F. No. 195/09/SZ/2020-RA

SPEED POST

F. No. 195/09/SZ/2020-RA
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 04/07/24

Order No. 14/2024-CX dated 04-07-2024 of the Government of India, passed by Ms. Shubhagata Kumar, Additional 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 Act, 1944 against the Order-in-Appeal No. VIZ-EXCUS-001-APP-162-19-20 dated 12.12.2019, passed by the Commissioner of Central Tax & Customs (Appeals), Guntur.

Applicants : M/s Hindustan Petroleum Corporation Ltd., Visakhapatnam.

Respondent . The Pr.Commissioner of CGST, Visakhapatnam.

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F. No. 195/09/SZ/2020-RA

ORDER

A Revision Application No. 195/09/SZ/2020-RA dated 16.03.2020 has been filed by M/s Hindustan Petroleum Corporation Ltd., Visakhapatnam (hereinafter referred to as the Applicant), against Order-in-Appeal No VIZ-EXCUS-001-APP-162-19-20 dated 12.12.2019, passed by the Commissioner of Central Tax & Customs (Appeals), Guntur. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original No. 03/2018/DRG/VSP-SOUTH/CEX dated 24.05.2018, passed by the Assistant Commissioner of Central Tax, Visakhapatnam south GST Division.

2. Briefly stated, the Applicants in this matter are manufacturers of various petroleum products falling under Chapter 25, 27 & 29 of the first schedule of the Central Excise Tariff Act, 1985. During an inquiry, it was revealed that the Applicant was clearing petroleum products like FO, Bitumen, ATD, HP HSD , HSD etc. manufactured by them to various warehouses without payment of duty under Bond as per the provisions of Rule 20 of the Central Excise Rules, 2002 read with notification no. 46/2001-CE(NT) dated 26.06.2001. During an inquiry conducted by departmental officers, it was revealed that during the period from 2011-12 to 2014-15,there were differences in the quantities cleared from the factory gate. Quantities received at the storage locations were found less, which effectively meant that there were transit losses. Accordingly, Applicants were issued an SCN wherein a duty of Rs. 39,10,118/- was demanded along with appropriate interest under Section 11AA of the Central Excise Act,1944, read with Circular No. 581/18/2001-CX dated 29.06.2001. Penalty under Section 11 AC of the Act ibid and penalty under Rule 25 of the Central Excise Rules, 2002 were also proposed. After due process of law, the lower Adjudicating Authority reworked the duty demand to Rs. 25,06,004/-(including cesses) and held that no transit losses are allowable in respect of the goods short-received in the destined warehouses in case of export warehousing and the assessee is liable to discharge duty liability for the same without any condonation. Accordingly, duty amounting to Rs. 25,06,004/-(including cesses) was confirmed

under Section 11A. In addition, a penalty of Rs.12,53,002/- was also imposed on the Applicant under Section 11AC of the Act ibid and penalty proposed under Rule 25 of the Central Excise Rules, 2002 was dropped. Aggrieved, the Applicants preferred an appeal with the Commissioner (Appeals). The Commissioner (Appeal) vide the impugned OIA upheld the OIO in toto and rejected the Applicant's appeal against it.

3. This Revision Application has been filed by the Applicants mainly on the grounds that the demand is due to non- consideration of transit losses. As per Board's letters F. No. 26/23/CXM/54 dated 01.06.1956 & F. No. 917/57-CX dated 02.03.1959, cumulative loss allowance may be granted to the extent of actual loss subject to a maximum ceiling of 0.5% for Motor Spirit, Kerosene, Refined Diesel oil, and Light Diesel Oil under T.I. Nos. 6,7,8&9 and 0.25% for furnace Oil under T.I. 10 which occurs due to natural causes such as evaporation etc. , temperature density and unavoidable human errors. Such losses can be storage losses, transit loss during pipeline transfers and bond removals by other than pipelines. Since the duty demand would not survive for the reasons mentioned above , the consequential interest U/s 11AA of the Act ibid is also liable to be dropped . Further, the Applicants finally submitted that as there was no fraud or wilful mis-statement and suppression of facts, penalty U/s 11AC of the Act ibid is also not leviable.

4. Personal hearing in the matter was held on 10.01.2024. Sh. A.K. Saha, Chief Manager (Finance) & Sh. Prudhviraj Panda, Manager (Finance) appeared for the Applicants. Sh. Prudhviraj submitted that the basic issue involved is non-consideration of transit loss in respect of goods moving from factory to export warehouse. He submitted that Commissioner(Appeals) reliance on CBIC's circular is erroneous as the said circular deals with provisional assessment in cases where the quantity is not known . Their products include HSD, ATF etc. and the invoice is based on the tank depletion quantity and self-certificate. He submitted that their case is not related to provisional quantities but based on quantities reflected in AREs/CT2. He sought to make additional written submissions, which was allowed. No one appeared for the Respondent department nor has any request for

adjournment been received. Hence, it is presumed that the department has nothing to add in the matter.

