IN THE HIGH COURT OF ORISSA AT CUTTACK

CEREF No.5 of 2007

M/s. Utkal Steels Ltd., Sundergarh .... ***Appellant***

Mr. Sidhartha Ray, Advocate

-versus-

Commissioner of Central Excise and Customs, Bhubaneswar .... ***Respondent***

Mr. A. P. Das, Standing Counsel for the Department

CORAM:
THE CHIEF JUSTICE
DR. JUSTICE S. K. PANIGRAHI

ORDER
26.07.2022

Order No.

03. 1.While issuing notice in the present reference application on 14th December 2007, the following questions were framed by this Court:

> *"i. Whether the Customs, Excise & Service Tax Appellate Tribunal, Kolkata Eastern Zonal Bench, Kolkata is correct in sustaining the allegation of excess stock of 486.845 M.T. when admittedly the Central Excise Authorities have not made physical weighment?*
>
> *ii. Whether the Customs Excise & Service Tax Appellate Tribunal is correct in ignoring the decisions of this Hon'ble Court in Hari Bhagat Agarwal Vs. State of Orissa reported in 51 STC 355, where this Hon'ble High Court has held that "without physical verification the tax cannot be levied on eye estimation?*
>
> *iii. Whether the Customs, Excise and Service Tax Appellate Tribunal, Kokkata, Eastern Zonal Bench, Kolkata is justified by holding that the revenue has discharged the burden of proof in arriving at the excess stock of 486.845 MT when admittedly there has been no*

physical weighment of the goods found in the factory premises?

iv. Whether non-consideration of relevant materials and evidences and objection raised by the applicant does not render the conclusion arrived at by the Custom, Excise and Service Tax Appellate Tribunal, Kolkata, Eastern Zonal Bench, Kolkata perverse in the particular circumstances of the case."

2. The fact that in the present case, there was no actual physical weighment of the stocks is apparent from the order dated 16th September, 1997 passed by the Deputy Commissioner of Central Excise & Customs, Bhubaneswar while adjudicating a show-cause notice in the following terms:

"As regards the 480.845 MTs of Iron & Steel products found to be excess during the stock taking, I find that the officers involved in the stock taking have not adopted a systematic procedure for taking the stock. There are no weighment slips. To that extent, I accept the contention that the stock-taking was not done on physical weighment."

3. When the matter went in appeal, the Commissioner of Central Excise (Appeals) also concurred with the above finding that there was no actual physical weighment of the stocks. The Customs, Excise & Service Tax Appellate Tribunal, Kolkata (CESTAT) (Tribunal) too in his order dated 22nd March, 2007 acknowledged this. In other words, the excess stock "as alleged was ascertained by eye estimation on the basis of the declarations given by the Appellant's own supervisor."

4. That this form of eye estimation is not acceptable in law for determining liability is settled in the decision of this Court in

Haribhagat Agar Walla v. State of Orissa, (1982) 51 STC 355, which has been followed in ***State of Odisha v. Habib Rahimutulla, 51 STC 403 (Ori)*** and also noticed by this Court in its order dated 4th May, 2022 in STREV No.230 of 2008 (***State of Odisha v. M/s. Kansal Food Products).***

5. In that view of the matter, question (i) framed by this Court is answered in favour of the Assessee and against the Department.

6. In view of the answer to question (i), the other questions are not required to be answered.

7. The impugned order of the CESTAT and the corresponding orders of the Appellate Authority and the Adjudicating Authority are hereby set aside.

8. The CEREF is accordingly disposed of.

(Dr. S. Muralidhar)
Chief Justice

(Dr. S. K. Panigrahi)
Judge

M. Panda