

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/451 /2008 - EX[DB]

Date 31/03/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S TRIVENI ENGINEERING & INDUSTRIES LTD.
RAMKOLA DISTT. KUSHINAGAR (U.P.)
M/S TRIVENI ENGINEERING & INDUSTRIES LTD.

C.C.E ALLAHABAD

Appellant
Vs
Respondent

2010 EX[DB] dated 10-2-10

I am directed to transmit herewith a certified copy of Final order No. 130/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent

C.C.E ALLAHABAD

38, M.G. MARG, CIVIL LINES, ALLAHABAD

2. Adv. / Consult SH. R.K. HASIJA, ADV. C/D
MR.V. LAXMIKUMARAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3 C.D.R

4 J.C.D.R.

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)

11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

12 Taxindiaonline.com Pvt.Ltd. B-XI/8183, Vasant Kunj, New Delhi - 110070

13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

14 Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

15 LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)

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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

PRINCIPAL BENCH - COURT NO. I

Date of Hearing/Decision:10.02.2010

Excise Appeal No. E/451/2008

[Arising out of Order-in-Original No.MP(DEM-44/2007) 23 of 2007 dated 23.11.2007 passed by the Commissioner of Central Excise, Allahabad].

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr.Rakesh Kumar, Member (Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	See
4	Whether Order is to be circulated to the Departmental authorities?	Y.

M/s. Triveni Engineering & Industries Ltd. ...Appellants

Vs.

Commissioner of Central Excise, Allahabad ... Respondent

Present for the Appellants : Shri R.K. Hasija, Advocate
Present for the Respondent : Shri Sunil Kumar, DR

Coram:Hon'ble Mr.Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL ORAL ORDER NO. 130/10-EX DATED:10.02.2010

PER: JUSTICE R.M.S.KHANDEPARKAR

Heard the Id. Advocate for the appellants and Id. DR for the respondent and perused the records. The appellants challenge the order dated 23rd Nov., 2007 passed by the

Commissioner, Allahabad. By the impugned order the Commissioner has confirmed the demand of duty of Rs.75,85,328/- while directing payment of interest and imposing penalty of equal amount under section 11AC as also under Rule 25 of the Central Excise Rules 2002. By the impugned order the Commissioner has disposed of the proceedings initiated pursuant to the issuance of show cause notice dated 26th June 2007.

2. The impugned order is sought to be challenged on two grounds. Firstly, that the findings arrived at by the Commissioner are not borne out from records and are merely based on assumptions and secondly, on the ground that there was no case for invoking extended period of limitation.

3. The appellants are engaged in the manufacture of V.P. sugar/molasses falling under chapter 17 of the Schedule to the Central Excise Tariff Act, 1985. On 8th of December, 2006 the preventive team of the Central Excise Department detected that the appellants had declared excess quantity of molasses in their storage tanks well after the expiry of period of the cane supply season for the years 2001-02, 2004-05 and 2005-06. It was noticed that the appellants had declared 2,153.349 MTs. for the year 2001-02 season, 1,050.000 MT for the year 2004-05 and 1315.000 MT for the year 2005-06 after the closure of the factory for respective cane supply seasons and when the records did not disclose any molasses having been pumped in the tank for a period of two months prior to filling of

declarations and therefore, the said show cause notice dated 26th of June, 2007 came to be issued to the appellants. It was the case of the Department that since the quantity of molasses was required to be declared at the time of clearance, it was practically impossible for such huge quantity of molasses to have remained unnoticed by the appellants for a period of two months after the closure of the season, more particularly in view of the fact that before storage of the molasses in the tanks, the weight thereof was required to be verified by the party. In the circumstances, it was the case of the Department that the appellants had produced and cleared clandestinely corresponding VP sugar without payment of duty and accordingly, the Department taking into consideration the total quantity of the excess molasses, total quantity of the cane which was required to produce the said excess quantity of molasses and corresponding quantity of the sugar from crushing of such excess quantity of cane, required the appellants to explain as to why the excise duty to the tune of Rs.74,98,580/- being the duty in relation to such excess quantity of sugar of 8821.858 MT clandestinely manufactured by crushing such excess quantity of the cane should not be recovered from the appellants.