4.1 The applicants submitted additional submissions vide their letter dated 10.01.2024 stating that vide Board's Circular F.No. 261/6/28/80/CX-8 dated 19.10.1981, GOI has clarified that in relation to goods where evaporation or pilferage can take place,1% is a standard permissible loss. Reliance was placed on Government of India (RA), Mumbai's order No. 423-426/2018-CX(SZ)ASRA/Mumbai dated 30.11.2018. It was also submitted that the Applicants had been filing ARE-3 before the Range authority along with details of respective CT-2 for each consignment. Though there was some time gap in submitting consolidated ARE-3 for each unit, the allegation of not informing with the department is not correct, hence, extended period of limitation was not invokable in their case. Finally it was submitted that as per the provisions of CBEC Circular No. 804/1/2005-CX dated 04.01.2005 , only storage loss of products is not allowed but the Appellate Athority has quoted both storage losses and transit losses while referring to the above circular, which is incorrect, if seen from the background of the above circular.

5. The Government has carefully gone through the relevant case records, the submissions filed by the Applicant and perused the impugned OIA and the OIO in the instant matter. The Government observes that the issue involved is the liability to the Central Excise duty of the shortage in petroleum products received at export warehousing destinations of the Applicant after they were cleared from the manufacturing facility of the Applicants without payment of duty under bond.

6. At the outset, the Government observes that it would be prudent to look at whether the Central Excise Act, 1944 or the Central Excise Rules, 2002 specify any limit for condonation of transit losses or even make a provision for grant of such reprieve. The answer is that there is no such provision available in either the Central Excise Act, 1944 or the Central Excise Rules, 2002. Even though, various limits for condonation of losses for various commodities have been prescribed through various letters issued by the Board in the past, but they do not hold a permanent stature. It

is also pertinent to note here that these limits keep on varying from time to time. It is observed that the Applicants have placed reliance on Board's Circular F. No. 261/6/28/80/CX-8 dated 19.10.1981, Board's letters F. No. 26/23/CXM/54 dated 01.06.1956 & F. No. 917/57-CX dated 02.03.1959 to contend that Board provides for condonation of transit losses. The 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 at the same time, it would be pertinent to note here that these clarifications have been issued prior to the withdrawal of warehousing facility in respect of petroleum products on 06.09.2004.

6.1 The Government notes that 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 provided vide Notification No. 47/2001-CE(NT) dated 26.06.2001 was withdrawn w.e.f. 06.09.2004 vide Notification No. 17/2004-CE(NT) dated 04.09.2004.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. Government of India's order No. 196-201/2022-CX(WZ)ASRA Mumbai dated 12.12.2022 in the case of M/s Indian Oil Corporation Ltd. Vs Commissioner of CGST & Central Excise, Vadodra-I places reliance on this.

6.2 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 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 all any differential quantity between the quantity cleared and actually received by the eligible end-user. "

6.3 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 irrespective of any subsequent loss, the quantity cleared from the refinery would be the deciding factor for assessing the duty payable.

6.4 Thus the Circular dated 04.01.2005 makes it clear that even if the assessee is unable to identify the consignment/quantity 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 quantity removed 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 quantity removed from the refinery irrespective of losses, then an assessee opting for self-assessment would also be required to pay duty. Similarly 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.

6.5 Moreover, the CBEC in para 2(ii) of the Circular No. 804/l/2005-CX., dated 04.01.2005 has clarified 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 post removal from refinery whatsoever are un-condonable.

7. The 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 post clearance from refinery. It is apparent from the text of CBEC Circular No. *804/1/2005-CX.* dated 04.01.2005 that the intent of the circular is 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 for 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. Reliance is placed on Government of India's order No. 196-201/2022-CX(WZ)ASRA Mumbai dated 12.12.2022 in the case of M/s Indian Oil Corporation Ltd. Vs Commissioner of CGST & Central Excise, Vadodra-I.

