Customs, Excise and Gold Tribunal - Calcutta
Kripal Springs (P.) Ltd. vs Commissioner Of Central Excise on 27 February, 2007
Equivalent citations: 2007 (121) ECC 224, 2007 ECR 224 Tri Kolkata
Bench: S T Chittaranjan, D Panda
ORDER D.N. Panda, Member (J) 1.1 The appellant being aggrieved by the order of adjudication passed on 24/03/2003 in adjudication case No. CCE/BBSR-II/2003 levying duty demand of Rs. 17,80,91 (SC)1/- [for the period from July 1996 to 10.5.2000] under Section 11A of Central Excise Act, 1944 (hereinafter deferred to as "the Act") with the equivalent amount of penalty under Section 11AC as well as interest at the applicable rate under Section 11AB of the Act, has preferred appeal to this forum.

1.2 While raising aforesaid duty demand, an amount of Rs. 6,76,477/- demanded in terms of order-in-original No. CCE/BBSR-II/03/2003 dated 26.2.2003 relating to the period 1997-98 and 1998-99 was reduced to prevent double taxation on the ground that the same related to the period from July, 1996 to 10/5/2000 (at page 28 of the order of adjudication). Such proceeding was initiated by the DGCEI, Kolkata against the appellant on the allegation that excisable goods i.e. spring leaves of different size and varities were clandestinely manufactured and removed without payment of duty. Adjudication was made by order in original CCE/BBSR-II/03/2003 on 26.2.2003 and that was upheld by Tribunal in Appeal Case No. EDM-251-253/03 on 31.5.2005.

1.3 In the course of Audit conducted for the period from October 1996 to September, 1997, copies of Balance Sheet of the Appellant was called for and on failure of the appellant to provide the same, those were obtained from Andhra Bank for the period from 1995-96 to 1997-1998 and sales figures obtained from Income Tax Authority. Sales Tax officer, Bargarh also made the sales figure of the Appellant documents it was noticed that sale figures of springs leaves furnished by the Appellant to Excise authority was lower than the sales figures submitted to the above Authorities/concerns and reasons of discrepancy explained was unsatisfactory.

1.4 It was also noticed from Past records of the appellant that in last five years, they had not paid duty out of PL Account but sizeable amount of duty was discharged out of Modvat Credit only. That led to an interference by Authorities below that substantial quantity of finished goods were removed without payment of duty. Further analysis of the Modvat Credit availed by the Appellant on the input revealed that minimum duty amount of Rs. 573/- was payable from PLA after deducting MODVAT credit available in respect of 1 MT of Flat used in manufacture of dutiable goods. A detailed working was made with such proposition and exhibited in annexure 'C' to the Show Cause Notice (SCN) dated 03.08.2001 seeking reply of the Appellant thereon.

1.5 It was also noticed by the authorities that day to day record to prove stock position at the finishing stage was not maintained by the Appellant. On objective analysis of production figures, it was found that 807.264 MT of finished goods were unaccounted as per calculation made in Annexure-D to SCN dated 03.8.2001 and held to be clandestinely manufactured as well as removed showing huge process loss and thereby legitimate duty payable was evaded. While arriving at the suppression, the Learned Authority observed at para 19 of the impugned order at page 27 and 28 as under:

From the facts and evidences, discussed above, it is obvious that the assessee has absolutely no supporting evidence to establish the submission made by them in their written reply to the Show Cause Notice and at the time of personal hearing. Therefore, these contentions have to be rejected as base less and unsubstantiated. It has been conclusively shown that the assessee has completely failed to put up any befitting and tenable defence to controvert and disprove the evidences relied upon in the case and thereby to counter the allegations leveled against them in the Show Cause Notice. The explanation given for the resultant difference of 807.264 MT of finished goods in terms of scale loss, burning loss in the quenching oil tank, turning and boring wastage does not hold good since the detected shortage/difference is too huge to be explained as turning/boring wastage and scale loss and since they had in any case been regularly accounting for handling and processing glosses in their books of account and all losses including so-called scale losses should have been included therein. It has further been established during the course of investigation of the records of the assessee that the theory of scale loss, burning loss etc. are baseless and untenable contention. Thus the assessee has totally failed to disprove the charges of suppression of production and surreptitious removal of excisable goods without payment of duty. The assessee being an unit operating under Self Removal Procedure since long, should be aware of various provisions of Central Excise Laws and is expected to maintain the prescribed Central Excise documents in a correct manner. Instead of assisting the Central Government in collection of its legitimate dues, the assessee has tried their level best to defraud the Government exchequer by surreptitiously removing the finished excisable goods without payment of Central Excise duty. Hence, the allegation of evasion of Central Excise Duty by suppressing the facts stands fully established against the assessee and they are liable to pay the Central Excise Duty as demanded in the instant Show Cause Notice. The details of the said duty demanded is calculated in the Annexure-C to the Show Cause Notice. However, in a similar issue i.e. for clandestine manufacture and removal of excisable goods i.e. M.S. Spring Leaves of different size and varieties without payment of duty during the period of 1997-98 and 1998-99 another proceeding had been initiated by the DGCEI, Kolkata against the same assessee. The said case has been adjudicated vide my Order-in-Original No. CCE/BBSR-II/03/2003 dated 26.02.2003 wherein Central Excise duty {amount of Rs. 6,76,477/- has been confirmed against the same assessee. By adjusting the said amount from the instant demand, the assessee is required to pay a net amount of Central Excise duty of Rs. 17,80,911/-[Rs. 24,57,388/-(-) Rs. 6,76,477/-

1.6 In addition to the above findings, the investigation made by Preventive section on 11.5.2000 resulted with finding of excess stock of spring leaves to the tune of 5.779 MT and such stock was seized. Adjudication against that excess stock was completed on 29/9/2000 by the Learned Dy. Commissioner, Sambalpur-II Divn. In appeal, action of that Authority was upheld by the learned CCE (Appeals) in terms of order in appeal No. 65/BBSR-II/02 disposed on 18/12/2002 and that reached to finality. Therefore, learned Adjudicating Authority in para 22 of the impugned order held that the Appellant is a habitual law breaker as observed in order-in-original in CCE/BBSR-II/03 dated 26.2.2003 and, in order-in-appeal No. 65/BBSR-II/02 dtd.18.12.2002. For the observations and findings stated in para 4 to 19 of the order of adjudication (at page 20 to 29) the appellant faced the demand as stated in para 1.1 aforesaid and such demand is under present appeal.

2.1 Ld. Counsel appearing for the appellant vehemently challenged the impugned order raising two issues before this forum. Firstly, that the proceeding was time barred and secondly that the normal process loss which was inherent and invisible, although was to be given due weightage to arrive at production figure, assessable quantity of excisable goods as well as value thereof was determined arbitrarily by Adjudicating Authority for the impugned period and such authority acted baselessly. Therefore, order of adjudication was ill founded and liable to be vitiated. According to him He urged that disallowance of such normal losses does not ipso facto lead to the inference that there was clandestine manufacture and removal of 807.264 MT of excisable goods without payment of duty or the same unaccounted with intent to evade duty. There was no malafide nor any deliberate intention of the Appellant to evade duty. He submitted that the appellant while manufacturing spring leaves, uses flats of different sizes. Activity of manufacture undergoes series of process and operations. At every stage of processing, normal loss occurs to the raw material depending on the quality of input. Series of activities involved give rise to huge invisible loss. Entire finished goods manufactured were accounted for and there was neither clandestine manufacture nor such removal.

2.2 He further submitted that there was no intention at all to evade duty for which the proceeding was time barred and penalty was also not leviable. But merely on surmise and suspicion, exercise was done to impute the appellant to charges through time barred proceeding when entire fact and figure were all along available year after year in record. Further, the sales figure obtained from Income Tax and Sales Tax Authority were not at all examined yearwise to ask for reason why there was difference. But a superfluous view taken. Therefore, the calculation made in Annexure D to Show Cause Notice was baseless and unreasonable. Consequently, the order of Adjudication is unsustainable.

