



IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
PRINCIPAL SEAT
W.P(C) No.3864/2022

1. Dharampal Satyapal Ltd

A company incorporated under the provisions of the Companies Act, 1944 having its Registered Office at 1711, S.P. Mukherjee Marg, Delhi-110006 and Factory at Industrial Estate, Bamunimaidam, Guwahati- 781 021 and in the present proceeding represented by Mr. Shantanu Sarma, Deputy General Manager of the petitioner Company.

2. Mr. Promod Kumar Padhy

Aged about 53 years, the Territorial Head as well as one of the directors of the Petitioner No. 1 company, and resident of Abirkung Apartment, Flat No. A4, Hatigarh Chariali, Mother Teresa Road, Guwahati-781024, Assam

.....Petitioners

-Versus-

1. Union of India

Through under Secretary, Government of India, Ministry of Finance (Department of Revenue), North Block, New Delhi.

- 2. Principal Commissioner, GST & Central Excise Commissionerate, Guwahati,** GST Bhawan, Kedar Road, Machkhowa, Guwahati-781 001
- 3. The Superintendent (HQRS. Anti Evasion-I),** Office of the Commissioner of Central Excise & Service Tax, Gauhati, HQRS Anti Evasion, Unit-I, Sethi Trust Building, 6th Floor GS Road, Bhangagarh, Gauhati-781005.
- 4. The Assistant Commissioner (Anti Evasion)** Officer of the Commissioner of Central & Service Tax HQRS Anti Evasion, Unit 14, GS Road, Bhangagarh, Gauhati-781005.

.....Respondents

W.P(C) No.5399/2022

Chiranjib Roy Choudhury

Son of Shri B.K. Roy Choudhury, aged about 57 years and resident of C/1102, Express Green Apartment, Sector-I, Vaishali, Ghaziabad, UP

.....Petitioner

-Versus-

1. Union of India

Through under Secretary, Government of India, Ministry of Finance (Department of Revenue), North Block, New Delhi.

2. Principal Commissioner, GST & Central Excise Commissionerate, Guwahati, GST Bhawan, Kedar Road, Machkhowa, Guwahati-781 001

3. The Superintendent (HQRS. Anti Evasion-I), Office of the Commissioner of Central Excise & Service Tax, Gauhati, HQRS Anti Evasion, Unit-I, Sethi Trust Building, 6th Floor GS Road, Bhangagarh, Gauhati-781005.

.....Respondents

4. Dharampal Satyapal Ltd.

A company incorporated under the provisions of the Companies Act, 1944 having its Registered Office at 98, Okhla Industrial Estate, Phase-III, Delhi- 110020 and

Factory at Industrial Estate, Bamunimaidam, Guwahati-
781 021

..... Proforma Respondent

W.P(C) No.5200/2022

Bharat Goswami

Son of Late manic Chandra Goswami,
aged about 70 years and resident of
House No. 22, Monalisa Path, Zoo
Narengi Road, Guwahati-781024,
Kamrup (M), Assam

.....Petitioner

-Versus-

1. Union of India

Through under Secretary, Government of India, Ministry
of Finance (Department of Revenue), North Block, New
Delhi.

**2. Principal Commissioner, GST & Central Excise
Commissionerate, Guwahati,** GST Bhawan, Kedar
Road, Machhowa, Guwahati-781 001

3. The Superintendent (HQRS. Anti Evasion-I),
Office of the Commissioner of Central Excise & Service
Tax, Gauhati, HQRS Anti Evasion, Unit-I, Sethi Trust
Building, 6th Floor GS Road, Bhangagarh, Gauhati-
781005.

.....Respondents

4. Dharampal Satyapal Ltd.

A company incorporated under the provisions of the
Companies Act, 1944 having its Registered Office at 98,
Okhla Industrial Estate, Phase-III, Delhi- 110020 and
Factory at Industrial Estate, Bamunimaidam, Guwahati-
781 021

..... Proforma Respondent

W.P(C) No.5195/2022

Manabendra Deb

Son of Late Mrigendra Kumar Deb,
aged about 55 years and resident of
Lohit Apartment-II, Flat No. 2(B), 3rd
Floor, Nalinibala Devi Path, Sri Nagar,
Guwahati-781005, Kamrup (M)

.....Petitioner

-Versus-

1 Union of India

Through under Secretary, Government of India, Ministry
of Finance (Department of Revenue), North Block, New
Delhi.

2. Principal Commissioner, GST & Central Excise Commissionerate, Guwahati, GST Bhawan, Kedar Road, Machkhowa, Guwahati-781 001

3. The Superintendent (HQRS. Anti Evasion-I), Office of the Commissioner of Central Excise & Service Tax, Gauhati, HQRS Anti Evasion, Unit-I, Sethi Trust Building, 6th Floor GS Road, Bhangagarh, Gauhati- 781005.

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4. Dharampal Satyapal Ltd.

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Factory at Industrial Estate, Bamunimaidam, Guwahati-
781 021

..... Proforma Respondent

- B E F O R E -

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

<u>Advocate for the petitioners</u>	: Dr. A. Saraf, Senior Counsel assisted by Mr P.K. Bora, Advocate
<u>Advocate for the respondents</u>	: Mr. S.C. Keyal, Standing Counsel, CGST
Date of Hearings	: 29.05.2024, 19.06.2024, 25.06.2024, 16.07.2024 & 18.07.2024
Date of Judgment & Order:	: 21.10.2024

JUDGMENT AND ORDER (CAV)

These writ petitions challenge the order-in-original No. 05/Pr.Commr./CE/GHY/2021-22 dated 24.03.2022 passed by the Principal Commissioner, GST & Central Excise Commissionerate, Guwahati whereby the demand of recovery of Central Excise in terms of the Notice issued under Section 11A (10) of the Central Excise Act, 1944 read with Rule 18 of the Pan Masala Packing Machines (Capacity of Determination and Collections of Duty) Rule, 2008 (hereinafter referred to as "the Rule of 2008") as well as recovery of interest and penalty was imposed. The particulars in respect of each of the writ petitions will be discussed later in the Judgment.

2. Since W.P(C) No. 3864/2022 (Dharampal Satyapat Ltd) was argued by the respective counsel as the lead case, the facts relating to this particular case are discussed. The other writ petitions have similar facts and circumstances which will be referred to later in the judgment.

3. The writ petitioner in WP(C) No. 3864/2022 is a company incorporated under the Companies Act 1956, having its registered office in Delhi. The petitioner has an industrial unit in the city of Guwahati in the state of Assam. The petitioner is registered under the Central Excise Act 1944 and has registration number AAACD0132HXM030. The petitioner is engaged in the manufacture of 'Pan Masala'. The said item, according to

the petitioner, is classified under Tariff Entry 2106 90 20. The petitioner company is represented by its Deputy General Manager of the said company.

4. It is the case of the petitioner projected before this Court that the Central Excise Duty payable by the petitioner company for manufacture of its product, i.e., Pan Masala, is based upon the annual capacity of production of its factory determined in accordance to the provisions of the Rules, read with Notification No. 42/2008-CE dated 01.07.2008, which lays down the rate of duty on the basis of which the Central Excise Duty liability is to be calculated. In other words, the duty payable by the petitioner is to be calculated on the basis of a number of operating packing machines and the maximum packing speed of a packing machine.

5. It is submitted on behalf of the petitioner that in the month of January 2014, the petitioner company purchased packing machines from 'Sanko Machinery Company Limited', Japan for manufacturing pan masala (without tobacco) pouches. As per the product specification specified in the quotation of the machine, estimated speed of the machine was 900 to 1000 pouches per minute for a pouch length of 90 mm containing 18 to 22 grams of pan masala. During the pre-delivery trial run of the machine in Japan, the machine was found to have encountered some technical

issues and the petitioner company was advised by the supplier company namely 'Sanko Machinery Company Limited' to operate the machine at optimum speed around 750 pouches per minute and to observe the results before it could be operated at its rated speed of 900 to 1000 pouches per minute. The petitioner company accordingly placed orders for the machinery and the same was delivered to the factory premises of the petitioner company. As is required in terms of the Rules of 2008, the petitioner company decided to declare the maximum speed of the machine as experienced by it during the pre-delivery trial run of the machine which is 700 pouches per minute. The first declaration for the machine under the rules was filed by the petitioner on 09.01.2014 for operating the machinery with effect from 18.01.2014 for packing pan masala in 20 grams pouches. The maximum packing speed was accordingly declared as required under the Rules in Form-1 as 750 pouches per minute. The said declaration that the maximum packing speed of the machine was 750 pouches per minute as declared by the company was duly approved by the Assistant Commissioner of Central Excise by order dated 17.01.2014. As is required under the Rules, similar declarations were filed till June, 2014 which were also approved by the Assistant Commissioner of Central Excise.

6. Subsequently, on 18.07.2014, the petitioner company submitted another declaration in terms of Rule 6 (6) of the Rules of 2008 before the Assistant Commissioner of Central Excise. In the said declaration, the petitioner company stated that w.e.f 26.07.2014, the petitioner company would be operating the machine for manufacture of Rajani Gandha Paan Masala 18 grams pouch with MRP 50/- per pouch at the speed of 1000 pouches per minute. The said declaration was duly approved by the Assistant Commissioner by its order dated 23.07.2014. The petitioner company continued to file similar declarations declaring the maximum packing speed of the machine as 1000 pouches per minute, though the machine was operated at a speed above 750 pouches per minute as operational efficiency at that speed was never achieved consistently.

7. It is submitted that although the declaration of maximum packing speed of the machines was made at 1000 pouches per minute, because of operational reasons, the company found that it was not capable of efficiently running at the rate of 1000 pouches per minute. After evaluating proper checks and conducting series of tests, the company came to the conclusion that the machine was not capable of running at speeds of 1000 pouches per minute, but would run smoothly at the speed of 740-750 pouches per minute. In the meantime, pursuant to the amendments brought in the Finance Act, 2015 with effect from 1st of

March 2015, the Ministry of Finance, Department of Revenue, issued Notification No. 5/2015-C.E (N.T) dated 1st of March 2015 and Notification No. 6/2015-C.E. dated 1st of March 2015 whereby the maximum packing speed of the machines was introduced as an additional factor relevant to production and levy of duty.

8. Pursuant to the said notifications issued by the Ministry of Finance, Rule 4 of the Rules of 2008 was amended. Under the amended Rule 4 of the Rule of 2008, it was provided that the factors relevant to production of notified goods shall be the number of packing machines in the factory of the manufacturer and the maximum packing speed at which such packing machines can be operated for packing on notified goods of various retail sale prices. Under the said amended Rule 4, the maximum packing speed of the machine was required to be declared for the purpose of calculation of total production and determination of duty liability. The petitioner continued to declare its maximum packing speed of the machine in the highest slab of '751' pouches per minute and above, and was assessed to the highest rate of duty under the amended Rules of Finance Act, 2015.

9. On 26th of May, 2016, the petitioner company issued a communication to the Assistant Commissioner of Central Excise, stating that as per the approval earlier granted vide order dated 18th of May,

2015, the petitioner company was to operate the machine from 19.05.2015 to 31.05.2015. However, due to number of customer complaints received from the market relating to ineffective sealing of the pouches or improper pouch formation, the company has decided to discontinue the operation of the machine at the earliest date which accordingly to the relevant Rules fell on 30.05.2015 so that the technical issues arising in the machine can be corrected. The Assistant Commissioner, Central Excise was requested to depute an officer on 29.05.2015 at 23:55 hours to uninstall and seal the machine. It was further informed by the petitioner that in terms of the Rule 8 of the Rules, the petitioner would operate the machine for manufacturing limited quantity of Rajanigandha Pan Masala of 10 grams pouch at RSP 25/- per pouch to further explore the quality effectiveness of the machine with respect to the said product. The speed of the machine was declared in Form-1 as above 751 pouches per minute.

