

**Collector of Central Excise Vs. Niphad Sahakari Sakhar Karkhana**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Dec-20-1985

**Reported in :** (1986)(6)LC281Tri(Delhi)

**Appellant :** Collector of Central Excise

**Respondent :** Niphad Sahakari Sakhar Karkhana

**Judgement :**

1. The dispute in this case is on the method of calculation of average production of sugar for the purpose of grant of the Central Excise Duty Concession (commonly called incentive rebate for higher production) in terms of the exemption notification No. 132/82-C.E., dated 21-4-1982.

In order to facilitate the understanding of the controversy, we reproduce this notification below :- "In exercise of the powers conferred by Sub-rule (1) of rule 8 of the Central Excise Rules, 1944, read with Sub-section (4) of Section 50 of the Finance Act, 1982 (14 of 1982), the Central Government hereby exempts sugar, described in column (1) of the Table below and falling under sub-item (1) of Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise and special duty of excise leviable thereon as is specified in the corresponding entry in columns (2) and (3) of the said Table.

of	excise	and	special	duty	of
exercise					
(3)					

-----Description of sugar Duty  
------(1) (2)  
-----1. Sugar produced in a

factory during (Rupees per quintal) the period commencing on the 1st 40.00 24.50 day of May, 1982, and ending Provided that the amount of exemption specified in column (2) or column (3) of the said Table shall not exceed the amount of duty of excise payable on free sale sugar or levy sugar, as the case may be.

(a) "average production" in relation to sugar produced in a period in a factory, means the average production during the corresponding period of each of the preceding three sugar years ; (c) "levy sugar" means sugar required by the Central Government to be sold under an Order made under Clause (f) of Sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (10 of 1955) ; (d) "sugar year" means the period of twelve months commencing on the 1st day of October and ending with the 30th day of September next following.

2. In computing the production of sugar during the period mentioned in column (1) of the Table in respect of a factory mentioned therein- (i) the data, as furnished in Form R.G. 1 prescribed in Appendix 1 to Central Excise Rules, 1944, or in such other record as the Collector may prescribe under Rule 53 or Rule 173-G of the said rules, shall be adopted ; (ii) any sugar obtained by refining gur or khandsari sugar shall not be taken into account ; (iii) any sugar obtained by reprocessing of sugar house products left over in process at the end of any preceding sugar year shall be taken into account ; and (iv) any sugar obtained by reprocessing of defective or damaged sugar or brown sugar, if the same has already been included in the quantity of sugar produced, shall not be taken into account.

3. Where during the period mentioned in column (1) of the said Table, production in any of the preceding three sugar years was nil, the average production shall be determined as under.- The average shall be the average of the corresponding periods among the preceding three sugar years in which the factory had actually produced and the period or periods in which it did not produce during the said three sugar years shall be ignored while arriving at the average.

4. Where production during May to September in all the preceding three sugar years was nil, the entire production during May to September, 1982 will be entitled to the exemption under this notification." 2. There is no controversy on the facts of the case. The respondent factory did work in the preceding three sugar years but it

did not produce any sugar during the two corresponding periods (May-September) of 1978-79 and 1979-80 seasons. The Assistant Collector held that since the factory had produced sugar during May-September of 1980-81 only, that alone could be considered for arriving at the average production and determining the excess production for the year 1981-82. He held further that since there was no production during May-September of 1978-79 and 1979-80, the period of these years had to be ignored while determining the average production as per Clause 3 of the notification.

To put it simply, he divided the total production of the previous three preceding periods (which, in fact, meant the production of May-September of 1980-81 year only because the production in the earlier two years was nil) by 1. In other words, the production during May-September of 1980-81 season was taken as the average production. In appeal, the Collector (Appeals) set aside the Assistant Collector's order and accepted the respondents' plea that the production during May-September of the previous three years should be divided by 3. By doing so, the average production figure becomes smaller and it correspondingly gives a larger figure of excess production during 1981-82 for earning the duty rebate. The Collector of Central Excise, Aurangabad is now in appeal before us with the prayer that the order of the Collector (Appeals) be set aside and the order of the Assistant Collector restored. In brief, the Collector's argument is that because of Clause 3 of the Notification the average should be arrived at by dividing the production of previous three years by 1 and not by 3.

3. During the hearing before us, the respondents placed reliance on the following authorities :- (i) 1982 E.L.T. 866 (Bombay)-Mfs. Balasaheb Desai Sahakari Sakhar Karkhana Ltd. v. Union of India and Ors.

(ii) Order No. 182/84-D, dated 11-4-1984 of the Tribunal in Appeal No. E-405/79-D of M/s. Kalambar Vibhag Sahakari Sakhar Karkhana Ltd. (iii) 1983 E.L.T. 484 (Mad.)-1980 CEN-CUS 505D (Mad.)-Sakhti Sugars Limited, Coimbatore v. Union of India and Ors., relied on in Tribunal's order reported at 1983 ECR 1995-D (CEGAT)- Mahalakshmi Sugar Mills Co. Ltd. v. Collector of Central Excise, Kanpur.(Madras) (D.B.)-Assistant Collector of Central Excise v. New Horizon

Sugar Mills (P) Ltd., later confirmed by the Supreme Court on 13-2-1981 when it dismissed Union of India's S.L.P. (C) No. 9538/79.