4. It was the case of the appellants in response to the said show cause notice that the demand was based purely on assumption that the appellants might have purchased and crushed additional quantity of cane and corresponding quantity of sugar might have been manufactured and cleared

clandestinely and, therefore, such a demand could not be made against the appellants. It was their further case that the cane received in the factory was properly weighed and recorded in the statutory registers maintained by the appellants as also the production of sugar on crushing such cane along with the molasses. It was also further case of the appellants that the sugar manufactured was kept in gunny bags of one quintal each and the same was counted and accounted for in daily stock register and weekly report thereof were submitted to the Department, besides, monthly account. It was their further case that their sugar godown was hypothecated to the Central Bank of India and daily report of production, storage and dispatch of the sugar was duly informed to the Branch Manager of the Bank. All the details of purchase of raw-materials for the production of sugar and molasses were also submitted to the proper officers of the Department. As regards declaration of the excess molasses, it was the case of the appellants that the same was due to the chemical reaction of the elements present in the molasses. Since in the storage tank of molasses, the heat used to get generated automatically, to control the temperature inside the tanks, water was showered from all sides of the tank. It was noticed that the same at times used to percolate into the tank and get mixed with molasses. These also used to be rain water seepage into the molasses tank resulting in increase in quantity of molasses. Besides, there was seepage of ground water which used to get mixed with the molasses. All these factors added to the increase of the quantity of the molasses

and the same was declared from time to time to the Department. According to the appellants, there was no suppression of any fact nor any mis-declaration and the records regarding the production and storage of the products manufactured in the factory of the appellants were regularly verified by the Department's personnel. For the above reasons according to the appellants the demand was not sustainable apart from the fact that it was barred by limitation and there was no case for imposition of penalty or for demand of interest.

5. The Commissioner by the impugned order held that the appellants themselves had declared remarkable excess quantity of molasses in pucca pit and steel tank on the dates after the closure of the unit when there was no manufacturing activity going on in the factory. The authorized signatory of the appellants, namely, Shri Suresh Chandra Sinha had admitted that the excess quantity of molasses were not included in the RT-8 (c) statement of the corresponding sugar season and such declarations were made after the closure of the business hours. Further he had stated that the molasses were stored in tank after weighing the same in calibrated tanks and stock of molasses was being verified from time to time by the appellants and the UP State Excise Officer who had control over the same. He has further observed that the stock of molasses as shown in the show cause notice as having been declared as excess quantity of molasses was not disputed by the appellants. The defence which was raised by the

appellants was three folds, namely, that the demand of duty was on the basis of assumptions and presumptions; the demand was barred by limitation and the facts do not justify imposition of penalty or demand of interest. Further observing that the government agencies have no control over the procurement or weighment of the cane supplied to the sugar factory, the Commissioner has observed that it is UP State Excise Agencies who had the control over the records pertaining to molasses. The contention regarding mixing of water with the molasses in the process of spraying of water on the tanks wherein the molasses were stored has been rejected while observing that the Department was never informed about the same at any point of time and that, it was statutory obligation of the appellants to inform the Department about the procedure adopted by them to control the temperature in the tanks wherein excisable products were stored and they had failed to do so. The Commissioner has also observed that the appellants had not furnished any explanation for generation of excess quantity of molasses after closure of the factory. The theory of addition and/or mixing of water was sought to be pleaded only after issuance of show cause notice, apart from the fact that there was no proof regarding such mixing of water with the molasses. In the facts and circumstances, the Commissioner has held that abnormal excess molasses found subsequent to the date of closure of the factory, presence of which has not been satisfactorily explained, is a clear evidence of clandestine production and clearance of sugar from the factory.

6. As regards the point regarding bar of limitation, it has been observed by the Commissioner that it was mandatory for the appellants to submit RT-8(c) statement under the Central Excise Rules to provide quantity of sugar cane crushed as also VP sugar and molasses manufactured during the crushing season. Any shortage or excess observed was required to be recorded under revised RT-8(c) statement, which was never done by the appellants. The same discloses willful misstatement of fact to evade the payment of excise duty corresponding to the VP sugar clandestinely manufactured and removed from the factory which justifies penalty. It has also been observed that mere sending of letter to the department was not sufficient and party should have complied with the requirements of law in that regard. The fact that the excess quantity of molasses was not mentioned in their Returns being clearly established, the extended period was invokable and, therefore, bar of limitation was not attracted.