10. Pursuant to the communication of the petitioner company, the Assistant Commissioner of Central Excise by order dated 29.05.2015 approved the declaration of the petitioner company in Form-1 regarding speed of the machine as above 750 pouches per minute and allowing the manufacturing of the product by the petitioner company at RSP 25/- per pouch for operational reasons before finally un-installing and sealing the

machine on 29.05.2015 at 23:55 hours under physical supervision of the Superintendent of Central Excise, Range IIA in terms of Rule 6(5) of the Rules.

11. The petitioner company took up the issue of reviewing the performance of the machine with its supplier and manufacture namely Sanko Machinery Company Limited, Japan. The supplier after detailed review informed the petitioner company that the machine suffers from major technical snag in the design and though it was designed to manufacture comparatively bigger sized pouches at a speed above 1000 per minute, they found that the relevant components inside the machinery did not synchronize itself with internal quality checks and controls of the machine. It was therefore decided to downgrade the relevant components of the machine so that it matched the internal controls and checks of the machine. This downgrading would restrict the production at the speed of around 740-750 pouches per minute as was informed by the manufacturing company. It was also informed that its actual speed could not be worked out unless a non-commercial trial run was undertaken. Accordingly, the petitioner company informed the Assistant Commissioner of Central Excise by communication dated 12.06.2015 that it would like to conduct a non-commercial trial-run in the

presence of the Assistant Commissioner of Central Excise to find out the actual maximum packing speed of the machine.

12. In pursuance to the request made by the petitioner company, the Assistant Commissioner of Central Excise by order dated 15.06.2015 directed the Superintendent of Central Excise to supervise the de-sealing and trial run of the machine on 16.06.2015 at 11:00 hours and thereafter supervise the un-installing and sealing of the machine after the trial run is completed.

13. In pursuance to the said order passed by the Assistant Commissioner, on 16.06.2016, the major component of the machine namely the Central Processing Unit (CPU) was changed and thereafter the technical trial-run of the machine was conducted by the Department in association with one Shri S.K. Dutta, Government Registered Engineer, who was also appointed by the Assistant Commissioner of the Central Excise Department for that purpose. The said registered Chartered Engineer was engaged by the Department vide order 15.06.2015 for determining the maximum speed of the said machine after its technical alteration.

14. The said registered Chartered Engineer in his report stated that the machine was tested several times by applying manual as well as

automatic techniques and he concluded that the maximum capacity of the machine as 730 pouches per minute for both 18 gm and 10gm pouches.

15. Based on the report, the Assistant Commissioner of Central Excise by order dated 16.06.2016 held that the maximum packing speed of the machine falls within the slab of 301 to 750 pouches per minute.

16. Pursuant to the said order passed by the Assistant Commissioner of Central Excise, the petitioner continued to make declaration under the Rules of 2008 for operating the machine, declaring the maximum packing speed of the machine as 750 pouches per minute. All such declarations filed by the petitioner company were duly approved by the Assistant Commissioner of Central Excise by passing orders under the Rules and those orders have attained finality as no appeal under the statute was filed by the party.

17. It is submitted on behalf of the petitioner that inspite of change of the components in the machinery and its trial run being carried on in the presence of the officials, the petitioner was surprised to receive a letter dated 18.11.2015 from the respondent No. 4, namely, Assistant Commissioner (Anti Evasion), Office of the Central Excise & Service Tax Headquarter, Anti Evasion, Unit-1, GS Road, Bhangagarh, Guwahati. By the said letter, the petitioner company was informed about initiation of an enquiry in relation to the packing speed of the machine and thereby called

upon the petitioner company to submit a list of documents mentioned in the letter including the purchase order, proforma invoice, packing list, bill of entry payment particulars etc. The petitioner company in the meantime by communication dated 23.11.2015 issued to the Assistant Commissioner of Central Excise informing the department that the petitioner company would be re-starting production by operating the machine and therefore the Assistant Commissioner of Central Excise was requested to de-seal the machine on 29.11.2015 at 00:05 hours and thereafter uninstall and seal the machine on 30.11.2015 at 23:55 hours. As was declared in all past declarations for the period of June 2015 to October 2015, the maximum packing speed of the machine was declared as 750 pouches per minute.

18. The Assistant Commissioner of Central Excise issued a show cause notice dated 25.11.2015 on the petitioner company calling upon it to show cause in its defence to establish that the maximum packing speed of the machine is below the 750 pouches per minute for pouch weight of 18 grms of MRP 50/- per pouch as declared by the petitioner company on 23.11.2015. The petitioner company was called upon to appear personally on 27.11.2015 at 11:00 hours before the Assistant Commissioner of Central Excise to submit such reasons orally and/or in writing. The petitioner company in response to the show cause Notice issued by the department submitted its reply with all requisite documents on

26.11.2015. The department however by order dated 27.11.2015 concluded that for 18 grms Pan Masala pouches, the maximum speed of the machine will fall in category 751 pouches per minute and above for assessment of duty and not 750 pouches per minute as declared by the petitioner company on 23.11.2015. The petitioner company was thereafter called upon to pay duty of the said machine in terms of Rule 9 read with the provision of the Notification dated 6/2015-CE dated 01.03.2015.

Being aggrieved, the petitioner company filed an appeal against the order passed by the Assistant Commissioner before the Commissioner of Customs, Central Excise & Service Tax (Appeals). The appellate authority by order dated 30.08.2016 allowed the appeal filed by the petitioner and held that the maximum speed of the machine would be the production speed of the machine and the same could be re-determined under Rule 6(2). The appellate authority held that all declarations about the maximum speed of the machine were on record and nothing was mis-declared and the orders passed by the Assistant Commissioner of Central Excise from June, 2015 to October, 2015 have remained unchallenged and uncontested. It was held that the order dated 16.06.2015 was passed in accordance with the prescribed Rules after physical verification of the machine in presence of the departmental officers and departmental

deputed Chartered Engineer and thus the said order could not be questioned by the Assistant Commissioner of the central Excise as a quasi judicial authority. It was held that if the machine was not in a condition to pack more than 750 pouches per minute, the determination of duty for higher quantity is bad in the eyes of law. Against the said order passed by the Commissioner of Appeal, the department preferred an appeal before the CESTAT, Kolkata and the said appeal was numbered as E/76891/2016-EX[DB] and the said appeal is stated to be still pending disposal before the CESTAT, Kolkata.

19. Thereafter, on 30.08.2016, the respondent No. 3 by summons dated 16.09.2016 directed Shri C. Roy Choudhury, who is an official of the petitioner company, to appear before the respondent No. 3 on 26.09.2016 in order to give statements with respect to the machine. In terms of the summons issued, the said Shri C. Roy Choudhury appeared and gave his statements before the respondent No. 3. It is submitted that the respondent No. 3 directed the said Shri C. Roy Choudhury to appear before the Office of the respondent No. 3 on a daily basis and in pursuance to that the said person appeared before the respondent No. 3 for five (5) from 26.09.2016 to 30.06.2016. It is stated that during his appearance before the Assistant Commissioner of Central Excise, the said Shri C. Roy Choudhury was informed that serious consequences will follow

in the event the admissions as desired by the department are not carried out.

20. This led to the petitioner company filing in a writ petition before the High Court being W.P.(C) No. 6065/2016. A Co-ordinate Bench of this Court by order dated 22.06.2017 allowed the writ petition and quashed the enquiry instituted by the respondent No. 4 vide letter dated 11.11.2015.

21. Being aggrieved, the department preferred a writ appeal against the said Judgment and Order dated 22.06.2017 by W.A. No. 242/2017. The said writ appeal also came to be disposed of by order dated 11.05.2018. Although the appellate Court declined to interfere with the order dated 22.06.2017 passed by the Single Bench in W.P.(C) No. 6065/2016, the appellate Court disposed of the writ appeal by allowing the department to conclude the enquiry without recording the statement of one Mr. Chander Kant Sarma, a Director of the Company, and it was also ordered that the respondents namely the present petitioner will not challenge the findings (adverse, if any) of the enquiry report on the ground that the said Mr. Chander Kant Sarma was not given an opportunity in the enquiry and to that extent the order passed by the learned Co-ordinate Bench vide Judgment and order dated 22.06.2017 passed in W.P(C) No. 6065/2016 stood modified.

22. Thereafter, the Commissioner, GST and Central Excise namely the respondent No. 2 issued the demand cum show cause notice bearing C.No. IV (06) 58/Hqrs. AE-I/2015/110 dated 27.06.2020 to the petitioner company to show cause within 30 days as to why the Central Excise Duty amounting to Rs. 27,61,33,589/- should not be demanded and recovered under Section 11A(4) of the Central Excise Act, 1944 read with Rule 18 of the Rules, 2008 and as to why interest at the appropriate rate should not be charged and realized under Section 11AA of the Central Excise Act, 1944 read with the proviso to Rule 9 of the Rule of 2008. The petitioner company was further asked to show cause as to why penalty as provided under Rule 17 of the Rules of 2008 read with Section 11 AC of the Central Excise Act, 1944 should not be imposed and further as to why an amount of Rs. 2,00,00,000/-voluntarily deposited by the petitioner should not be appropriated against the differential duty payable.

23. Pursuant to the said show cause notice, the petitioner submitted its reply disputing the claims made by the department in the show cause notice. The petitioner company questioned the correctness of the show cause notice issued on the ground that it was barred by limitation and consequently the show cause could not have been issued and no demand/penalty or interest was imposable on the petitioner company.

The petitioner company in view of the reply submitted requested the respondent No. 2 to drop the proceedings initiated against the company.

24. The Principal Commissioner by order dated 24.03.2022 vide order- in-original No. 05/Pr.Commr./CE/GHY/2021-22 rejected the claims of the petitioner company and confirmed recovery of Central Excise Duty along with interest and penalty as well as for appropriation of the amount deposited by the petitioner during the investigation against differential duty payable.

25. Being aggrieved by the impugned order dated 24.03.2022 passed by the Principal Commissioner, the present writ petitions have been filed praying for interfering and setting aside with the impugned orders passed by the Central Excise authority department.

26. The learned Senior counsel for the petitioner submits that a bare perusal of the impugned order passed by the Commissioner reveals that the detailed reply filed by the petitioner was never considered. He submits that in the detailed reply filed by the petitioner company, it was clearly mentioned that the enquiry initiated against the petitioner company is not permissible in view of the issue having already being decided by the Assistant Commissioner of Central Excise against the petitioner company and the Commissioner of Appeals, Central Excise having reversed the findings of the Assistant Commissioner of Central Excise in favour of the

writ petitioner and the matter being presently pending disposal before the CESTAT, Kolkata in an appeal preferred by the department against the orders passed by the Commissioner of Appeals. It is submitted that there was no scope for the respondent, Central Excise Department, to re-open this issue and re-decide the question during the pendency of the appeal before the CESTAT, Kolkata. It is submitted that the impugned order is bad in law besides the said impugned order being issued without taking into consideration the particulars submitted by a detailed reply filed by the petitioner company and thereby the said impugned order also proceeds to re-open the questions in respect of the assessment period which have already been decided by the appropriate authority and has presently attained finality in view of the order passed by the Commissioner of Appeals, Central Excise, and which have not been interfered with as the further appeal preferred by the Department before the CESTAT, Kolkata is presently pending disposal. It is submitted that such decided issues which have attained finality cannot be reopened by way of another show-cause notice as has been sought to be done.