4. We find that the first two authorities aforesaid are not relevant to the point at issue before us. These authorities related to Exemption Notification No. 257/76-C.E., dated 30-9-1976. The dispute therein was whether nil production in one or more of the preceding years totally disqualified a sugar factory from earning the duty rebate. It was held in these authorities that it was not necessary that the factory must have produced sugar in each and every year of the preceding 3 or 5, (as the case may be) years and that the benefit of the notification was available to a sugar factory which had not produced sugar during any of the specified preceding years. In the case before us, the department is not seeking to totally disqualify the respondent factory. The dispute is only on the point whether the production of the preceding three years should be divided by 3 or by 1, in order to arrive at the average.

5. The authorities mentioned at (iii) and (iv) above are more relevant to the point in dispute before us. However, both these authorities are on the interpretation of Exemption Notification No. 146/74-C.E., dated 12-10-1974. This notification also related to grant of duty relief for higher production of sugar. The corresponding provisions, which are the subject matter of dispute, were worded differently in this notification. We reproduce them for the sake of a comparative study with the corresponding provisions of Notification No. 132/82-C.E., dated 21-4-1982 :- "In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 the Central Government hereby exempts sugar, described in column (2) of the Table below and falling under sub-item (1) of Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise leviable thereon as is specified in the corresponding entry in columns (3) and (4) of the said Table.-----Sl.

Description	of	sugar	Duty	of	
exciseNo.			(1)	(2)	(3)
(4)-----				(a)	the overall production of

the factory Rs. 60/- Rs. 16/- for the entire sugar year does not equal per per the average production of the preceding quintal quintal five sugar years: (b) the overall production of the factory for Rs. 82/- Rs. 22/- for the entire sugar year equal or exceeds per per the average production of the preceding quintal quintal five sugar years:2. \* \* \* \*----- (a) "average

production", in relation to sugar produced in a period by a factory which had gone into production for the first time in 1967-68 or earlier, means the simple average production during the corresponding period of the preceding five sugar years ;\* \* \*

\* 4. Where production in one or more sugar years among five sugar years was nil, the production in such sugar year or sugar years shall be ignored and the average production shall be the average of the production of the corresponding period of the remaining sugar years.

6. In the case reported at 1983 E.L.T. 484 (Mad.)-1980 CEN-CUS 505D, the Madras High Court held that under Item 1 of the Notification No.146/74-C.E., dated 12-10-1974, the average production of the preceding five years has to be worked out by dividing the total production during October and November of any of the preceding five years by live not with satanding the fact that there was no production of sugar at all during October and November of any of the preceding five years. In the second case at 1980 E.L.T. 10 (Madras), a Division Bench of that High Court held that though the production during the months of October and November for some of the years was nil, yet the production could not be said to be nil during the sugar year as such and, consequently, paragraph 4 of the notification on its own terms would not apply. A plea was made on behalf of the department before the High Court that paragraph 4 of the notification should be read as if, after the word 'production' in the commencement of the paragraph, the words 'during the relevant months or corresponding period' were present and not to read the word 'production' as indicating production during the whole of the sugar year. The High Court declined to accept this plea and held that if the language of the notification was deficient to bring out the real intention of the Government, it was not for the High Court to supply the deficiency.

7. We find that the deficiency has been supplied in the new notification No. 132/82-C.E., dated 21-4-1982 with which we are concerned in the present appeal.

As against the words 'means the simple average production during the corresponding period of the preceding five sugar years' in explanation (a) of Notification No. 146/74-C.E., the words in explanation (a) of the new notification are 'means the average production during the preceding period of each of the preceding three sugar years'. The difference in wording is of a more pronounced and material character when we come to paragraph 3 of the new notification. As against the words 'where production in one or more sugar years among five sugar years was nil' in paragraph 4 of the old notification, the words in paragraph 3 of the new notification are 'where during the period mentioned in column (1) of the said Table, production in any of the preceding three sugar years was nil' (under lining supplied to mark the difference). It is, therefore, not correct for the respondents to canvass that the same interpretation should be given to these paragraphs of the two notifications. The respondents may have a point when they say that when one talks of average, it is implicit that the average has to be of more than one figure. But it is open to the legislature to create deeming fictions and give artificial meanings to expressions in the statute. Thus when paragraph 3 of the new notification No. 132/82-C.E. says that the sugar years during May-September of which there was no production are to be ignored, they will have to be ignored while working out the average, no matter whether it leaves only one out of three preceding years for working out the average. Any other interpretation would make paragraph 3 of the new notification nugatory. Because of the altered language of the new notification, it is no longer permissible to argue that nil production in the specified period could be ignored only if the production in the entire sugar year was nil. Under the new notification, if there was no production during May-September period of any of the preceding three sugar years, such year would have to be ignored totally. In other words, it would not enter into calculation of average production at all. We, therefore, hold that since the respondent factory did not produce any sugar during May-September periods of 1978-79 and 1979-80, the Assistant Collector was correct in taking the production of 1980-81 sugar year alone as the average production of the preceding three years.

8. Accordingly, we allow this appeal, set aside the impugned order in appeal passed by the Collector (Appeals) and restore the order in original of the Assistant Collector.