7. As regards the first ground of challenge, the Id. Advocate appearing for the appellants has drawn our attention to the decision of the Apex Court in **Oudh Sugar Mills Ltd. vs. Union of India** reported in 1978 (2) ELT 172 (S.C.). He has further submitted that finding regarding the clandestine production and removal of sugar is based solely on the calculations made on the basis of the excess molasses declared by the appellants which is not permissible in view of the decision of the Constitutional Bench of the Supreme Court in

Oudh Sugar Mills. There being no other evidence collected by the Department in this regard, it was not permissible for the Id. Commissioner to confirm the demand of duty against the appellants. Taking us through the impugned order as also the show cause notice and the reply thereto, he further submitted that the department has not produced any evidence regarding excess procurement of sugar cane as also of sale of the sugar to any of the customer of the factory for the relevant years to arrive at a conclusion about excess production of sugar and to justify the allegation of clandestine removal thereof by the appellants. For the disposal of 8821.858 MT sugar, it would require about 88,000 bags to store and about 8082 Trucks to transport the same. In the absence of any evidence in support of such storage or such transportation of the sugar for the relevant year of alleged production, there was absolutely no justification to hold that the appellants had clandestinely manufactured and removed the sugar of the quantity alleged in the show cause notice.

8. The Apex Court in **Oudh Sugar Mills Ltd.** case was dealing with a matter wherein in May 1957 Asst. Chemical Examiner on inspection of the factory of the appellants in that case had made a report to the government that the company had not kept correct accounts of the sugar cane juice which was consumed for the production of sugar as was otherwise required under Rule 83 of the Excise Rules. The report related to the period between the commencements of crushing season for the year 1956-57 and 7th May 1957 and accordingly 11,606

mounds of sugar were reported to have been short accounted for. A show cause notice came to be issued and after hearing the parties, the Collector of Excise, Allahabad required the company under his order dated 19th Feb., 1958 to pay the duty on the said quantity of 11,606 mounds of sugar and also imposed penalty. The appeal carried against the same to the Central Board of Revenue did not yield any success. The revision application to the government also was rejected and hence the company had approached the Apex Court. It was the case of the company that the allegation of short accounting of the sugar was based on assumption and not on factual data. It was specific contention of the company before the Apex Court that it could not be held guilty of short accounting of sugar unless it was established that they had manufactured sugar and had removed the same from the factory or there was some loopholes in the working of the factory, which could provide the particulars in respect of clandestine removal of sugar by the company, and therefore only on the basis of calculations made by the Asstt. Chemical Examiner, the authorities could not have confirmed the demand of duty. Taking note of the said contention as well as the report made by the Asstt. Chemical Examiner, it was observed by the Apex Court that those calculations were certainly based on some assumptions. Firstly, that the difference of 56 mounds noticed by the Asst. Chemical Examiner during two and quarter hours test which was conducted by him on 7th May, 1957 was uniformly applied for every two and quarter hours working throughout the working hours of the crushing season which

began on 4th November, 1956 and went on upto May 7th, 1957. The second assumption was that the persons in charge of operations were letting the mixed juice to fill up the tanks uniformly up to a level beyond the fixed mark and never below that level or at any other level. The third assumption was that the average of 10.11% of sugar recovered from the mixed juice was taken as a safe basis for calculating the quantity of sugar not accounted for. And the fourth assumption was that the milling performance of the factory was assumed to be uniformly efficient throughout the entire period of crushing season. Considering the report having been based on these assumptions along with some other assumptions, the Apex Court observed that "if any one of these assumptions breaks-down, then the ultimate conclusion will have to be rejected as incorrect. It has to be borne in mind that human element is involved at certain stages of the operations such as time of commencement of the day's working, the rapidity or slowness in feeding cut sugarcane into the crusher and mills, accurately adding the same quantity of water in the crusher and mills, stopping the inflow of mixed juices into the tanks at a uniformly higher level than that indicated by the mixed mark, alarming the uniform time lag between the emptying of the tanks and starting inflow into them again and so on. It is also unsafe to rely on the average of 10.11% of sugar recovery for the entire period because it involves the assumption that even during the period when the gross weight of the tanks was 7.5 tons or less sugar content of the sugarcane were crushed in

the factory, it would not have yielded anything less than 10.11%."