27. The learned Senior counsel for the petitioner submits that the Petitioner Company filed a detailed reply along with a synopsis submission during the course of hearing before the Principal Commissioner. However, the reply and synopsis although were taken on record but the same have

not been dealt with while giving finding as can be seen from "Discussion and Finding" section of the order in original dated 24.03.2022. The Principal Commissioner, Respondent No. 2 herein has not considered the reply submitted by the Petitioner and has not returned any finding on the submissions made on behalf of the Petitioner. In the reply to the show cause notice, the Petitioner company specifically submitted that the period in dispute was covered by the order dated 16.06.2015, which was passed in accordance with Rules after the physical verification of the machines with the help of a Government registered Chartered Engineer and which has attained finality as no appeal has been filed by the Department and thus the case cannot be reopened again by issuing the show cause notice. This submission was not negated by the Respondent No. 2 and he has simply omitted any discussion on this part of the reply.

28. The learned Senior counsel for the petitioner further submits that a show cause notice dated 25.11.2015 was issued for Increasing the speed of the machine above 750 when the Petitioner requested for reinstallation of machine without any change in material facts. The show cause notice was decided by the Commissioner CE (Appeals) in favour of the Petitioner wherein it was held that the earlier order dated 16.06.2015 has attained finality and cannot be reopened in the subsequent

proceedings. This point was also was not negated by the Respondent No.2 and he has simply omitted any discussion on it.

29. The learned Senior counsel for the petitioner submits that under the Rules, change of parameters of machine is not prohibited, rather specifically allowed at any time under Rule 6(6) of the Pan Masala Packing Rules, 2008. This said fact was also not negated by the Respondent No. 3.

30. The Petitioner Company relied upon various judicial pronouncements in its reply. However, the same were not taken into consideration and neither the same were discussed nor their applicability for the case at hand was negated. Since the Commissioner has not considered the above points raised by the Petitioner in the reply to the show cause notice and has not negated the submissions made by the Petitioner, the impugned order in original dated 24.03.2022 is absolutely illegal, without jurisdiction and violative of the principles of natural justice and thereby the Impugned order in original dated 24.03.2022 is liable to be set aside and/or quashed.

31. The learned Senior counsel for the petitioner submits that all speed determination orders of the period in dispute are appealable under Section 35 of the Central Excise Act, 1956. After the introduction of speed based capacity and levy, capacity of packing machine bearing Serial No.

131023840 was determined by the Assistant Commissioner vide an order dated 16.06.2015 on account of alteration of machine and change of parameters by following the due process of law. The said order dated 16.06.2015 has attained finality as the order was never challenged by the Department before the Appellate Authority under Section 35 of the Central Excise Act, 1944 and thus the same now cannot be altered by issuance of a show cause notice. Further, the machine in question has been de-installed and re-installed during the period of dispute with the admitted speed below 750 PPM under supervision of the Departmental Officers vide orders passed by AC/DC and the said orders have attained finality as no appeal was filed by any party. It is submitted that the Respondent No. 2 therefore acted most illegally and arbitrarily in passing impugned order in respect of the matter which have already attained finality and the order in Original dated 24.03.2002 is therefore liable to be set aside and quashed.

32. The learned Senior counsel for the Petitioner submits that the show Cause notice dated 27.06.2020 was nothing but a second and unwarranted attempt to reopen the issue which was already accepted. In the first attempt a show cause notice dated 27.11.2015 was issued before issuing appealable installation order based on the declaration of the Company and it was for changing the speed with prospective effect from

29.11.2015. In the present case, the show cause notice dated 27.06.2020 was issued after issuing appealable installation orders accepting the declaration of the Petitioner Company. Further, the show cause notice dated 27.06.2020 sought to change the speed not with prospective effect but rather for the period buried in past. This retrospective determination of speed, which was already covered by appealable orders for the relevant period which has also attained finality, is not permissible under the law.

33. It is argued on behalf of the Petitioner that second show cause notice dated 27.06.2020 and the order in original dated 24.03.2022 suffers from vice of res-judicata inasmuch as on the same Subject, the earlier show cause notice dated 25.11.2015 also issued on the final adjudication order passed on 25.11.2015 which was set aside by the Commissioner (Appeals). It is submitted that the Respondents cannot be allowed to reagitate the same issue which has been finally decided by the Commissioner (Appeals) by issuance of a second show cause notice.

34. The learned senior counsel for the Petitioner further submits that similar issue was also raised by the Commissioner of Central GST, Agartala and the Petitioner submitted reply to the same. The Petitioner referred to the Rule 6(2) of the Rules of 2010 as well as various judicial pronouncements on the said issue. The Petitioner also relied on the

decision of the Rajasthan High Court on the same issue which was also relied upon in the reply to the show cause notice dated 27.06.2020. In so far as it's unit in Agartala is concerned, it is submitted that the Commissioner of Central GST, Agartala vide order dated 15.01.2015 accepted the submissions of the petitioner and thereby charges framed against the petitioner company by the demand cum show cause notice were dropped. No appeal whatsoever was filed by the Department against the said order dated 15.01.2015 and the said order attained finality. The petitioner submits that the department having accepted the contentions of the petitioner in respect of the machine installed at Agartala on the same issue, it cannot be permitted against to raise the same issue in respect to machine installed at Guwahati. The Department having accepted the order passed by the Commissioner, GST by order dated 15.01.2018 is precluded from passing any contrary order on the same issue in respect of machine installed in the Guwahati and thereby the impugned show cause notice as well as the order in original is without jurisdiction and the same may be set aside and quashed.

35. In support of his contention that the impugned order dated 24.03.2022 issued by the Commissioner, if not interfered with, will amount to allowing the department to re-decide an issue already decided earlier by the department and the appeal preferred by the department

which is pending before the CESTAT, Kolkata, it is submitted that the principle of res-judicata is clearly applicable in the facts of the present case and the department could not have proceeded to issue show cause and passed impugned order on the issues which were already decided in favour of the present petitioner. In support of his contentions, he refers to the Judgment of the Apex Court rendered in Commissioner of Customs, Kandla Vs. ABM International Ltd, reported in 2015 (322) E.L.T. 818 (S.C). He has also referred to the following Judgments in support of his contentions above:

- (1) Jai Hind Oil Mills & Co. Vs. Union of India, reported in 1994 (71) E.L.T. 902 (Bom);
- (2) Metal Extruders India Pvt. Ltd. Vs. Union of India, reported in 1994 (69) E.L.T. 477;
- (3) Para Food Products Vs. Commissioner of Central Excise, Hyderabad, reported in 2005 (184) E.L.T. 50 (Tri-Bang);

36. He further submits that for invocation of proceedings under Section 11A of the Central Excise, there must be deliberate suppression of facts which is a condition precedent for invocation of the provisions under Section 11A and consequently avail the benefit of the limitation prescribed under the said section. It is submitted that all particulars regarding the maximum packing speed, the defects which were noticed in the machine imported from Japan and all correspondences exchanged between the petitioner and the manufacturer as well as the department were available

before the department and therefore the invocation of the powers under Section 11A of the Central Excise Act was not at all called for in the facts of the present case. It is reiterated that in the facts of the present case and the materials which are available, there was absolutely no suppression of facts that can be attributed to the petitioner. In support of his contentions, the learned Senior Counsel refers to the following Judgments of the Apex Court:

1. Pushpam Pharmaceuticals Co. Vs. C.C.E. Mumbai, reported in 1995 (78) E.L.T. 401 (SC);
2. Collector of Central Excise Vs. Chemphar Drugs & Liniments, reported in 1989 (40) E.L.T. 276 (SC);
3. M/s Anand Nishikawa Co. Ltd. Vs. CCE, Meerut, reported in 2005 (188) E.L.T. 149 (SC) and
4. Dinesh Fragrance Vs. Union of India, reported in (2016) SCCOnline Raj 3612.

37. It is submitted by the learned Senior counsel for the petitioner that the penalty in the instant case has been imposed most mechanically without passing any speaking order and without assigning any reasons. He submits that the imposition of penalty is not an automatic consequence of the failure to comply with the provisions of the Act, but can only be imposed only when there is *mens rea* on the part of the dealer in not complying with the provisions of the Act or the Rules or violation of the provisions of the Act. It is submitted that penalty

proceedings are quasi criminal proceedings and thereby penalty cannot be imposed mechanically without assigning any reasons or without passing any speaking order. The guilty intention or *mens rea* on the part of the dealer has to be established before imposition of penalty. The learned Senior counsel for the petitioner relies upon the judgments of the Apex Court in Hindustan Steel Ltd. vs. State of Orissa reported in (1970) 25 STC 211 and Sherres vs. De Rutzen, reported in (1895)1 QB 918 in support of his contentions.

38. It is submitted that in the present case, penalty has been imposed without arriving at a finding that there was *mens rea* or guilty intention on the part of the petitioner and thereby the question of imposition of any penalty does not arise and as such the impugned order 24.03.2022 in so far as the same relates levy of penalty is absolutely illegal, without jurisdiction and thereby liable to be set aside and/or quashed.

39. In view of all the submissions made, the learned Senior counsel submits that the impugned order dated 24.03.2022 issued by the Commissioner of Central Excise confirming recovery of Central Excise Duty along with interest and penalty as well as for appropriation of the amount deposited by the petitioner during the investigation against differential duty payable be contrary to the provisions of law and having been passed

without taking into consideration the reply submitted by the petitioner is required to be interfered with set aside and quashed.

40. Per contra, Mr. S.C Keyal, learned Standing Counsel, Customs strongly disputes the submissions made on behalf of the petitioners. The learned counsel for the respondents submits that department has contested the matter by filing the detailed affidavit in opposition. Referring to the affidavit filed by the learned counsel for the respondents, the appellate Court vide Judgment and Order dated 11.05.2018 passed W.A no. 242/2017 after careful consideration of all the materials permitted the department to proceed with the enquiry conducted. It is in pursuance to the leave granted by the writ appellate Court that the department has proceeded to conclude the enquiry initiated and thereafter passed the order which is impugned in the present proceedings. It is submitted that under the provision of the Central Excise Act, under Section 35(B), there is a specific provision for filing an appeal against the orders passed by the Central Excise authority. He submits that when there is a statutory alternative remedy already prescribed under the provisions of the statute, the assessee should be relegated to prefer the statutory appeals prescribed under the Act. On this count itself the writ petition should be dismissed and the parties may be left to approach the statutorily prescribed authorities for filing appeals against the orders

passed by the Commissionerate. It is submitted that there are no pleadings or submissions made by the petitioner as to why the petitioner have preferred the present writ petition without exhausting the statutorily prescribed forum for filing the departmental appeal.