8. It has also been contended by the Applicants that they had been filing ARE-3 before the Range authority along with details of respective CT-2 for each consignment, hence, the allegation of no information with the department is not correct, therefore invoking the extended period of limitation was not correct in their case. On this contention, the Government observes that Board's Circular No. 581/18/2001-CX, dated 29-6-2001 specifies conditions, procedures, class of exporters and places under sub-rule (2) of rule 20 of Central Excise (No. 2) Rules, 2001 in respect of export warehousing. Further the warehousing procedure specified is reproduced below as:

"5. Warehousing Procedure :

5.1 For removal of excisable goods from a factory or any other premise approved by the Commissioner to a warehouse, procedure laid down in Circular No. 579/16/2001-CX, dated 26-6-2001 issued under Rule 20 of the said rules will be applicable. It is clarified that the Notification No. 46/2001-C.E. (N.T.), dated 26-6-2001 do not cover removal from one warehouse to another.

5.2 The Central Excise Officer in-charge of the warehouse will issue certificate in duplicate of removal in the Form CT-2 specified at Annexure-III indicating details of the general bond executed by the exporter. The CT-2 shall bear per-printed serial numbers running for the whole financial year beginning on the 1st April of each year. The said officer will issue twenty five CT-2 certificates at a time, signing each of the leaf with the official stamp. More certificates can be issued if it is so requested by the exporter on the grounds of large number of procurements. The exporter will fill up the relevant information in CT-2. After making provisional debit in the Running Bond Account, he will indicate the same in the CT-2. One copy of CT-2 will be

forwarded to Officer-in-charge of the warehouse. One copy will be sent to the consignor and one copy will remain with the exporter.

5.3 The consignor will prepare an application for removal in the Form specified in Annexure-IV (hereinafter referred to as ARE-3) and an invoice (under Rule 8 taking into account CT-2 certificate) and follow the procedure specified in Circular No. 579/16/2001-CX., dated 26-6-2001 issued under Rule 20. The serial number of the corresponding CT-2 shall be mentioned on the top of the each copy of ARE-3. Any nominal variations between the provisional debit indicated in the CT-2 and the actual duty involved in the goods removed as indicated in ARE-3, can be ignored. Immediately on receipt of goods, the provisional debit shall be converted into actual debit on the basis of the details mentioned in ARE-3.

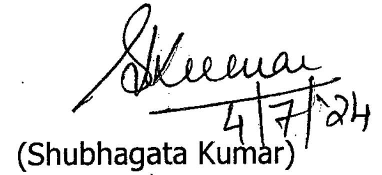
5.4 The officer-in-charge of the warehouse will countersign application and despatch to the Range Office having jurisdiction over the factory/ other approved premise of removal within one working day of receipt of the application. He will make suitable entry in his own record accordingly.

5.5 The assessees shall maintain private record (Warehousing Register) containing information relating to details of ARE-3 and invoice, date of warehousing certificate, description of goods received including marks and numbers, quantity, value, amount of duty, details of operation in the warehouse and new packages and their marks and number, clearance from the warehouse for export (ARE-1 No., Invoice No., quantity, value, duty) and clearance for home consumption. They shall produce this Register to the Central Excise Officers in-charge of the warehouse whenever required."

From the wordings of warehousing procedure (supra), it is very much clear that ARE-3 document is the main document from which it can be ascertained as to how much excisable goods were cleared duty free from the factory and how much of the same was warehoused. Accordingly, the Applicant was under obligation to timely submit the ARE-3s so that the short receipt of the excisable goods at the warehouse ,if any, could be ascertained by the Department to take timely action. However,

from the Show Cause Notice placed on record, it is seen that the Applicants did not do so. The Applicants have themselves admitted in their revision application at para 5 that there was a time gap in submitting consolidated ARE-3 for each unit, implying that the Applicants had not been submitting the requisite documents in a timely manner as required by law. Further the Government finds from the records that this issue has been elaborately discussed by the original adjudicating authority at para 22.8 of OIO. The reason assigned by the lower adjudicating authority for invoking extended period appears to be adequate and sustainable. Therefore, the order of Commissioner (Appeals) does not merit any interference.

6 Accordingly, the revision application is rejected in light of the above.



(Shubhagata Kumar)

Additional Secretary to the Government of India

M/s Hindustan Petroleum Corporation Limited,
Visakh Refinery, Finance Deptt.,
Malkapuram,Visakhapatnam-530011 .

G.O.I. Order No. 14 /24-CX dated 04-07-2024

Copy to: -

1. The Pr. Commissioner of CGST & Central Excise, Visakhapatnam, GST Bhavan, Port Area, Visakhapatnam-530035 .
2. The Commissioner of CGST (Appeals), 4th Floor, Custom House, Port Area, Visakhapatnam-530035.
3. PPS to AS (RA)
4. Guard File
5. Spare Copy.
6. Notice Board.

ATTESTED