9. Apparently, the Apex Court after pointing out the flaws in the report of the Chemical Examiner clearly held that such a report could not have been the basis for calculating the quantity of the sugar that might have been produced, even assuming it was produced clandestinely, in the factory by the appellants. In fact, the Apex Court had further observed thus:

"We would also mention one more factor which is mentioned in the letter addressed by the mills to the Resident Inspector on July 27, 1957, replying to the Asstt. Chemical Examiner's comment on the working of the factory. In that letter, they have taken explanation to the calculations of the percentage of mixed juice to the quantity of sugarcane made by the Asstt. Chemical Examiner on the ground that it is merely inferential and based upon the factor which was first evolved in 1921 by one Noel Deer by taking average of number of analysis conducted by him."

10 Having so observed, it was held by the Apex Court that apparently, the particular ratio upon which the calculations of the Asstt. Chemical Examiner was based was founded on analysis of Java cane and, therefore, could not have been the guide for determination of the ratio in respect of Indian cane. Besides, the point raised was a highly technical one and yet neither of the Counsels was able to throw any light upon it, and, therefore, it was not possible to arrive at any conclusion upon it but only to observe that the said contention was not considered by the Collector or by the Central Board of Revenue

or the Central Government. In the circumstances, therefore, the Apex Court held that the finding that 11,606 mounds of sugar were not accounted for by the company was arrived at without any tangible evidence and was based only on inferences involving unwarranted assumptions. As regards the formula, which was applied by the Asstt. Chemical Examiner, it was observed that the same was on the basis of formula which was evolved by one Noel Deer who had arrived at the same on the basis of analysis of Java cane and not Indian cane which is different from Java cane. The Apex Court has nowhere held as sought to be contended by the Id. Advocate for the appellants, that the calculations can never be based on any formula as such. On the contrary the calculations based on ratio applicable to Java cane having been blindly applied to the Indian cane and there being no other evidence, the same were rejected. The decision of the Apex Court is on the point of total absence of cogent evidence and the findings being based on mere assumptions. It is not on the point that the finding can never be based on an established formula. It is essentially, on the point that any formula should not be applied ignoring the facts of the case.

11. Reverting to the facts of the case, if one peruses the show cause notice which was issued to the appellants it clearly revealed the formula which was applied for arriving at the quantification of the sugar clandestinely manufactured and removed. The following table apparently disclosed the formula

applied for arriving at the figure of excess production of molasses:-

Sl. No.	Sugar season	Date of closure of the factory	Storage Tank/p. Pit	Date of declaration	Declaration excess quantity of molasses (MT)
1.	2001-02	01.05.2002	Pucca Pit No.2	04.07.02	600.000
			-do-	12.07.02	600.000
			-do-	21.08.02	356.649
			Steel Tank No.2	21.09.02	391.700
			-do-	20.10.02	150.000
			-do-	07.11.02	30.000
			-do-	17.11.02	25.000
				Total	2153.349
2.	2004-05	02.03.05	Pucca Pit No.2	21.05.05	400.000
			Steel Tank	02.06.05	500.000
			No.1		
			-do-	08.06.05	150.000
				Total	1050.000
3.	2005-2006	29.03.06	Pucca Pit No.2	07.04.06	500.000
			-do-	23.05.06	200.000
			Pucca Pit No.1	4.06.06	200.000
			-do-	07.06.06	150.000
			Steel Tank	30.07.06	200.000
			Steel Tank No.1	31.07.06	65.000
				Total	1315.000