2.3 The Ld. Counsel in support of his arguments relied the following judgments:

* Paxma Axle & Springs (P) Ltd. v. Collector of C. Ex., New Delhi reported in 2000 (125) ELT 836 ( Tribunal) * Viral Corporation v. Commr. of Central Excise, Surat 2000 (125) ELT 838 ( Tribunal) * India Forge & Drop Stampings Ltd. v. Commr. of C. Ex., Pune-I * Indian Farmers Fertiliser Co-operative Ltd. v. C.C.E., Lucknow .

* Suvarna Polymers Pvt. Ltd. v. Commr. of C. EX., Hyderabad * Tamil Nadu Housing Board v. Collector of Central Excise, Madras * Indian tool Manufacturers v. Assistant Collector of c. Ex. , Nasik * Collector of Central Excise v. Chemphar Drugs & Liniments * Bhor Industries Ltd. v. Collector of Central Excise * Cosmic Dye Chemical v. Collector of Central Excise, Bombay 3.1 The Ld. JDR appearing for the Department submitted that questionable conduct of the appellant is already on record in view of the excess of spring leaves of 5.779MTs found by Preventive squad in the course of investigation on 11/5/2000 resulting with the levy of duty demand and subsequent such practice of Clandestine removal noticed in para 22 by the Ld. Adjudicating Authority in the impugned order. The present proceeding is against third such act arose during the impugned period screening record itself as submitted by the appellant to Public Authorities. The Ld. Adjudicating Authority made a clear finding and discussion in paragraph 2 to para 22 running from page 19 to 31 of the order of adjudication and explained each and every aspect of the clandestine practice of the appellant. When such self speaking order exists, that does not call for further supplementing except

highlighting certain aspects of order of adjudication with evidence borne by record. For the questionable behaviour of the appellant, the proceeding was rightly initiated within the extended period since there was intention to evade duty in a planned manner of sharing/spreading huge process loss to different stages of production with willful intent to evade duty enjoying Modvat Credit. Secondly, showing huge process loss year after year, the appellant has made the Department to believe that its sale was very low whereas higher sales figures were shown in returns to both sales tax as well as income tax authorities.

3.2 Learned JDR further/the process loss that was claimed by the appellant was unfair, exorbitant, excessive and unreasonable which resulted in pilferage of Revenue. The appellant was not fair to make payment of duty from PLA account but all along it was taking advantage of Modvat credit. They had also not filed declaration as required by Rule 173B disclosing generation of scrap and marketability thereof. This was another mischief for suppression of production as well as clearance. There was also no basis to show the generation of unsaleable scrap and scaling loss. The percentage of loss shown to the Excise Authorities was 10% whereas the unsaleable scrap and scaling loss was not proved by evidence and thus claim of the Appellant was baseless. There was no record to show stages of manufacture of finished goods and the place of existence/storage thereof for the purpose of identification and inventory. The appellant has also failed to establish a standard relation between the input and the output when it has been engaged in manufacturing activity for past few years. In view of no convincing evidence brought by appellants to rebut various allegations in the show cause notice, the order of adjudication is sustainable.

4.1 Heard both sides and perused the records.

4.2 The principal allegation of the Department against the appellant was on the basis of annexure 4D' to the Show Cause Notice (SCN) dated 3/8/01 taking opening balance of the finished goods into consideration adding to that the goods manufactured during the impugned period and deducting therefrom the goods cleared as well as the closing stock available, clandestine removal of 706.951 MT and 100.313 MT of scrap aggregating 807.264 MT were found A Detailed calculation of such pilferage was made in annexure *D' to SCN was as under:

ANNEXURE-D

DETAIL CALCULAT5ION OF
GOODS REMOVED CLANDESTINELY AND DUTY THEREOF
M/S KRIPAL SPRINGS (INDIA) LTD., BARGARH

| | |
|---|---|
| A Flats issued for consumption (MT) | 8767.407 |
| B Packing material contained in the flat (MT) | |
| @ 1 Kg. per MT | 8.767 |
| C Actual flat utilized for manufacture (MT) | 8758.640 |

PARTICULARS

S.
Leaves

Scrap

Opening

balance as on 1.7.96 (MT)

138.541

4.530

Goods manufactured

7,855.597

a. S. Leaves @ 0.896 MT per 1 MT of flat consumed

903.043

b.
Scrap @ 0.103 MT per 1 MT of flat consumed

Total (1
+ 2)

7,994.138

907.573

Goods
cleared (on record) with duty

6,665.172

734.269

5.

Closing
balance a. Recorded

168.530

b.
Finishing room

447.686

c.
Total ( a + b )

616.216

51.406

6.

Qnty.
found excess

5,799

72.990 0

7.

Total
of goods cleared + balance in hand (4+5+6)

7,287.187

807.259

8.

Goods
removed clandestinely (3 - 7)

706.951

100.313

9.

A.
Value (Rs.)

14,845.974

| | | |
|---|---|---|
| 10. | Total value (Rs.) | 15,358.676 |
| 11. | Duty payable @ 16% adv (Rs) | 2457.388 |

NB:- Out of total cut flats (semifinished goods) of 499 092 MTs found in the finishing room the quantity of s leaves and scrap has been cancelled @ 89.70% and 10.30% of flats ( i.e. 499.092 MTs) used in the same ratio as is being maintained by the party as per their statutory records during the period under reference.

4.3 In addition to the discrepency found as above, quantity of generation of finished goods was found to-be disproportionate by Annexure 'C to SCN. This was not disputed by Appellant. Further, the sales figures given to the Sales Tax Department and Income tax Department as well as Central Excise Department was worked out in annexure 'A' to the SCN and in reply to that notice, sale of different goods clubbed in sale was not proved by evidence. Huge discrepancy was noticed on comparison of figures submitted to Sales Tax, Income Tax and Excise Authority. Appellant explained that income from non manufacturing (sic) was returned in Income Tax return. But that was baseless in absence of cogent, credible and convincing reason and evidence as well as proper reconciliation. Department also worked out the duty incidence in respect of 1MT of flat used for manufacture of finished goods and duty liability after giving CENVAT credit-was Rs.573/- as worked out in Annexure 'C-1' to SCN. This remained unexplained without proper reason. The appellant accordingly failed to assign any cogent reason for its defence against the allegation of clandestine removal of 807.264MT of goods worked out in Annexure 'D' to SCN except a bald reply that there was process loss and that was invisible. Pleas of the appellant was discarded for the reason discussed in para 13 in page 26 of the order of adjudication which reads as under:

Generation of scrap was about 10% as per the Central Excise record. This scrap has been taken into account Further another generation of unsaleable scrap and scaling loss to the tune of another 10% is not supported by any legal document or by any convincing proposition. If so, such scrap should have been available at the time of stock- taking; and such scrap should also have been accounted for in Central Excise records and returns. Since this was not done, the explanation seems to be only an after thought in order to accommodate the shortage found during the stock taking.

4.4 Generation of scrap to the extent of 10% was found to be acceptable was held to be not acceptable for no evidence nor declaration. Further, it was the finding of the Ld. Adjudicating Authority that the requirement of declaration under Rule 173B of Central Excise Rules, 1944 was not filed and no proper record showing amount of production and disposal of the scrap was maintained to prove for its defence. In absence of any declaration under the rule and maintenance of record, the Department was right to say that additional generation of scrap was without any evidence for which claim of the Appellant was baseless and liable to be discarded.

