

**HIGH COURT OF TRIPURA
AGARTALA
Review Pet.No.73 of 2022**

The Union of India and Others

.....Petitioner(s)

Versus

M/s Tripura Ispat

.....Respondent(s)

For Petitioner(s)	:	Mr. P. Datta, Adv.
For Respondent(s)	:	Dr. A.K. Saraf, Sr. Adv. Mr. Koushik Roy, Adv. Mr. P. Baruah, Adv.

Date of Hearing and
delivery of Judgment
and Order : 14.03.2023

**HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR. JUSTICE ARINDAM LODH**

Judgment & Order(Oral)

Chief Justice, Acting

Heard Mr. P. Datta, learned counsel appearing for the review petitioner as well as Dr. A.K. Saraf, learned senior counsel assisted by Mr. Koushik Roy and Mr. P. Baruah, learned counsel appearing for the respondent.

2. The present review petition has been filed in the spirit of Section 114 read with Order XLVII Rule 1 of the CPC seeking review of the judgment and order dated 12.01.2021 passed by this Court in WP(C)No.465 of 2020.

3. The brief fact of the case is that in order to encourage industrial growth in the North Eastern region and for the industrial development of the region, the Government of India had formulated industrial policy. After due deliberations, the Government of India issued a notification dated 24.12.1997 under which certain areas such as growth centers, infrastructure development

centers, export promotion and industrial parks etc. were made tax free zones for a period of ten years. Pursuant to such notification, various circulars were issued giving shape to the said industrial policy granting exemption from payment of excise and additional duty of excise. In subsequent policy decisions taken by the Government of India in the year 2007 also such concessions were continued. Attracted by the tax concessions offered by the Government of India the taxpayer established a plant for manufacture of excisable goods such as MS Ingots, HSD Bars in the State of Tripura.

4. M/s Tripura Ispat is registered partnership firm and it is engaged in the manufacture of excisable goods such as Ms Ingots. HSD Bard Rods falling under Central Excise Tariff Sub Heading No.72142090 and 72061010. The Commercial production commenced on or around 13th February, 2006. For the goods cleared by the taxpayer from its manufacturing unit, it claimed exemption under notification dated 25.04.2000 and claimed refund of CENVAT duty paid in case in the year 2004 the Government introduced Education and Higher Education cess. Once paid, the taxpayer claimed refund of such cess paid in this case. However, the departmental authorities refused to refund the same at that stage.

5. The question of collecting education cess and higher education cess on such goods which were exempt from payment of excise duty came up for consideration before a two Judge bench of Supreme Court in case of SRD Nutrients Private Limited versus Commissioner of Central Excise, Guwahati reported in 2018 SCC. In the said decision it was held that the education cess and the higher education cess are in the nature of surcharge and when the

primary tax i.e. the basic excise duty itself is exempt such additional levies cannot be collected. Based on the said decision of the Hon'ble Apex Court, the taxpayer filed refund applications before the competent authority. By an order dated 29th May, 2019, the Assistant Commissioner of Central Goods and Services Tax, Agartala passed a speaking order sanctioning the refund of the education cess and higher education cess collected on the goods cleared from its manufacturing units.

6. The taxpayer received the refund as per the said order of the Assistant Commissioner. However, on 03.07.2020, the Assistant Commissioner passed the said order, the decision of the Supreme Court in case of SRD Nutrients(supra) came up for consideration in the three Judge Bench of Hon'ble Supreme Court. In case of Unicorn Industries versus Union of India and Other reported in 2020 SCC, the Supreme Court held and observed that the decision in case of SRD Industries (supra) was per incuriam.

7. Based on CBIC instruction under F.No.276/1872018-CX.8A part dated 09.01.2020 that was in turn based on the decision of the Supreme Court in case of Unicorn Industries (supra) the Assistant Commissioner issued a show cause notice to the taxpayer as the refund of education cess and higher education cess was erroneously granted and therefore, in terms of Section 11A of the Central Excise Act, the same was liable to be recovered. He, therefore, called upon the taxpayer to showcause as to why such amount should not be recovered with interest.

8. As per the submission of the taxpayer in the said Writ Petition, the Apex Court order in the matter of SRD Nutrients(supra) held the field at the

time of issuing the refund order dated 29.05.2019. Any subsequent change in law would not authorize the competent authority to seek recovery of such refund since his original order can neither be stated to be erroneous nor would any such change in law will cloth him with the jurisdiction to seek recovery in terms of Section 11A of the Central Excise Act.

9. On the other hand, it was submitted by the Department that the decision of the Supreme Court in case of SRD Nutrients(supra) was disapproved in the subsequent decision in case of Unicorn Industries (supra) in which the three Judge Bench held and observed that the decision in case of SRD Nutrients was per incuriam. The show cause notice has been issued within the period of limitation prescribing Section 11A of the Act. The Assistant Commissioner was thus justified in invoking the correct law as declared by the Supreme Court in subsequent decision and therefore, the department sought that the petition be dismissed.

10. The Hon'ble High Court of Tripura has stated that none of the relevant facts are in dispute. The taxpayer having set up a manufacturing unit in the State of Tripura availed the benefit of duty exemption on the goods cleared from such manufacturing and pursuant to the Government of India policy to encourage industrial investment and growth in North Eastern region. The taxpayer contended that since the basic duty of excise was not payable, the additional charge of education cess and higher education cess also cannot be collected. Based on the decision of the Supreme Court in case of SRD Nutrients, the petitioners made refund claims for refund of education and higher education cess. Such refund application was allowed by the Assistant Commissioner.

However, soon thereafter, in the decision in case of Unicorn Industries the Supreme Court held and observed that the decision in case of SRD Nutrients was per incuriam.

11. The Hon'ble High Court of Tripura vide order dated 12.01.2021 disposed of the writ petition by setting aside the impugned show cause notice dated 03.07.2020 issued by the Assistant Commissioner of Central Goods and Services Tax, Agartala.

12. Mr. P. Datta, learned counsel appearing for the review petitioners has submitted that department has already moved an application for modification of the judgment rendered in the case of SRD Nutrients Pvt. Ltd., dated 10.11.2017 in C.A. 2781-2790 of 2010. According to him, the Hon'ble Apex Court has issued notice and the Assessee has filed its counter. Bajaj Auto has also moved an intervener application. It is the endeavour of the Union to bring SRD in line with Unicorn, which is a larger Bench judgment delivered subsequently and holding both SRD Nutrients and Bajaj Auto to be Per Incuriam. Let the Hon'ble Supreme Court allow the modification application, then the ration in SRD would also get modified. The matter shall be argued before Hon'ble bench shortly. Hence, the present review petition have been filed against the judgment dated 12.01.2021 with a specific prayer that the matter may be adjourned sine dine till the modification application is decided by the Hon'ble Apex Court. Such stand is consistent with principles of judicial principles and equity. Hon'ble Apex Court in case of Kamlesh Verma versus Mayawati and Others in Review Petition No.453/2012, while highlighting the instances wherein the Review is maintainable, stated that "Discovery of new and important matter

or evidence” which, after the exercise of due diligence, was not produced before the Court can be the ground for filing a Review Petition.

13. Having heard both sides and after scrutinized the records we are of the considered opinion that the ground as raised by the review petitioner is not satisfactory and hence, the prayer made in this review petition stands rejected.

Accordingly, the present review petition stands dismissed.

JUDGE

CHIEF JUSTICE (ACTING)