12. The above quoted table clearly discloses the method adopted for arriving at the quantity of the sugar which was manufactured by the appellants clandestinely which resulted in production of the excess quantity of molasses and the same correspondence to the quantity of undisputed amount of molasses found in the factory of the appellants for the relevant period. By 'relevant period' means the period immediately following the relevant crushing season. It is apparent to note that the Commissioner on analysis of the materials on record apart from observing that the authorized signatory of the appellants company in his statement, had not disputed the quantity of excess molasses having been declared subsequent to the closer of the crushing season for the relevant year, has also observed that the appellants have failed to produce any evidence to show as to how additional molasses came to be stored in the pits after the closure of the crushing season and when the factory had already closed. In the background of these facts, we find no material having been brought on record even to doubt remotely the contention of the department as regards the calculation regarding the quantity of the sugar which was manufactured clandestinely in the factory.

13. It is true as rightly pointed out by the Id. Advocate for the appellants that the Department has not produced any evidence as regards the excess procurement of sugarcane or in relation to the customers of the factory who might have purchased the excess quantity of the sugar so manufactured.

Nevertheless, fact remains that the appellants themselves had declared excess quantity of the molasses after the closure of the crushing season without producing any evidence regarding generation of the excess quantity of molasses after the closure of the crushing season for the relevant years. It is nobody's case that the molasses got generated before the closure of the factory. Rather it has been the contention of the appellants themselves that the molasses increased in quantity on account of seepage of water in the storage tank and mixing of water therein. It is, however, pertinent to note that there is no contemporaneous record in relation to any such excess generation of molasses in the factors or any material which could reveal the increase in the quantity of molasses on account of seepage of water during the period immediately after the expiry of crushing season till the date of declaration made in that regard. It is pertinent to note that the theory of mixing of water had been for the first time thought of after the service of show cause notice. We have not been pointed out a single document or material which could reveal that the appellants had at any point of time prior to service of show cause notice disclosed to the Department or any other authority that storage of the molasses were subjected to seepage of water therein.

14. It is also pertinent to note that though the appellants had sent the letters to the Inspector of State Excise about excess quantity of molasses and with copy thereof to Superintendent, Central Excise and Asstt. Commissioner of Central Excise,

there is no explanation forthcoming from the appellants as to what prevented the appellants from filing revised RT-8(c) statements which was the clear requirement of law in the case of any excess of molasses being observed by the appellants. In-fact, there is a clear finding to that effect by the Commissioner and we find no challenge to the same rather we have not been informed either across the bar in the course of argument nor we find on record, any explanation in this regard forthcoming from the appellants.

15. It is also necessary to note the fact that the excess quantity of molasses declared by the appellants was not in small quantity. For the year 2002, the declarations made from July 2002 to November 2002 was in relation to excess quantity of 2100.249 MT of molasses, for the year 2005 declaration was for the quantity of 1050 MTs and for the year 2006, it was for 1315 MTs. It is the case of appellants that the entire excess quantity of molasses increased on account of mixing of water therein. As already seen above, the total excess quantity of molasses was 4,518.349 MTs, which is equivalent to 30 Lakhs of litres. Considering that each ton would comprise of 700 Ltrs., the total quantity of excess molasses would comprise of nearly 30Lakh Ltrs of water. However, it is their own case that molasses in question were sold to the distillers which apparently show the molasses were in consumable state and not barred for use of human consumption. The law however clearly prohibits the use of such water mixed molasses for human consumption as rightly pointed out by the Id. DR. In

the case of **Shakumbari Sugar & Allied Ind. Ltd. vs. Commissioner of Central Excise, Meerut-I** reported in 2006 (206) ELT 497 (Tri.- Del.), the Tribunal had clearly held that such molasses which were watery molasses were unfit for human consumption. One wonders how the excess molasses which were really the watery molasses, could have been consumed by the distillers!

16. It cannot be disputed that the primary burden lies upon the Department to prove the allegation regarding clandestine manufacture and removal of the goods. However, in the case in hand, the fact of storage of excess molasses was not only undisputed but it was clearly admitted by the appellants themselves. It is also not in dispute that the generation of molasses in sugar factory can be only during the process of manufacture of the sugar. This being undisputed facts coupled with the defence which is sought to be raised by the appellants that in the matter in hand the excess molasses were found on account of mixing of water therein, the primary burden about factum of generation of excess quantity of molasses and the same being consequent to the corresponding quantity of manufacture of sugar clearly stood established and burden in that regard by the department was clearly discharged. The onus thus shifted upon the appellants to prove that the excess generation of molasses was on account of mixing of the water and not on account of excess manufacture of sugar.

