IN THE HIGH COURT OF ORISSA AT CUTTACK

OTAPL No.6 of 2007

M/s. Kripal Springs (India) Ltd. .... ***Appellant***

Mr. Jagabandhu Sahoo, Senior Advocate

-versus-

Union of India and others .... ***Respondents***

None

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

<u>ORDER</u>
30.11.2022

<u>Order No.</u>

21. 1. The present appeal is directed against an order dated 24th May 2007 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Eastern Zonal Bench, Kolkata in Central Excise Appeal No.EDM-287/03 whereby the adjudication order dated 24th March 2003, passed by the Commissioner of Central Excise levying a duty demand of Rs.17,80,911/- for the period from July 1996 to 10th May 2000 under Section 11A of the Central Excise Act, 1944 (CE Act) with equivalent amount of penalty under Section 11 AC and interest under Section 11 AB of the CE Act was affirmed.

2. By the order dated 11th October 2007, while admitting the appeal, this Court noted that the Appellant had already deposited Rs.10lakhs and ordered that subject to the Appellant paying a further sum of Rs.3,50,000/-, realization of the balance amount should remain stayed.

3. Subsequently, on 24th July 2019, the following questions of law were framed for consideration:

> 1. Whether in the facts and circumstances of the case, invocation of extended period of limitation under Section 11-A of the Central Excise Act by the adjudicating authority can be sustained in law?
>
> 2. Whether in the facts and circumstances of the case, the conclusion with regard to inevitable process loss and tolerance on weight is based on lawful considerations?

4. This Court has heard the submissions of Mr. Jagabandhu Sahoo, learned Senior Advocate for the Appellant. None is appearing for the Department today.

5. As far as the first question is concerned, it is seen that under Section 11-A of the CE Act while the normal period of limitation for reopening an assessment was six months and the extended period of limitation was five years, however, for invoking the extended period of limitation, the onus was on the Department to show that there was suppression of facts, willful misstatement, fraud or collusion. In the present case, 5.7 MTs of spring leaves were allegedly found in excess in the Appellant's factory at the time of the visit of the officers. In other words, the said material was not found entered in the RG-1 records.

6. As noted by the CESTAT in the impugned order, one of the contentions raised by the Appellant was that there was no intention to evade duty and that all the facts and figures were available with the Department from the books maintained by the Appellant. On

this submission, the CESTAT has in the impugned order recorded in para 5 as under:

> "5. In view of the aforesaid observations and findings visible from record it cannot be held that there were invisible process loss contributing for generation of finished goods at a lower rate and on consideration of relevant factors, taking into consideration totality of facts and circumstances, we find no reason to interfere with the order of the Ld. Adjudicating Authority. In view of the suppression noticed, we also find that the proceeding was well within the extended period and was not hit by bar of limitation. However, imposition of equal amount of penalty as a right dose was not demonstrated by order of Adjudication. Therefore, following the ratio laid down by the Hon'ble Apex Court in the case State of M.P. v. BHEL-1998 (99) ELT 33 (SC) imposition penalty of Rs.5.00 Lakhs would meet end of justice while interest shall be realizable according to law."

7. What the CESTAT appears to have overlooked in coming to the above conclusion was the order earlier passed by the CESTAT on 19th June 2003 in SP-153/03 and Appeal ESM-55/03 which arose from the adjudication order dated 18th December 2002, where the following finding was rendered:

> "However, I find that the appellants have given sufficient plausible explanation for the excess found material not entered in RG I records, which explanation is in accordance with ISI standard. By allowing tolerance on the weight of leaves, I find that the excess weight in fact, was notional than real. In the circumstances, I find no justification in confiscation of the goods or for imposition upon the appellants. Impugned order is set aside and the

appeal is allowed with consequential relief to the appellants. Stay petition also gets disposed of."

8. The above order of the CESTAT appears to have attained finality. In other words, the finding that there was no justification in confiscation of goods allegedly found in excess of what was entered in the RG-1 records attained finality. Consequently, the above conclusion reached by the CESTAT in para 5 of the impugned order appears to be not based on the records of the case. Further, the CESTAT failed to notice that for the purposes of Section 11 A of the CE Act, for invocation of the extended limitation period of five years, the Department had to discharge the onus of showing that there has been willful suppression of misrepresentation of facts or fraud practiced by the Petitioner. This, however, they have not been able to.

9. The Court is unable to find anything in the impugned order of the CESTAT which would justify invocation of the extended period of limitation.

10. As far as question No.2 is concerned, the finding with regard to the "inevitable process loss and tolerance on weight" appears to have not been based on the record since it fails to account for the aforementioned order dated 19th June 2003 passed by the CESTAT.

11. Consequently, both questions are answered in the negative i.e., in favour of the Appellant and against the Department. The impugned order of the CESTAT is hereby set aside. The present appeal is accordingly allowed. The amounts already paid by

Appellant during pendency of the present appeal shall be refunded to the Appellant in accordance with law within a period of eight weeks of an application is being made for that purpose.

12. Issue urgent certified copy of this order as per rules.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S.K. Guin