41. It is submitted by the learned Standing Counsel that even on merits the petitioner does not have any case and the case projected on behalf of the petitioner is contrary to the facts and particulars which are available before the department. It is submitted that from 26.07.2014 to May, 2015, the petitioner had declared the speed of 1000 pouches per minute and was running the machine accordingly. It is only after the introduction of Notification No. 5/2015-CE (N.T) dated 01.03.2015 where the maximum packing speed of the machine was also introduced as an additional factor relevant for production and levy of the duty, that the petitioner company started having its problems. It is submitted that pursuant to the notification No. 5/2015 dated 01.03.2015 where maximum speed of the machine was also made a criteria for determining deemed production of a machine, that the assessee in order to avoid payment of increase duty in terms of the amendment brought in came up with "quality issue" and attempted to reduce the speed of the machine contrary to the information regarding the maximum speed of the machine having been already declared by the petitioner on the basis of the

purchased documents of the machine. It is submitted that while requesting for a technical trial run in the month of June, 2015, the assessee submitted that the manufacturer of the machine admitted major technical snag in the design of the machine which required replacement of major components of the machine as it did not synchronise itself with the internal quality checks and controls of the machine. It is submitted on behalf of the respondents that unnecessary credence and magnitude to the word "Govt. Registered" has been given by the petitioner to superfluously amplify the certificate issued by the Chartered engineer. It is submitted that the said Chartered Engineer was neither Central Government Registered nor a permanently approved Chartered Engineer for the Department. Further in his certificate, the said Chartered Engineer merely certified the capacity and not the maximum speed of the machine. It is submitted that there is a difference between the capacity of the machine at any given point in time depending upon the different reasons and the inherent "maximum speed" of a machine. It is submitted that under Rule 6(6) of the Rules of 2008, it is provided that whenever there is a fresh declaration from the assessee in respect of the operation of a packing machine, the competent authority as the case may be is to approve such fresh declaration and determine the annual capacity of production relating to such a machine based on relied upon evidences and records. Each such determination is therefore independent to the earlier

determinations made by the department. It is submitted that there is no dispute that the maximum speed of machine was 1000 pouches and the determination of duty on the reduced/modified/actual packing speed clearly renders the provisions of the Rules of 2008 amending by the notification dated 05/2015 redundant. The intention as reflected in the Rules is to levy the duty on the Pan Masala pouch packing machine on their inherent maximum pouch packing speed per minute (i.e. maximum pouch packing capacity of the machine). It is submitted that pursuant to the issue of the Notification 05/2015, the assessee only with a view to avoid the payment of the appropriate duty and which according to the department is in the higher slab, resorted to temporary alteration of the machine to reduce the packing speed. Such conduct of the assessee is ex-facie illegal, impermissible under law and is also an attempt to defeat the purpose and object of the legislative intent of the Notification 05/2015. Consequently, there being evasion of duty with regard to such rules, the department issued a show cause and passed the order which is impugned in the present writ petition. It is submitted that the maximum speed of the machine for which it is manufactured and at which it can be operated is relevant for determination of the deemed production of the machine and the consequential duty liability in terms of Rule 5 of the said Rules and Section 3(A) of the Act. It is submitted that the initial declaration of 1000 pouches per minute was declared by the petitioner itself. The company

continued to run the machine in terms of the said declaration from July, 2014 to May, 2015. This quality of packing was never disputed by the company during its 1 ½ years of the operation of the machine till May, 2015. Nothing unusual was noticed by the company/the assessee during this period. However with the introduction of the speed of the machine as a factor for determining the production capacity and the consequential duty, the assessee started raising question about improper sealing of the pouches etc. It is a strange co-incidence that the assessee started having problems with the machine after introduction of the speed slab as a factor for determining the capacity of production and determination of speed. It is submitted that the whole exercise regarding the quality issue raised by the petitioner company was created with the sole purpose to project the decrease of the speed of the machine by way of some modification so as to avoid paying duty in the higher slab. Such reasons were not considered genuine as acceptable by the department. Any such declaration filed by the assessee/company is to be considered afresh based upon the evidences and the records available before the department and such determination has may be made by the department is independent to the earlier orders. Under such circumstances, it is submitted that there is no infirmity in the order passed by the adjudicating authority. The modification stated to have been made by the assessee in the machine

are purely of temporary in nature and can be reversed at any point of time as per the design.

42. It is further submitted that since the issue in the appeal presently pending before the CESTAT has not yet reached its finality, the department has proceeded to adjudicate the show-cause notice already issued to the petitioner. It is submitted that the Judgment of the High Court of Rajasthan referred to and relied upon by the petitioner rendered in Dinesh Fragrance (Supra) is distinguishable on facts from the present case at hand and therefore the same will have no application to the facts of the present case. It is submitted that in view of the leave granted by the appellate Court in W.A. No. 242/2017, the enquiry as permitted was conducted by the department and the conclusions of the enquiry culminated into the issuance of the show cause notice and the department upon due consideration of all the facts and circumstances as available on the record passed the order dated 24.03.2022 which is presently impugned in the present writ petition. Since during the enquiry it was found that there was deliberate suppression of facts the department proceeded to issue show cause under Section 11A and therefore the same is not barred by limitation as raised by the writ petitioner. Under such circumstances, it is submitted that there is no infirmity in the order dated 24.03.2022 passed by the Commissioner

pursuant to the show cause notice and the writ petition being devoid of merit, the same should be dismissed accordingly.

43. The learned senior counsel for the petitioner in reply reiterated his submissions made in the writ petition and denied the contention of the department that there was manipulation or suppression by the petitioner at any stage with an attempt to bring down the speed of the machine. It is submitted that whatever was undertaken by the petitioner company was communicated with the department and the trial runs were conducted in full presence of the Chartered Engineer as well the departmental officer. It is submitted that there is no denial that the issue which was already decided earlier by the Commissioner is presently pending disposed before the CESTAT, Kolkata and therefore the same authority for the same period could not have re-opened this issue by issuance of a show-cause notice and come to a different view. Such decision of the respondent authority is cleared barred by the doctrine of res-judicata and if allowed to stand will have the effect of rendering the appeal pending before the CESTAT as infructuous.

44. Although the facts as narrated above relate to W.P.(C) No. 3864/2022 (Dharampal Satyapal Ltd), since four number of writ petitions are being taken up for hearing and disposal together, it is necessary to refer briefly to the relevant facts in each of the writ petitions. These three

Writ petition being W.P.(C) No. 5195/2022; W.P.(C) No. 5200/2022 and W.P.(C) No. 5399/2022 are preferred by the officials of the petitioner in W.P.(C) No. 3864/2022 on whom the department has passed adverse orders and imposed penalty and accordingly, these persons in their individual capacity have also assailed the said actions of the respondents in these writ petitions.

45. In so far as the W.P.(C) No. 5399/2022 is concerned, the petitioner has filed this writ petition challenging the show cause notice bearing C. No. IV (06) 58/Hqs. AE-I/2015/112 dated 27.06.2020 issued by the Principal Commissioner, GST and Central Excise Commissionerate, Guwahati directing the petitioner to show cause as to why penalty should not be imposed under Section 26 (1) of the Central Excise Rules, 2002 read with Rule 18 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and Order in original No. 05/Pr.Commr./CE/GHY/2021-22 dated 24.03.2022 passed by the Principal Commissioner, GST and Central Excise Commissionerate, Guwahati imposing a penalty of Rs. 27,61,33,589/- on the petitioner in terms of Rule 26(1) of Central Excise Rules, 2002 read with Rule 17 of the Pan Masala packing Machines (Capacity Determination and Collection of Duty) Rules, 2008.

46.1 The petitioner was issued a show cause notice dated 27.06.2020 alleging that the petitioner played a vital role in the attempt to exhibit downgrading of Machine No. 131023840 and also in the proforma respondent company's effort to mis-declare, willfully conceal and mis-represent the material facts with an intention to evade Central Excise Duty. It was therefore alleged that the petitioner had connived intentionally and voluntarily aiding the proforma respondent company to commit an offence which was punishable under Section 9AA of the Central Excise Act, 1944 and accordingly, the petitioner was held liable for penalty under Rule 26 of the Central Excise Rules, 2002, read with Rule 18 of the Rules of 2008. The petitioner was therefore called to show cause within 30 days of the receipt of the said notice as to why penalty under Rule 26(1) of the Central Excise Rules, 2002 read with Rule 18 of the Rules of 2008 should not be imposed upon the petitioner.

46.2 The petitioner submitted its reply to the said show cause notice controverting the allegations made in the said show cause notice to the effect that the packing speed of machine Model FP Matrix-R cannot be altered by mere changing of CPU without changing Servo Motor was not made by him voluntarily but the same was made under extreme pressure and duress exerted by the Investigating Officers. The petitioner further submitted in the said reply that the maximum speed of the machine is not

determined by the Servo Motor and other components but it is the COP of the machine that assimilates and synchronises the task of different components of the machine and limits the maximum speed of the machine as arrived at by the machine manufacturer by the know how which is done by the machine manufacturer inside the CPU through embedded and propriety machine language programmes and thus the maximum speed of the machine can only be altered by the propriety programme residing in the core of the micro-processors of the CPU. The petitioner in the said reply further confirmed that the packing speed of the machine could be changed only and only by changing the CPU.

46.3 The petitioner further in response to the allegation submitted that no other parts of the machine (including Servo Motor) was changed on the date of technical modification of the machine submitted that the except for the CPU/Controller of the machine, no other parts of the machine including the Servo Motor was changed by the proforma respondent company on the date of technical modification of the machine, and further submitted that on the date of technical modification of the machine, the CPU/Controller of the machine was changed thereby downgrading the packing speed of the machine.

46.4. In response to the allegation that the petitioner has admitted that the new CPU was installed only to exhibit the speed limit of

730-750 ppm before the Assistant Commissioner on the day of non-commercial trial run on 16.06.2015, it is submitted on behalf of the petitioner that the said statement was not made by him voluntarily but under extreme pressure and duress exerted upon him by the Investigating Officer. The Petitioner submitted that by changing the CPU, the packing speed of the machine was downgraded to below 750 ppm. The Petitioner further stated that the statement made by him to the effect that for any permanent change of the maximum speed limit of the machine, the CPU/Controller has to be changed was ignored/ suppressed by the Department in the show cause notice. The Petitioner further submitted that there was absolutely no willful mis-declaration or misrepresentation or suppression of material facts/ information in connection to the alleged short payment of Central Excise Duty by the proforma Respondent Company. The Petitioner accordingly prayed that the Proceedings initiated against him in the show cause notice be dropped and a personal hearing be afforded to him to explain the submissions in person.

46.5. The Principal Commissioner however without considering the submissions made by the petitioner passed an Order in Original bearing No. 05/Pr.Commr./CE/GHY/2021-22 dated 24.03.2022 wherein it was held the petitioner played a vital role in the attempt to exhibit

downgrading of machine No. 131023840 and also in the proforma respondent company's effort to mis-declare, willfully conceal and misrepresent the material fact with an intention to evade Central Excise Duty. It was further stated that the petitioner had connived intentionally and voluntarily aided the proforma respondent company to commit an offence which was punishable under Section 9AA of the Central Excise Act, 1944 and was held liable for penalty under Rule 26 of the Central Excise Rules, 2002 read with Rule 18 of the Rule of 2008. The Principal Commissioner therefore vide the order in original dated 24.03.2022 imposed a penalty of Rs. 27,61,33,589/- upon the petitioner in terms of Rule 26(1) of the Central Excise Rules, 2002 read with Rule 17 of the Rule of 2008.

46.6. The petitioner submits that from a plain reading of Section 9AA of the Central Excise Act 1944 it would be clear that it contains a deeming provisions and it states that If an offence Is committed by a company, every person who is in charge of, and is responsible to the company for the conduct of the business of the company, as well as the company itself, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, Sub-section (2) of section 9AA Is an exception to sub-section (1). It states that if an offence has been proved to have been committed with the consent or

connivance or is attributable even to negligence on the part of the Director, Manager or other officer of the company, such officer is also deemed to be guilty of that offence. It should be noted that negligence is a tort and amounts only to a civil wrong. However, sub-section (2) states that even negligence would make a director guilty of an offence. The explanation to the section gives an artificial definition to the term "company" so as to include firm and other association of individuals and the word 'Director' is to include even a partner in a firm.

46.7. It is submitted that under Section 9AA, under which persons in charge for conducting the affairs of the company are deemed to be guilty, is not a merely a procedural provision. It is a substantive piece of law and there can be no question of giving retrospective effect to it. Such an interpretation would also be hit by Article 20(1) of the Constitution as a person cannot be punished for an act which Was not an offence at the time of commission that act.