17. The perusal of the records disclose that as regards the

contention regarding the mixing of water with the molasses being the reason for increase in the weight thereof, there was no material of any type produced on record in support of the said contention. As already seen above, the mere contention in that regard cannot be believed. The contention being that the excess molasses were on account of mixing of water, it was necessary for the appellants primarily to establish the same by producing the analysis of the sample of molasses with the necessary contents of the water. There were no such efforts made by the appellants for reasons unknown. The burden in that regard was squarely upon the appellants as by the time the facts were revealed to the department and the investigation had started, the molasses in question were already consumed.

18. As regards the specific defence raised in this respect by the appellants in reply to the show cause notice was as under:-

"5.12. That the temperature of the tanks are recorded daily to see the behaviour of molasses stored in the tanks. It is necessary because due to reaction in chemicals present in the molasses, heat is generated and unless it is controlled, it may reach to flash point and may result in auto-combustion. With a view to lower down the temperature inside the tanks, water is showered from all sides including top of the tanks to reduce internal temperature. In addition to cooling system the circulation of Molasses is also carried out by way of taking Molasses from the bottom and adding it at the top level of the steel tank. It so happened that from the top cooling water being spread at the top find place to enter into the steel

tank of Molasses and cause quantity got mixed with the Molasses which ultimately resulted in increase the total quantity of Molasses over a period of time. In case of open underground pucca pits total rain water entered into the Molasses which again resulted in increase the total quantity of Molasses. Besides seepage water also enter into pucca pits.

5.13 That the weight of molasses thus increases for two reasons as stated above i.e. first, due to defect in discharge tank and its value resulting in discharge of more or less molasses than the calibrated weight and secondly, due to presence of water as a result of cooling spray and seepage of rain water. The excess and shortage of molasses in the tank with reference to recorded weight is detected at the time of final clearance. After final clearance if there is shortage of molasses, remission is claimed. In case the molasses still remains in the tanks though the recorded closing balance of molasses comes to nil, the excess is determined in phases at the time of total clearance of molasses from the tanks. In such situation, the total quantity is first recorded in Daily Stock Account and removal thereof is shown accordingly. Information to this effect are simultaneously given to the Jurisdictional Superintendent Range and to Inspector of U.P.State Excise. This system of accounting of excess quantity of molasses is repeated till the molasses are accepted by the Distillers and is completely cleared. Each time the excess of molasses is detected, report is submitted to Jurisdictional Superintendent Central Excise as well as, to Inspector U.P. State Excise. The declaration of excess Molasses is a practice regularly followed by every sugar factory where excess and shortages always happened. In our case over the last six years we have declared and informed the concerned department in time. Copies of

written information submitted to the aforesaid officers during the period under reference are enclosed and collectively marked as Annexure-3."

19. The above averments clearly disclose clear confirmation of excess molasses with sole contention that the increase thereof was on account of mixing of water. As already observed above, there is no material placed on record in support of the said contention. Being so, while the Department had clearly discharged its burden, the appellants failed to discharge the onus.

20. As rightly pointed out by the Id. DR it appears that the excess generation of molasses or excess production of sugar was a normal phenomena in the factory of the appellants. The Id. DR has drawn our attention to earlier cases in relation to the appellants factory in this regard. They are:

(1) reported in 1984 (18) ELT 225

(2) Reported in 1986 (26) ELT 583.

21. On merits, for the reasons stated above, we find no fault with the findings arrived at by the Commissioner.

22. The other point sought to be raised relates to bar of limitation and the absence of facts for invocation of extended period of limitation for issuance of show cause notice.

23. Undoubtedly the period involved in the matter is 2001-

02, 2004-05 & 2005-06. The show cause notice was issued on 27th June, 2007.

