under Section 35 EE of the Central Excise Act, 1944, a Revision Application against the Order of Commissioner (Appeals) passed under Section 35 A ibid lies with Government only if such orders relate to cases as mentioned in provision to sub-section (1) of Section 35(B) of the Act. Sub-section (1) of Section 35 B of Central Excise Act, 1944 reads as under:-

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- (a) *a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;*
- (b) *an order passed by the Commissioner (Appeals) under Section 35A;*
- (c) *an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise under Section 35, as it stood immediately before the appointed day;*
- (d) *an order passed by the Board or the Commissioner of Central Excise either before or after the appointed day, under Section 35A, as it stood immediately before that day;*

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to -

- (a) *a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;*
- (b) *a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;*
- (c) *goods exported outside India (except to Nepal or Bhutan) without payment of duty ;*
- (d) *credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder*

and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998.

Further, Section 35 EE of Central Excise Act, 1944 states that "(1) The Central Government may, on the application of any person aggrieved by any order passed under Section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of Section 35 B, annul or modify such order:

[Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees]"

9. Government notes that the proceedings here have originated with the issue of Show Cause Notice dated 17.03.2010 for violating Rule 4,6,8,10 and 11 of the Central Excise Rules, 2002 for removing the excisable goods without payment of duty. Therefore, the present order is resultant demand of duty under Section 11 A of the Central Excise Act, 1944 on the excisable goods cleared without payment of duty and the demand is confirmed on the value of goods found short during the course of a preventive check in the factory of the applicant. The impugned order states that issue to be decided is whether shortage detected during stock taking was actual shortage and whether applicant can claim shortage detected to be storage loss due to natural causes. The shortage due to storage loss if any is not reflected in returns. If there was a storage loss at all the applicant as per general industry practice should have approached the jurisdictional Central Excise Authorities for remission of duty. Government here finds that it is an undisputed fact that the applicant has not informed about the shortage of molasses to the jurisdictional Superintendent and has neither filed an application under Rule 21 of the Central Excise Rules, 2002 with the jurisdictional authorities nor made any claim for such remission. If it were a case of storage loss the applicant should have approached the jurisdictional Central Excise Authorities and it would have also reflected in their records and returns. Further, the applicant in his voluntary statement recorded under Section 14 of the Central Excise Act, 1944 at the time of booking of the case could not put forth any satisfactory reasons for the shortage of goods and voluntarily deposited the duty on the shortage of goods.

10. Government thus finds that the case matter is that pertaining to the non-payment of duty on the quantity of molasses found short and not a case of loss of goods due to storage loss. Hence the instant case does not fall with the purview of ambit and scope of provisions contained for Section 35EE read with proviso to Section 35(B) (1) of the Central Excise Act, 1944 under which the instant revision application has been made.

11. In view of above discussions Government therefore finds that the Revision Application filed before Central Government in terms of Section 35 EE of Central Excise Act 1944 is beyond jurisdiction. As such, this Revision Application is dismissed for being non-maintainable. The applicant is at liberty to file an appeal before the appropriate authority under Section 35 B of Central Excise Act, 1944.

12. So, ordered.



(RIMJHIM PRASAD)

Joint Secretary to the Government of India

M/s DSM Sugar Mansurpur,
Mansurpur, District Muzaffarnagar
Uttar Pradesh.



Attested.

श्रीमती अरवि
श्रीमती अरवि
अधीक्षक (उ.प्र.)
अधीक्षक (उ.प्र.)

GOI Order No. 86/2015-CX dated 28.09.2015

Copy to:-

1. Commissioner of Customs and Central Excise, Meerut-I, Opposite Shaheed Park, Delhi Road, Meerut, U.P.
2. Commissioner of Central Excise (Appeals), Meerut-I, Opposite CCS University, Mangal Pandey Nagar, Meerut-250005, U.P.
3. Assistant Commissioner of Central Excise Division-I, Muzaffar Nagar.
4. Shri Alok Arora, Advocate, Opposite Telephone Exchange, 82-Mission Compound, Saharanpur (UP)

5. PA to JS(RA).

6. Guard File.

7. Spare Copy.

Attested



(Shaukat Ali)

Under Secretary to the Government of India