46.8. It is submitted that it is a well settled law that conjecture and surmises cannot be the basis of suspicion under Section 9AA of the Central Excise Act, 1944. Specific allegations of the acts or omissions and commissions must be made against a particular person. Penal proceeding cannot be allowed to be proceeded with on vague and camouflage hypothesis and prejudice must be presumed to have been caused to the

accused under such circumstances. Suspicion, however grave, cannot take place of proof. If any person is to be made liable under Section 9AA of the Central Excise Act, 1944, necessary averments relating to the consent/connivance/ negligence must be made and specific findings must be arrived at to that effect.

46.9. The Petitioner submits that liability of the person mentioned in Sub-Section (2) of Section 9AA of the Central Excise Act, 1944 is on account of specific part played by him relating to the consent/connivance/ negligence. It is necessary to make a person liable under Section 9AA(2) of the Central Excise Act, 1944 to every consent/connivance/ negligence in his part. For making a person liable under Section 9AA(2) of the Central Excise Act, 1944, the mechanical repetition of the requirement under Section 9AA(1) of the Act of 1944 will be of no assistance but there must be necessary averment to how and what manner the accused was guilty and therefore responsible under Sub-section (2) of Section 9AA of the Central Excise Act, 1944.

46.10. The Petitioner submits that in the present case, in the show cause notice dated 27.06.2020, it was alleged that the Petitioner played a vital role in the attempt to exhibit downgrading of Machine No. 131023840 and also in the proforma Respondent Company's effort to mis-declare, wilfully conceal and misrepresent the material facts with an

intention to evade Central excise Duty. It was further alleged that the Petitioner had connived intentionally and voluntarily aiding the proforma Respondent Company to commit an offence which was punishable under Section 9AA of the Central Excise Act, 1944, In the said show cause notice, the Petitioner was charged under Section 9AA of the Central Excise Act, 1944 for mis-declaration, willful mis-representing and willful concealment of material facts and thereby conniving and voluntarily aiding the proforma Respondent Company in the short payment of the Central Excise Duty. It is pertinent to mention herein that same show cause notice was also issued to the proforma Respondent Company calling upon the said proforma Respondent company to show cause as to why Central Excise Duty to the tune of Rs. 27,61,33,589/- along with interest and penalty should not be recovered from them. The said proforma Respondent Company also replied to the show clause notice and after the reply to the said show cause notice, by the same order in original dated 24.03.2022, penalty of Rs. 27,61,33,589/- has also been imposed on the proforma Respondent Company. Against the order in Original dated 24.03.2022, the proforma respondent company filed a writ petition before this Hon'ble Court which was registered and numbered as W.P.(C) No.3864/2022.

46.11. The Petitioner further submits that the petitioner has not suppressed any material facts or information. The Respondents in fact totally failed to prove the charges levelled against the Petitioner and thereby the show cause notice 27.06.2020 as well as final order in original dated 24.03.2022, so far as the imposition of penalty of Rs, 27,61,33,589/- against the petitioner is concerned, is absolutely Illegal, without jurisdiction and the same are liable to be set aside and quashed.

46.12. The petitioner submits that as per sub-section (2) of section 9 AA of the Act, a person can be deemed to be guilty of an offence only when the offence committed by the company was with the consent or connivance of or is attributable to any neglect on part of the person concerned. In the present case, the petitioner was performing his lawful duty assigned to him by the company and in any way was not connected with the payment of duty by the company and thereby the question of any consent or connivance or neglect by the petitioner with the company for committing any offence under the Central Excise Act, 1944 or the Central Excise Rules, 2002 or the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 does not arise. The petitioner further submits that the respondent No. 2 in the impugned order in original has not stated as to in which or in what manner the petitioner had given his consent or connived with the company for

commission of any offence and the respondent No. 2 by simply reproducing the language of the provisions of the Act and the Rules of 2002 and 2008 cannot make a person liable for an offence under the Act. since the question of any consent or connivance or neglect by the petitioner with the company for committing any offence does not arise, the petitioner cannot be saddled with the huge penalty equivalent to the amount of duty alleged to be recoverable from the proforma respondent company and in that view of the matter the impugned order In original dated 24.03.2022 is absolutely illegal, arbitrary and Is liable to be set aside and/ or quashed, The petitioner submits that neither he was dealing with excisable goods In any way nor had any role in filing speed declarations of the subject machine for which imposition of penalty under Rule 26 of Central Excise Rules, 2002 is bad in law.

46.13. The petitioner submits that the allegation of clandestine manufacture and its clearance is not at all supported by the facts and in the absence of which imposition of penalty under Rule 17 of Pan Masala packing machine (Capacity determination and calculation of duty) Rules, 2008 is illegal.

46.14. The petitioner submits that the respondent No. 2 failed to consider that the petitioner is working as an employee in the proforma respondent company and imposition of penalty amounting to Rs.

27,61,33,589/- on the petitioner for no fault on his part is not only illegal and arbitrary but the amount of penalty imposed is so exorbitant that the petitioner, who is just a salaried employee of the proforma respondent company who was not directly dealing with excisable goods, cannot even think of paying such a huge amount on account of penalty for no fault of his own and thereby the impugned show cause notice dated 27.06.2020 and the impugned order in original dated 24.03.2022 are liable to be set aside and/ or quashed.

46.15. There being no *mens rea* on part of the petitioner and the petitioner having lawfully performed his duties assigned to him by the company, the imposition of penalty on the petitioner is absolutely illegal, arbitrary and is liable to be interfered with.

47. In so far as the W.P.(C) No. 5200/2022 is concerned, the petitioner therein has filed this petition challenging the Demand cum show cause notice bearing C. No.IV (06) 58/ Hars.AE-I/2015/111 dated 27.06.2020 issued by the Principal Commissioner, GST and Central Excise Commissionerate, Guwahati directing the petitioner to show cause as to why penalty should not be imposed under section 26 (1) of the Central Excise Rules, 2002 read with Rule 18 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 as well the Order in original No. 05/Pr.Commr./ CE/GHY/2021-22 dated 24.03.2022

passed by the Principal Commissioner, GST and Central Excise Commissionerate, Guwahati imposing a penalty of Rs. 27,61,33,589/- on the petitioner in terms of Rule 26 (1) of Central Excise Rules, 2002 read with Rule 17 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008.

In the present case penalty has been imposed by dated 24.03.2022 passed by the Principal Commissioner, GST and Central Excise, the Respondent No. 2 imposing a penalty of Rs. 27,61,33,589/- in the purported exercise of powers under section 26(1) of the Central Excise Rules, 2002 read with Rule 17 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 for allegedly committing an Offence under Section 9AA of the Central Excise Act, 1944, the Petitioner preferred this present petition seeking appropriate relief. The facts of the case are similar to that of the W.P(C) No. 5399/2022 and thereby the submission made In W.P(C) No. 5200/2022 may be taken to be the submission in respect of W.P(C) No. 5399/2022.

The Petitioner submits that the Petitioner was not dealing with excisable goods, neither he had any role in procurement of the subject machine nor he was a technical person who could have any technical knowledge about the machine and quality of its produce. For which

imposition of penalty under Rule 26 of Central Excise Rules, 2002 is bad in law.

The Petitioner further submits that that the respondent No. 2 failed to consider that the petitioner had been working with the proforma respondent company as superannuated employees from April,2008 and thereby imposition of penalty amounting to Rs. 27,61,33,589/- on the petitioner for no fault on his part is not only illegal and arbitrary but the amount of penalty imposed is so exorbitant that the petitioner, who is just a superannuated employee of the proforma respondent company and not directly dealing with excisable goods, cannot even think of paying such a huge amount on account of penalty for no fault of his own and thereby the impugned show cause notice dated 27.06.2020 and the impugned order in original dated 24.03.2022 are liable to be set aside and/ or quashed.

48. In so far as W.P.(C) No. 5195/2022 is concerned, the petitioner has filed this writ petition challenging the Demand cum show Cause notice bearing C. No. IV (06) 58/ Hars.AE-I/2015/113 dated 27.06.2020 issued by the Principal Commissioner, GST and central Excise Commissionerate, Guwahati directing the petitioner to show cause as to why penalty should not be imposed under section 26 (1) of the Central Excise Rules, 2002 read with Rule 18 of the Pan Masala Packing Machines (Capacity

determination and Collection of Duty) Rules, 2008 as well the order in original No. 05/Pr.Commr./CE/GHY/2021-22 dated 24.03.2022 passed by the Principal Commissioner, GST and Central Excise Commissionerate, Guwahati imposing a penalty of Rs, 27,61,33,589/- on the petitioner in terms of Rule 26 (1) of Central Excise Rules, 2002 read with Rule 17 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008.

In the present case penalty has been imposed by dated 24.03.2022 passed by the Principal Commissioner, GST and Central Excise, the Respondent No. 2 imposing a penalty of Rs. 27,61,33,589/- in the purported exercise of powers under Section 26(1) of the Central Excise Rules, 2002 read with Rule 17 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 for allegedly committing an offence under Section 9AA of the Central Excise Act, 1944, the Petitioner preferred this present petition seeking appropriate relief. The facts of the case are similar to that of the W.P(C) No. 5399/2022 and thereby the Submission made in W.P(C) No. 5195/2022 may be taken to be the submission in respect of W.P(C) No. 5399/2022.

The Petitioner submits that the Petitioner was not dealing with excisable goods, neither he had any role In procurement of the subject machine. Moreover, the petitioner had not signed any statutory

declaration form regarding packing speed of the subject machine. For which imposition of penalty under Rule 26 of Central Excise Rules, 2002 is bad in law. The Petitioner further submits that the respondent No. 2 failed to consider that the petitioner is working as the salaried employee in the proforma respondent company and imposition of penalty amounting to Rs. 27,61,33,589/- on the petitioner for no fault on his part is not only illegal and arbitrary but the amount of penalty imposed is so exorbitant that the petitioner, who is just an employee of the proforma respondent company who is not connected to excisable goods in any way, cannot even think of paying such a huge amount on account of penalty for no fault of his own and thereby the impugned show cause notice dated 27.06.2020 and the impugned order in original dated 24.03.2022 are liable to be set aside and/ or quashed.

49. The learned counsel for the parties have been heard. Pleading available on record have been carefully perused.

50. In order to decide the lis between the parties, it is necessary to refer to the relevant rules.

51. In exercise of powers conferred by sub-sections (2) and (3) of Section 3A of the Central Excise Act 1944, the Central Government framed the "Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008". These rules came into effect from 1st of July 2008.

52. "Packing Machine" is defined under Rule 2 (c):- includes all types of Form, Fill and Seal (FFS) Machines and Profile Pouch Making Machines, by whatever name called, whether vertical or horizontal, with or without collar, single track or multi-track, and any other type of packing machine used for packing of pouches of notified goods.

53. Similarly, Pan Masala (without tobacco)" is also defined under Rule 2 (d) as under:-

Pan Masala means excisable goods falling under tariff item 21069020 of the First Schedule to the Tariff Act.

54. Rule 4 of the Rules provide that the factor relevant to the production of notified goods shall be the number of packing machines in the factory of the manufacturer.

55. Rule 5 elaborately provides the quantity deemed to be produced. Under Rule 5, number of pouches deemed to be manufactured per operating packing machine per month, along with the retail price per pouch is described in a table in a tabular form.