24. The Id. Advocate for the appellants drawing our attention to the copies of the letters dated 14th July, 2002, 21st August, 2002, 21st September, 2002, 20th October, 2002, 7th November, 2002, 18th November 2002, 23rd May, 2005, 10th June 2005, 7th April 2006, 23rd May, 2006, 4th June, 2006, 19th June, 2006, 30th July, 2006, 31st July, 2006 addressed to Inspector of the State Excise Department, the ER-1 forms and copies of RG-1 Register for the relevant period submitted that these records clearly disclose timely intimation of excess molasses found in the factory, as also verification of the records by the respondent's officers which would disclose sufficient knowledge of excess generation of molasses much prior to issuance of the show cause notice and, therefore, there was no case made out for invoking extended period of limitation. Considering the same, according to the Id. Advocate, the demand is barred by limitation.

25. The Id. DR on the other hand placed reliance in the decision of the **Commissioner of Customs vs. M/s. Candid Enterprises** reported in 2001 (130) ELT 404(S.C.) and referring to the stand taken by the appellants in response to the show cause notice submitted that undisputedly, the appellants did not file the statutory document in the form of RT-8(c) disclosing excess molasses and the verification of RG-1 Register did not reveal generation of excess molasses or manufacture of excess sugar. Referring to the letter sought to be relied upon by the appellants it was contended that mere

sending of letters after the expiry of crushing season would not give rise to the presumption about the knowledge of excess generation of molasses or clandestine manufacture and removal of sugar by the appellants. It is also contended on behalf of the Department that there is genuine doubt as to whether the letters were factually received by the Department.

26. The Id. Advocate for the appellants however has drawn our attention to the reply which was filed in response to the show cause notice and has submitted that the fact of the generation of excess molasses was informed from time to time to the Department and not only that, they had also paid duty on such excess molasses.

27. The Apex Court in **Commissioner of Customs vs. Candid Enterprises** case has undoubtedly observed that the fraud nullifies everything and, therefore, mere delay in taking action in the case of fraud may not be a justification to enable the party responsible for playing fraud to avoid the consequences of such wrong. However, before deciding applicability or non-applicability of this rule to the facts of the case in hand, it is necessary to consider the circumstances under which the action has been initiated against the appellants.

28. The show cause notice on the face of it, disclosed that the same was sought to be issued on account of declaration of excess quantity of molasses in the storage tanks/pucca pits of

the appellants in relation to the period of 2001-02, 2004-05 and 2005-06 while the notice was issued on 26th June, 2007. Undoubtedly, it is also stated in the show cause notice that these declarations were detected by the preventive officers while checking the factory premises on 8th December, 2006. While having noted those facts in the show cause notice, the Department sought to justify the action by invoking extended period of limitation by saying as under:-

"This reply of the party is illogical/impractical regarding declaration of excess quantity of molasses by them. The molasses is stored in storage tanks/ pucca pits after taking its actual weight in calibrated tank and the same is cleared too on actual weighment. Further, the party used to verify physically the stock of molasses time to time (weekly) stored in the tanks/pucca pits. Therefore, it is practically not possible that such a huge quantity of molasses remains unnoticed in the tanks for about two months after the closure of factory. Moreover, the trend of declarations of excess quantity of molasses in a particular storage tank provides the solid basis to infer that the party had made these declarations erroneously and as such this act of theirs cannot be explained satisfactorily. This is further evident with the fact that a huge quantity like 600 MT, 600 MT & 356.649 MT of molasses were found excess by the party in the same pucca pit No.2 on 04.07.2002, 12.7.2002 and 21.8.2002 respectively. It clearly reveals that declarations were made to provide accountal sanctity to the unaccounted molasses, a by-product generated concurrently with the V.P. Sugar during production.

It is a natural fact that during the manufacture of a principal commodity, if any byproduct is generated,

their percentage recovery will be in a similar proportion. Thus, such huge quantity of excess declared molasses must have the concurrently produced V.P. Sugar with its, in tandem.

From the above it appears that party has committed fraud and willful mis-statement in RT 8 (c) to evade payment of central excise duty on corresponding V.P. Sugar and attracted penalty equal to Central Excise duty evaded under Section 11AC."

29. In other words the allegation of the fraud and willful misstatement had been made on the basis that declarations were made essentially to provide accountal sanctity to the unaccounted molasses. Perusal of the entire show cause notice, nowhere discloses any specific allegation to the effect that it was only on 8th of December 2006 during the inspection by the preventive officer that the Department for the first time came to know about excess quantity of molasses and indeed the Department could not have alleged so, as it has been specifically revealed in reply to the show cause notice that the excess quantity of molasses was cleared on payment of duty from time to time. Factum of payment of duty on excess molasses would clearly reveal knowledge of excess generation of molasses in the factory of the appellants at the appropriate time to the Department.

30. Besides, the show cause notice itself refers to dates of declaration, which tally with the dates of the letters which were addressed to the Inspector of State Excise Department with copy thereof to the Superintendent of the respondent.

The show cause notice nowhere states that those declarations were not received accordingly.

31. Above facts would reveal that the Department acquired knowledge about the excess quantity of molasses as and when the same was cleared on payment of duty. In these circumstances, it is difficult to accept the contention on behalf of the respondent that they were entitled to invoke the extended period of limitation.

32. The Id. DR, however, as already observed above, has submitted that there was a clear case of fraud played in the matter and hence the plea on bar of limitation is not available to the appellants. Undoubtedly, as ruled by the Apex Court, fraud would compel the wrong doer to face the consequence of his wrong doing. However, in the case in hand, even to assume that there is a fraud, taking into consideration the fact, which reveal periodical intimation of the fact of generation of excess molasses to the Department, payment of duty on excess molasses, periodical visits by the officers to the factory premises for verification of stock, in spite of preventive officers noting excess generation declaration on 8th of December, 2006 and no documentary evidence regarding any further investigation thereafter having been produced, it is difficult to believe that a fraud, if any, could not have been played without the connivance of the officers and employees of the respondent Department. Very fact that there were declarations, may not be in the form prescribed for the same filed by the appellants in relation to the excess molasses, the

fact remains that the factum of excess generation of molasses was communicated periodically under letters to the Superintendent of the respondent and Asstt. Commissioner of the concerned area. In these facts, in the absence of satisfactory explanations forthcoming from the Department, as to what prevented them from taking appropriate action within the period of limitation, and, further, if there was a fraud which could not have been played without the connivance of the Department personnel, how action could be initiated only against the appellants excluding such departmental personnel, inspite of the fact that the appellants had clandestinely manufactured the sugar, resulting in evasion of the duty to the tune of Rs.75,85,328/-. It was absolutely necessary for the Department to make proper investigation in this regard and to justify the delayed action. Even failure to bring on record justification for delayed action speaks volume. It is not a question of one or two rupees of duty. Amount involved was more than Rs.75 Lakhs of duty amount, besides interest thereon and penalty. It is really surprising to see the callous attitude on the part of the preventive section of the respondent in this regard. While deprecating such conduct on the part of the respondent, we find it necessary to direct the Registrar to send a copy of this order to the Hon'ble Minister of Finance as well as to the Revenue Secretary and the Chairman of the Board, for appropriate action if they deem fit and proper.

33. For the reasons stated above, therefore, the claim in relation to the period beyond one year prior to issuance of show cause notice dated 27th June, 2007 is clearly barred by

limitation. The records do not justify invocation of extended period of limitation.

34. In the result, appeal partly succeeds, demand of duty under the impugned order with reference to the period beyond one year prior to issuance of the show cause notice dated 27th June, 2007 cannot be sustained, as it is barred by limitation. The rest of the demand cannot be interfered with. The same is liable to be paid according to the calculation to be made by the Department and to be intimated to be appellants. The appellants also will be liable to pay interest thereon and equal amount of penalty in terms of section 11AC. There shall be no penalty under Rule 25 of Central Excise Rules. The order in that regard stands modified accordingly. The appeal is disposed of in the above terms.

35. Registrar to forward the copies of this order to the Hon'ble Minister of Finance as well as to the Revenue Secretary and the Chairman of the Board as stated above and place the compliance report in that regard before the President of CESTAT.

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Anita