56. Under Rule 6(1), the manufacture of notified goods shall immediately on coming into force of these rules, and, in any case, not later than ten days, declare, in Form 1 as under:

(i) the number of single track packing machines available in his factory;

(ii) the number of packing machine out of (i), which are installed in his factory;

(iii) the number of packing machines out of (ii), which he intends to operate in his factory for production of notified goods;

(iv) the number of multiple track or multiple line packing machine, which besides packing the notified goods in pouches, perform additional processes involving moulding and giving a definite shape to such pouches with a view to distinguish the brand or to prevent the counterfeiting of the goods, etc;

(v) the number of multiple track or multiple line packing machines out of (iv), which are installed in his factory;

(vi) the number of multiple track or multiple line packing machines out of (v), which he intends to operate in his factory for production of notified goods;

(vii) the name of the manufacturer of each of the packing machine, its identification number, date of its purchase and the maximum packing speed at which they can be operated for packing of notified goods of various retail sale prices;

(viii) description of goods to be manufactured including whether pan masala or gutkha or both are to be manufactured, their brand names, etc

(ix) retail sale prices of the pouches to be manufactured during the financial year;

(x) the plan and details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or section, to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be with a copy to the Superintendent of Central Excise:

Provided that a new manufacturer shall file such declaration at least fifteen days prior to the commencement of commercial production of notified goods in his factory.

57. Rule 6(3) provides that the annual capacity of production shall be calculated by application of the appropriate quantity that is deemed to be produced by using one operating packing machine as specified in Rule 5 to the number of operating packing machines in the factory during the month beginning which the capacity is being determined.

58. Rule 6(6) provides that in case a manufacturer wishes to make any subsequent changes with respect to any of the parameters which has

been declared by him and approved by the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, in terms of sub-rule (2), such as changes relating to addition or removal of packing machines in the factory or making alterations in any part or section of the approved premises or in the number of machines to be used in such part or section or commencing manufacture of goods of a new retail sale price or discontinuation of manufacturing of goods or existing retail sale price, etc., he shall file a fresh declaration to this effect at least fifteen days in advance to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, who shall approve such fresh declaration and re-determine the annual capacity of production following the procedure specified in sub-rule (2).

59. Rule 6 (7), the duty payable is to be calculated by application of the appropriate rate of duty specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 42/2008-CE dated the 1st of July, 2008 to the number of operating packing machines in the factory during the month.

60. On an application dated 23.11.2015, along with a declaration in Form-1 in terms of Rule 6 of the Rules of 2008 filed by the petitioner requesting for deputing Central Excise officer for de-sealing of the

machine on 29.11.2015 at 00:05 hours, the Assistant Commissioner of Central Excise vide order number 53 dated 27.11.2015 upon scrutinizing the materials before it came to a finding that the maximum packing speed of the machine at which it can be operated for packing of specified goods of 18 to 22 grams is 1048 pouches per minute (May 2015). It was held that as per the information provided in table-1 as extracted in the side order, the assessee/ the petitioner was correctly declaring the machine speed as '751 pouches and above' for the last almost one year till May 2015. The Assistant Commissioner therefore concluded that he did not find any reason for physical verification of the machine to determine the maximum packing speed at which it can be operated in the instant case and on the grounds and reasons mentioned in the order, the Assistant Commissioner concluded that the declaration submitted by the assessee on the 23.11.2015 in terms of Rule 6 of the Rules of 2008 and holding that the maximum packing speed of the machine is 751 pouches per minute and above. It was held that the assessee shall pay the duty on the findings arrived at in terms of Rule 9 of the Rule 2008 read with the provisions of notification number 6/2015-CE dated 01.03.2015.

61. The aforesaid order was appealed against by the petitioner/assessee before the first appellate authority, namely the Commissioner (Appeals) Customs, Central Excise and Service Tax (NER).

The first appellate authority by detailed order dated 30.08.2016 declined to agree with the findings of the Assistant Commissioner. The first appellate authority held that the order passed by the Assistant Commissioner was on earlier declarations submitted by the appellants/assessee in May 2015 without going for enquiry or physical verification and totally ignoring the Order No. 02/Capacity/ACG-II/2015-16 dated 16.06.2015 determining the Maximum Packing Speed of the machine as "301-750 pouches per minute" as well as all the subsequent orders passed by the Assistant Commissioner and against which no appeal was preferred by the department. The first appellate authority held that the adjudicating authority re-determined the duty of the speed on the higher side as the maximum packing speed on which the machine can be operated was less than 750 pouches per minute for the months of May, 2014, June, 2014, July 2014 and June 2015. The first appellate authority held that Rule 6 (2) of the Rules of 2008 gives ample opportunities to the adjudicating authority to make necessary enquiries, including physical verification before approval of the declaration, which was not done by the Assistant Commissioner before the order dated 27.11.2015 was passed. It was also held that the finding of the Assistant Commissioner that the appellant came up with the quality issue only pursuant to the amendment of the Rules of 2008 vide notification No. 5/2015-CE (NT) dated 01.03.2015, whereby maximum speed of the machine at which it can be

operated was also made a criteria for determining the deemed production by a machine and the consequent duty liability in terms of the said notification. Such finding of the Assistant Commissioner was held to have been based purely on assumption/presumption. The appellate authority also held that this finding is not tenable as even pursuant to the amendment of the Rule in the month of March 2015, the appellant had declared the maximum packing speed of the machine as "above 751" pouches per minute on the 13.05.2015. The first appellate authority also held that there are no records/evidences of clandestine removal of finished products by the appellant during the period from June 2015 to October 2015 to show any malafide intention on their part. It was held that the reasoning given by the department was not supported by facts and accordingly, the order of the adjudicating authority dated 27.11.2015 was held not legally sustainable and liable to be rejected. The impugned order dated 27.11.2015 was accordingly set aside and the adjudicating authority was directed to re-determine the production capacity by observing the formalities laid down in sub-rule 2 of Rule 6 of the Rules of 2008 and pass necessary orders as required under law.

62. Aggrieved by the said order passed by the first appellate authority, the department preferred an appeal before the CESTAT. The appeal is numbered as E/7689/2016-EX (DB). The said appeal is presently

pending disposal and which fact is not disputed by the parties before this Court.

63. Notwithstanding the order passed by the first appellate authority vide order dated 30.08.2016 and the consequential appeal filed before the CESTAT by the Revenue Department, the department proceeded to issue summons to the officers and directors of the petitioner company directing them to appear before the authority concerned. Being aggrieved, the petitioner challenged the said action by filing W.P(C) No. 6065/2016. This writ petition came to be disposed of by Judgment and Order dated 22.06.2017. The Co-ordinate Bench referred to the specific findings arrived by the first appellate authority, namely the Commissioner (Appeals) Customs, Central Excise and Service Tax (NER). The Co-ordinate bench was of the considered opinion that the findings arrived at by the first appellate authority/ Commissioner of Appeals have a direct bearing on the legality and tenability of the enquiry initiated by the department solely for the reason of lowering the packing speed of the machine as the change of the maximum packing speed of the machine was the central issue before the appellate authority. The Co-ordinate Bench held that when the first appellate authority held that change of parameter or maximum speed of the machine was permissible without any explanation, the very edifice of the enquiry has no foundation. And

consequently rejected the contentions of the respondents that the issue of packing quality was not raised in the earlier proceedings. The petition was accordingly allowed and the enquiry initiated against the petitioner company vide letter dated 18.11.2015 in the facts of the case was held to be ought not to be permitted to be continued in connection with packing machine ID No. 131023840 and consequently the enquiry was quashed. The amount of Rs. 2 Crores deposited by the petitioner was also directed to be adjusted against the excise duty payable in future.

64. Against the order dated 22.06.2017, an intra Court appeal was preferred. During the course of the hearing in the intra-Court appeal on a statement made by the counsel representing the appellants (the present respondents herein) that the head of the technical department of the petitioner company had admitted that certain misinformation were supplied to the technical department regarding procurement of the CPU and the consequential decision to change the CPU which was undertaken by a team under consultation of the business head of the company, one Mr. Chander Kant Sarma. This statement was purportedly stated to have been made by one Mr. Chiranjib Roy Choudhury who was the Senior Vice President and the head of the technical department. The appellate Court in order to verify the submissions of the respondent counsel directed for production of statements of the said Sri Chiranjib Roy Choudhury, Senior

Vice President. In pursuance to the order passed by the appellate Court, the statement stated to have been made by the said official of the company was placed on record by way of an affidavit. The appellate Court held that upon perusal of the statement recorded by the investigating officer of the department, it is seen that no such statement or misinformation as claimed to have been furnished by the Senior Vice President of the company is seen from the statement recorded and/or the affidavit filed. On a query made by the appellate Court regarding the veracity of the information placed before the court through the standing counsel, the concerned Assistant Commissioner was before the Court at the time of the hearing, submitted that this information was fed to him by the investigating officer, which was then forwarded to the standing counsel. Upon perusal of the information given to the learned standing counsel, the appellate Court concluded that the name of the said Assistant Commissioner one Mr. R.K. Sarkar is seen very much reflected in the instructions furnished to the learned Standing counsel for the Department and thereby concluded that such act of misinformation to the Court amounts to fraud being played upon this Court. In other words, the appellate Court did not accept the contention of the respondents that there was any admission on the part of the higher officials of the petitioner company regarding any misinformation being passed on to the departmental officer relating to the capacity of the concerned machine.

65 The appellate Court therefore concluded that the enquiry conducted by the Central Excise department was correctly interfered with by the learned Single Judge as the statement of the said official so recorded does not mention any misinformation as was submitted by the counsel for the respondent. Before the appellant submission was made by the departmental counsel that the department be allowed to conclude the enquiry under Section 11A of the Central Excise and Salt Act, 1944 without recording the statement of the one Mr. Chander Kant Sarma, who is the Director of the company and a key managerial person, by modifying the Judgment and order of the learned Single Judge. It appears that in view of the submissions made by the departmental counsel, the writ appellate Court disposed of the appeal, permitting the department to conclude the enquiry without recording the statement of Mr. Chander Kant Sarma and as agreed by the respondent before the appellate Court namely the present petitioner that they will also not challenge the findings (adverse, if any) of the enquiry report on the ground that Mr. Chander Kant Sarma was not given an opportunity in the enquiry. The order dated 22.06.2017 passed by the Co-ordinate Bench stood modified to the above extent.

66. Pursuant to the Judgment of the appellate Court, a show cause notice dated 27.06.2020 was issued by the department asking the

petitioner as to why an amount of Rs. 27,61,33,589/- (Rupees Twenty Seven Crore Sixty One Lakh Thirty Three Thousand Five Hundred and Eighty Nine only) should not be demanded and recovered from the petitioner under Section 11A (4) of the Central Excise Act, 1944 read with Rule 18 of the Rules of 2008. The petitioner was further asked to show course as to why interest at the appropriate rate under Section 11AA of the Act of 1944 read with proviso to Rule 9 of the Rules of 2008, and penalty under Rule 17 of the Rules of 2008 read with Section 11AC of the Act of 1944 should not be imposed together with the amount of Rs. 2,00,00,000/- voluntarily deposited by the petitioner should not be appropriated against a differential duty payable.

67. The petitioner responded by filing its reply dated 30.10.2020. The Principal Commissioner, by order dated 24.03.2022 passed an order directing recovery of Rs. 27,61,33,589/- from the petitioner in terms of Section 11A(10) of the Central Excise Act 1944 read with Rule 18 of the Rules of 2008, along with interest at appropriate rate as well as penalty of Rs. 27,61,33,589/- in terms of Section 11AC of the Central Excise Act 1944, read with Rule 70 of the Rules of 2008 and further order appropriation of the amount of Rs. 2,00,00,000/- deposited by the petitioner during investigation, against differential duty payable. This Court while issuing notice by order dated 03.08.2022 directed the

respondent department as an ad-interim measure that no coercive action shall be initiated against the writ petitioner and it was extended from time to time on various dates.

68. The primary grounds urged by the petitioner assailing the impugned order dated 24.03.2022 are that (i) the adjudicating authority did not consider the reply submitted by the petitioner while passing the impugned order as no reference to the materials placed by the petitioner by way of the reply has been referred to in the impugned order; (ii) the assessment period is covered by earlier orders passed by the co-ordinate authorities and which have attained finality and therefore the same could not have been opened by issuance of a show cause notice.

69. The respondents case projected before the Court is that the show cause as well as the impugned order passed by the Principal Commissioner is pursuant to the Judgment and order dated 11.05.2018 passed by the writ appellate Court, whereby the Judgment and order passed by the Single judge was modified and the respondents were permitted to proceed with the enquiry initiated under Section 11A. The impugned order clearly reflects in the opening paragraphs that an appeal may be preferred to the Customs, Excise and Service Tax Appellate Tribunal in Form-EA-3 within three months from the date of receipt of the order. It is submitted by the respondents that where there is a statutory

appeal prescribed, the petitioners ought to have been relegated or file the statutory appeal as prescribed thereunder. Consequently, these writ petitions should be dismissed on the ground of not availing the alternative remedy prescribed under the statute. The further submission of the respondents are that the order impugned is passed upon appropriate consideration of the reply filed by the petitioner and other relevant materials.

70. While there is no quarrel with the proposition that a writ Court will not invoke its extra-ordinary jurisdiction where there are statutory prescribed remedies available. But alternative remedy is not an absolute bar. There are exceptions to this Rule which permits a writ Court to invoke it's jurisdiction where the case falls under any of the exceptions.

71. To decide this issue it is necessary to refer first to the order passed by the first appellate authority/ Commissioner of Appeals. The appellate authority order was passed on an appeal preferred by the petitioner against the order dated 27.11.2015 passed by the adjudicating authority, namely the Assistant Commissioner Central Excise Division-II, Guwahati rejecting their application dated 23.11.2015 for de-sealing the machine on 29.11.2015 at 00:05 hours. By the order dated 27.11.2015, the adjudicating authority held that the maximum packing speed of the concerned machine was '751' pouches per minute and above.

72. A perusal of the order passed by the first Appellate authority reveals that while deciding the issue, the first appellate authority took into account the materials available in respect of the declarations, including the installation and operation history of the machine as available in the office. After a detailed examination of the materials, the first appellate authority concluded that the order dated 27.11.2015 passed by the adjudicating authority, namely the Assistant Commissioner for re-determining the duty of higher quantity was passed without judicious application of mind. It was held by the first appellate authority that the adjudicating authority passed the order simply based on earlier declarations submitted by the company in May 2015 without going for proper enquiry or physical verification and totally ignoring the order dated 16.06.2015, whereby the maximum packing speed of the subject machine was determined as '301-750 pouches per minute' as was also decided in the subsequent orders dated 27.07.2015; 25.08.2015; 15.09.2015 and 16.10.2015 passed by the Assistant Commissioner. These orders were never challenged and no appeal was filed against them. The first appellate authority held that the adjudicating authority could not have re-determined the duty/ the speed on the higher side. It was also held that from the records it was seen that the maximum packing speed on which a machine can be operated was less than 750 in the months of May 2014, June 2014, July 2014 and June 2015. The first appellate authority also

concluded that under the provisions of Rule 6(2) of the Rules of 2008 ample opportunities are provided to the adjudicating authority to make enquiry, including physical verifications before approval of the declaration and which was not done by the adjudicating authority before passing the order dated 27.11.2015. The first appellate authority therefore concluded that these justifications are based on presumption and assumption and which have no legal basis. The first appellate authority also concluded that there is no record or evidence of clandestine removal of finished products by the assessee during the period from June 2015 to October 2015 to show any malafide intention on their part. It was also held that the reasoning given by the adjudicatory authority while arriving at its conclusions by the order dated 27.11.2015 is not supported by facts. The appeal was accordingly allowed, directing the adjudicating authority to re-determine the production capacity after observing the formalities laid down in sub-rule 2 of Rule 6 of the Rules of 2008 and pass necessary orders.

73. As discussed, the order dated 27.11.2015 passed by the adjudicating authority was therefore held to be legally not sustainable and consequently rejected. And the order passed by the first appellate authority dated 30.08.2016 was appealed against by the respondents and

the appeal being Appeal No. E/7689/2016-EX (DB) is presently pending before CESTAT, Kolkata.

74. A careful perusal of the order of the first appellate authority reveals that the core issue before the appellate authority was the capacity of production of the concerned machine. The appellate authority, on the basis of the materials available for the authority, concluded that the capacity of the machine was '301-750' pouches per minute and which was a finding recorded by the adjudicating authority for the earlier periods. The subsequent order passed by the adjudicating authority vide order dated 27.11.2015, whereby the capacity of the machine was found to be above '751 pouches' minute was held to be not based on correct information/evidence. The appellate authority also held that no enquiry as permissible under Rule 6 of the Rules of 2008 was undertaken by the adjudicating authority before passing the order dated 27.11.2015, raising the speed of the machine from '301-750 pouches per minute' to above '751 pouches per minute' and the consequential imposition/collection of duty from the petitioner. These findings by the Departmental appellate Authority are findings of fact and these findings have been assailed by the department before the second appellate authority, namely the CESTAT, Kolkata and which appeal(s) are presently pending. The Co-ordinate Bench by Judgment and Order dated the 22.06.2017 passed in WP(C)

No. 6065/2016 also returned similar findings and accordingly quashed the enquiry proceeded against the petitioner company.

75. This order, however, came to be modified by the order dated 11.05.2018 passed by the passed by this Court in W.A. No. 242/2017. While the appellate Court by judgment and order dated 11.05.2018, modified the findings of the learned Single Judge and permitted the respondent to proceed with the enquiry initiated under Section 11A of the Central Excise Act 1944, the conclusions arrived at by the Coordinate Bench were never interfered with. The Judgment and order dated 11.05.2018 by the Writ Appellate Court merely permitted the respondent department to proceed with the enquiry considering such submissions made by the counsel and without recording the statements of the officials/ Directors of the petitioner company.

76. The questions which are raised in the present petition are essentially questions of facts based on the records and the evidences available before the Departmental authorities. There is no dispute that for several periods earlier the petitioner filed in the proper form the speed of the packing machines and which was duly approved by the adjudicating authority. The first appellate authority by its order dated 30.08.2016 interfered with the order passed on 27.11.2015 by the adjudicating authority holding the same to be not based on the evidences/the records

available. There is clear finding that there was no element of suppression or misrepresentation as could be inferred from the records available. Under the scheme of the Central Excise Act 1944. The Commissioner (Appeals) is the first appellate authority prescribed under the statute and is therefore a higher authority than the adjudicating authority, namely the Assistant Commissioner. The functions performed by the adjudicating authority as well as the appellate authorities are quasi-judicial functions. Accordingly, the first appellate authority is a quasi-judicial authority higher up in the hierarchy prescribed under the statute over the adjudicating authority. The findings of fact arrived at by the first appellate authority as seen from the order dated 30.08.2016 has not yet been interfered with by a still higher authority, namely the second appellate authority as prescribed in the statute, namely the CESTAT, Kolkata before which the appeal being appeal No. E/7689/2016-EX (DB) preferred by the respondent authority is presently stated to be pending. Therefore, the findings arrived by the first appellate authority are binding on the adjudicating authority and the adjudicating authority is duty bound in law to maintain the judicial discipline and accept the findings of the first appellate authority unless the same are interfered with by a still higher authority and/or an appropriate judicial forum. Such is not the position as on date and which is not in dispute.

77. In Abdul Kuddus Vs. Union of India, reported in (2019) 6 SCC 604, the Apex Court while examining the orders passed by collateral quasi-judicial bodies held that where a judicial or a quasi judicial tribunal gives a finding on law or fact, its findings cannot be impeached collaterally or in a second round and are binding until reversed in appeal by way of writ proceedings. The characteristic attitude of the judicial act or a decision is that it binds, whether right or wrong. Thus, any error either of fact or law committed by such bodies cannot be controverted otherwise than by way of an appeal or a writ unless the erroneous determination relates to the jurisdictional matter of that body. The Act and power of judicial review vested with the constitutional courts provide sufficient safeguards, in the present context.

78. The contentions of the respondents that in view of the order dated 11.05.2018 passed in W.A. No. 242/2017, whereby the order passed by the learned Single Judge was modified, permitting the department to complete the enquiry initiated under Section 11A of the Central Excise Act, 1944 cannot be interpreted to mean that a statutory quasi judicial authority above the adjudicating authority, namely the first appellate authority/ Commissioner's (Appeals) findings on law or on facts can be upturned by initiating an enquiry under Section 11A, more particularly when the department itself is an appeal against the order dated 30.08.2016 passed

by the Commissioner (Appeals) before the CESTAT, Kolkata. Such contentions of the respondents cannot be accepted in view of the established position in law. The modification of the Co-ordinate Bench's order by the writ appellate Court vide order dated 11.05.2018 passed in W.A. No. 242/2017 cannot also be interpreted to mean that the appellate authority has permitted the adjudicating authority to arrive at a conclusion dehors the facts and the findings of the first appellate authority. It is also necessary to note here that while the writ appellate Court modified the order of the Coordinate Bench by permitting the respondents to proceed with the enquiry, the appellate Court did not interfere or set aside the conclusions arrived at by the Co-ordinate Bench. Under such circumstances, it cannot be interpreted to mean that modification of the order passed by the Coordinate Bench vide order dated 22.06.2017 by the order dated 11.05.2018 passed in intra Court appeal will have the effect of permitting the respondents to ignore the factual aspects and the conclusions which have already been arrived at by the quasi judicial Departmental authority, namely the Commissioner (Appeals) in its order dated 30.08.2016.

79. This view of this Court finds support from the law laid down by the Apex Court in *Union of India & Ors Vs. Kamalakshi Finance Corporation Ltd, reported in 1992 Supp (1) SCC 443*, wherein the Apex Court held that in disposing of quasi judicial issues, the Revenue officers are bound by the

decisions of the appellate authorities. The principles of judicial discipline require that the orders of higher appellate authorities should be followed unreservedly by the subordinate authorities. Any action permitted to be carried on by the departmental authorities contrary to such judicial discipline, will amount to break in judicial discipline contrary to the law laid down by the Courts of India, including the Apex Court as well as the statute itself.

80. The impugned order upon being carefully perused does not reflect that the materials placed by the petitioner by way of its reply was taken into consideration as there is no reference found to have been made in the impugned order. While the respondents dispute such contention raised by the petitioner by filing their counter affidavit, the respondents did not produce any material before the Court to sustain their contentions that the detailed reply filed by the petitioner was indeed considered by the respondent authority while passing the impugned order. Under such circumstances, the respondents are duty bound to explain as to why the reply, along with all material particulars filed by the petitioner, was not taken into consideration by the Principal Commissioner while passing the impugned order.

81. Mere submissions by the counsel appearing for the respondents without supporting facts and materials before the Court cannot be accepted

to arrive at a conclusion that the reply filed by the petitioner was suitably considered by the respondent authority. Under such circumstances, *prime facie*, it appears that the impugned order passed by the Principal Commissioner was passed in violation of the basic principles of natural justice as the reply filed by the petitioner was not found to have been duly considered by the respondent authority upon careful perusal of the impugned order.

82. Coming to the objections raised by the respondents that in view of the statutory remedy available, the writ petition ought not to be entertained, this Court is of the considered view that while there is a specific provision for filing an appeal before the appellate authority prescribed under the provisions of the act, however, alternative remedy by itself will not be a bar for a writ Court to invoke its jurisdiction, if the Court is of the view that such alternative remedy will not be an efficacious remedy for the aggrieved party and consequently such aggrieved party cannot be left remediless by a writ Court by refusing to invoke its extraordinary jurisdiction.

83. In *Magadh Sugar & Energy*, reported in (2022) 16 SCC 428, the Apex Court has succinctly summed up the principles of the Bar of Alternative remedies and the exceptions thereto. The Apex Court held that while a High Court would normally not exercise its writ jurisdiction under

Article 226 of the Constitution if an effective and efficacious alternative remedy is available, the existence of an alternative remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallised by this Court in *Whirlpool Corpn. v. Registrar of Trade Marks* [*Whirlpool Corpn. v. Registrar of Trade Marks*, (1998) 8 SCC 1] and *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.* [*Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*, (2003) 2 SCC 107]. Recently, in *Radha Krishan Industries v. State of H.P.* [*Radha Krishan Industries v. State of H.P.*, (2021) 6 SCC 771] a two-Judge Bench of this Court of which one of us was a part of (D.Y. Chandrachud, J.) has summarised the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternative remedy. The Court has observed : (*Radha Krishan Industries case* [*Radha Krishan Industries v. State of H.P.*, (2021) 6 SCC 771] , SCC p. 795, para 27)

“27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternative remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) *the order or proceedings are wholly without jurisdiction*; or (d) the vires of a legislation is challenged.

27.4. An alternative remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternative remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

84. In the attending facts and circumstances, this Court has already held that the findings arrived at by the Commissioner (Appeals) in its order dated 30.08.2016 have much relevance in the present proceedings inasmuch as the order dated 30.08.2016 passed by the Commissioner (Appeals) highlights the facts based on the records and the evidences available before the department to conclude that the earlier order dated 27.11.2015 passed by the adjudicating authority was not based on proper enquiry or investigation as permitted under the Rules of 2008. It was held by the Commissioner (Appeals) that the findings of the adjudicating authority was based on presumptions and assumptions. This Court has already held that these findings will have a material effect in deciding the correctness of the core issue raised by the department that there was deliberate suppression and/or willful misinformation furnished by the petitioner company and thereby the department is required to involve its jurisdiction under Section 11A, of the Central Excise Act, 1944.

85. As have been discussed above, these findings of fact arrived at by the Commissioner(Appeals) will have a binding effect on the adjudicating authority. The Principal Commissioner, even if, assuming is not a subordinate authority to the Commissioner (Appeals), yet such findings of the Commissioner(Appeals) cannot be contradicted by another collateral authority like the Principal Commissioner without such findings being interfered with or set aside by a higher quasi judicial or an appropriate judicial forum. Any attempt by any such authority do so will be in total contravention of the principle of law laid down in Abdul Kuddus (Supra) and Kamalakshi Finance Corporation (Supra)

86. Under such circumstances, the impugned order dated 24.03.2022 passed by the Principal Commissioner will have to be held to be an order passed in violation of the judicial discipline required to be maintained by statutory quasi-judicial authorities.

87. In Commissioner of Customs, Kandala Vs. ABM International Ltd, reported in 2015 (322) ELT 818 (SC) on the question of principle of res judicata, the Apex Court held that it is not in dispute that the first round of litigation, the matter had come up to this Court and was decided in favour of the respondent assessee. While dismissing the appeal of the Revenue, considering the facts of this case, no doubt this Court left the question of law open. However, that could not be a ground to reopen the case of the

Revenue. The Apex Court is therefore of the opinion that the Customs, Excise and Service Tax Appellate Tribunal has rightly applied the principle of res judicata. The Apex Court further find that in the second round of litigation also, which was on the same facts and material, the question was sought to be taken up again by the Revenue. The orders of the Commissioner as well as Customs, Excise and Gold (Control) Appellate Tribunal which are passed in the second round of litigation further demonstrates that all these aspects were duly considered and pure findings of facts were arrived at which are in favour of the respondent.

88. Under Section 11A of the Central Excise Act, 1944, in order to initiate proceedings thereunder, the competent authorities of the department must arrive at a finding that any duty of excise was not levied or paid or short levied or short paid or erroneously refunded by reason of-

- (a) fraud; or
- (b) collusion; or
- (c) any willful mis-statement; or
- (d) suppression of facts; or

(e) contravention of any of the provisions of these act or the Rules made thereunder with the intent to evade payment of duty, by any person chargeable with duty then the competent officer may take necessary steps as per the procedure prescribed for recovery of such duty.

89. A perusal of the section reveals that in order to invoke powers under the Section 11A, the authority must come to a conclusion that any duty of Central Excise not levied or paid, or short levied or short paid or erroneously refunded by reason of fraud, collusion, willful mis-statement or suppression of fact, contravention of any of the provisions of these act or the Rules made thereunder with the intent to evade payment of duty, by any person chargeable with duty then the competent officer may take necessary steps as per the procedure prescribed for recovery of such duty. The competent authorities in the Central Excise Department must return a finding that because of any or all of the reasons as prescribed under the section, the reason for non levy or non payment or short levy or short payment or erroneous refund of Central Excise Duty by the department is attributed to the assessee for any of the reasons mentioned in the said section. The authorities must arrived at a clear finding that the duty required to be paid by the assessee was not paid or short paid or short levied or not levied because of reasons of fraud, collusion, mis-statement, suppression of fact or contravention of any provisions of the act of the Rules which can be attributed to have been resorted to by the assessee. It is only under such circumstances that the power under Section 11A of the Central Excise Act can be enforced by the competent authority.

90. In Pushpam Pharmaceuticals Co. Vs. CCE Mumbai, reported in 1995 (78) ELT 401 (SC), the Apex Court in the context of Section 11A regarding reopening of proceedings held that Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.

91. Similarly in *Collector of Central Excise Vs. Chemphar Drugs & Liniments*, reported in 1989 (4) ELT 276 (SC), the Apex Court held as under:

"9. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to subsection 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."

92. In *M/S Anand Nishikawa Co. Ltd. Vs. CCE, Meerut*, reported in 2005 (188) ELT 149 (SC) on the issue of "suppression of facts", the Apex Court held that relying on the observations of this Court in the case of *Pushpam Pharmaceutical Co. Vs. Collector of Central Excise, Bombay* [1995 Suppl. (3) SCC 462], the Apex Court finds that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to arrive at a finding of deliberate or willful suppression of facts/materials by the assessee. Therefore, in view of discussions made herein above it cannot be said that there was any deliberate intention on the part of the petitioner not to disclose the correct information or to evade payment of duty and as such it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to [section 11A](#) of the Act. This Court is therefore, of the firm opinion that where facts were known to both the parties and a collateral authority of the department namely Commissioner (Appeals) had already concluded that there was no suppression of facts and which finding has not been interfered with by

any higher authority as in the instant case, it was not open for the Principal Commissioner to come to a conclusion that the petitioners were guilty of "suppression of facts". Similarly, in [Densons Pultretaknik vs. Collector of Central Excise](#) [2003 (11) SCC 390], the Apex Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful misstatement or "suppression of facts". This view was also reiterated by this Court in [Collector of Central Excise, Baroda, vs. LMP Precision Engg.Co.Ltd.](#) [2004 (9) SCC 703].

93. As have been discussed above, the first Appellate authority namely the Commissioner (Appeals) on the basis of the materials and records available with the department returned a clear finding on facts that there was no willful or deliberate suppression of material or information. The Commissioner (Appeals) returned a finding that there were amply opportunity prescribed under the provisions available to the adjudicating authority to make necessary enquiries including physical verification before approval of the declaration and which was admittedly not done by the adjudicating authority. The Commissioner (Appeals) recorded a categorical finding that there were no records/evidences of clandestine removal of finished products by the petitioner during the period from June 2015 to October 2015 to show any malafide intention on their part

and any such reasoning given by the adjudicating authority was not supported by facts. These findings of fact were subsequently accepted by the Co-ordinate Bench by its Judgment and order dated 22.06.2017 passed in W.P.(C) No. 6065/2016. Although in the intra-Court appeal filed by the department, the appellate Court by order dated 11.05.2018 passed in W.A. No. 242/2017 permitted the department to complete the enquiry. However, the findings of the Co-ordinate Bench were not interfered with. In view of such clear findings of fact by the Commissioner (Appeals) and which order is presently pending disposal before the CESTAT in an appeal filed by the department itself being No. E/7689/2016-EX (DB), this Court must come to the conclusion that there was no willful or deliberate suppression or mis-statement offered by the petitioner resulting in short levy or short paid Central Excise Duty. If that be so the very foundation on the basis of which the show cause notice and the enquiry proceeded against the petitioner under Section 11A of the Central Excise Act ceases to exist. Such action by the department will amount to invocation and/or usurpation of jurisdiction when the circumstances clearly indicate that the departmental authorities ought not to have invoked its jurisdiction under Section 11A of the Central Excise Act.

94. In view of the discussions above, this Court having arrived at a conclusion that until the findings of fact in the Commissioner (Appeals) in its order are not interfered with by a higher statutory forum or an appropriate Court of law, this finding of fact cannot be ignored by the departmental authorities and consequently the invocation of jurisdiction under Section 11A in the absence of any deliberate or willful suppression or mis-statement of facts by the petitioner, no proceedings can be initiated under Section 11A as have been sought to be done.

95. The invocation of jurisdiction and the proceedings thereunder having held to be contrary to the provisions of law, it consequently follows that the penalty imposed along with interest also cannot be allowed to sustain. That apart the penalty sought to be imposed cannot be imposed in a mechanical way without passing any speaking order or assigning any reasons. Imposition of penalty is not an automatic consequence of the failure to comply with the provisions of the act, but it can only be imposed when there is a finding by the authority that there was a deliberate attempt on the part of the dealer in not complying with the provisions of the act or the rules or in violation of the provision of the act or the rules. The *mens rea* or the guilty intention on the part of any dealer/assessee has to be established before imposition of penalty. In Hindustan Steel limited versus State of Orissa reported in

(1970) 25 STC 211, the Apex Court held that penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute

96. It was further held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose

penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. The relevant paragraphs of the Judgment is extracted below:

"Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on @ consideration of all the relevant circumstances. Even if a Minimum penalty is prescribed, the authority competent to Impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender Is not liable to act in the manner prescribed by the statute.

It was further held as under:

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or - venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is hot liable to act in the manner prescribed by the statute

97. In *Sherres Vs. De Rutzen*, reported in (1895) 1 QB 918, it was held that *mens rea* is an essential ingredient of an offence. However, it is a rule of construction. If there is a conflict between the common law and the statute law, it has always been held that it is a sound rule to construe a statute in conformity with the common law. Ut,

it cannot be postulated that a statute cannot alter the course of the common law. The Parliament, in exercise of the constitutional powers, makes statutes and in exercise of that power it can affirm, alter or take away the common law altogether. Therefore, if it is plain from the statute that it intends to alter the course of the common law, then the plain meaning should be accepted. The existence of mens rea as an essential ingredient of an offence has to be made out by the construction of the statute. In other words, there is a presumption that mens rea is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by subject matter with which it deals and both must be considered.

98. Under such circumstances and in view of discussions above, this Court is of the view that the writ petitioner cannot be non-suited on the ground of availability of alternative remedy. This court is of the considered view that the alternative remedy prescribed under the statute will not be an efficacious and effective alternative remedy to the present petitioner in the attending facts and circumstances of the case. The submission of the respondents that the writ petitioner should be dismissed on the ground of alternative remedy cannot be accepted and is therefore rejected.

99. In view of in view of the findings arrived at by the Court as discussed above, this Court considers it appropriate to interfere with the impugned order dated 24.03.2022. The impugned orders are accordingly set aside and quashed. The penalty along with the interest is also set aside and quashed. The amount deposited by the petitioner to the tune of Rs. 2 Crore is permitted to be adjusted against the future duties as may be found to be payable by the petitioner company.

100. The writ petitions are accordingly allowed in terms of the above. No order as to cost.

JUDGE

Comparing Assistant