4.5 The reason why different sales figures were submitted to sales tax authority, income tax authority remained unexplained and no evidence even led at this stage. Therefore, it was quite probable for the Department to discard claims of the appellant on flimy grounds stated by the appellant and also without any reconciliation on record. Suppression of sales figure, suppressing actual manufactured goods was quite probable to hold by Revenue against the appellant. Appellant's contention that the accounts were not reliable was evidenced from variation of sales figures submitted to different taxing Authorities with no good reason.

4.6 The Department also found that inflated figures were submitted to banks, as an act of mischief. Considering various aspects of the matter, the Learned Adjudicating Authority in para 17 of the order of adjudication held that the allegations in SCN was not controverted by Appellant leading cogent, credible and convincing evidence. Two successive investigations stated earlier have also resulted with levy of demand on the appellant proving clandestine removal as well as manufacture

of such kind. The appellant failed to submit any reply against the allegation of the Department why minimum duty amount of Rs. 573/- was not payable by use of 1 MT of flat, more elaborately worked out in annexure C-1 of SCN.

4.7 The unaccounted flats/finished goods worked out in the Annexure 'C' to the Show Cause Notice also was without any contradiction for no standard input output ratio adopted to have been consistently followed by the appellant nor pleaded in defence with evidence. The appellant also did not lead any evidence showing behavioral pattern of generation of process/invisible loss by such industry. Learned Counsel for Appellant in the course of hearing relied on IS specification 3431-1982. But could not demonstrate how such specification helps the case of the Appellant. The Ld. Adjudicating Authority in para 11 at page 25 also held that tolerance on weight in the light of IS specification was not applicable to the product of the Appellant. This remained uncontroverted. The Ld. Adjudicating Commissioner also supported his reasons in para 15 (at page 26) finding that the balance sheets for the year 1996-1997 and 1997-98 depicted figures which were audited under Companies Act, 1956. Such audited accounts were also submitted to public authorities like Register of companies, Sales Tax Authority and Income Tax Authority. It was the onus of the appellant to prove the same to be true when the figures were alleged to be untrue. But that was not so done in the present case.

4.8 The appellant also failed to answer on the issue why modvat account was only utilized for discharge of duty when the duty liability in annexure 'C-1' to SCN was worked out by the Department as appellant's liability which was well reasoned. The Ld. Adjudicating Commissioner in para 16 of the order of adjudication brought out that there was ho reconciliation done with the quantity of input resulting the quantity of output. To prove that mathematical accuracy in input output analysis should not be followed for cogent reason, if any, was not adduced. Therefore, he came to the conclusion that business enterprise with huge wastages/losses would not survive. For such reason, he was also right to appreciate that annexure 'D' to the show cause notice clearly depicting the clandestine removal was sustainable. It was also quite proper on the part of the Ld. Adjudicating Commissioner to hold that the process loss explained had no basis since there was no method of accounting followed to demonstrate the stages of loss identifying quantum of output generated at each stage of processing nor the appellant ever prayed the Department for witnessing a trial run of manufacture to prove its bonafide when it had faced charges twice earlier as aforesaid. Following the judgment of Hon'ble High Court of Madras in the case of Madura Coats Limited v. CCE holding that Adjudicating Authorities are concerned only with preponderance of probability indicating the truth and are not lied down to strict rule of evidence, the appellant should have brought all evidence to come out of clutches of preponderance of probability. The Authorities below have not merely acted on mathematical precision by Annexure-D to SCN to work out loss of Revenue. But taking totality of facts and circumstances as well as circumstantial evidence, order of adjudication was passed which does not call for to hold otherwise. The Adjudicating Authority finding two sequential activity of evasion of Revenue in the past as stated earlier was right to decide the matter in the impugned order on the basis of the probabilities of the case. To affirm so we also find support from judgment of Hon'ble Supreme Court in the case of C.C. v. Bhoormull and such decision followed in Kumar and B. Sivalingam v. CCE 1992 (39) ECR 52 and Anoka Kohli v. CC 4.9 We have also gone through the various judgments cited by the Ld. Counsel but in absence of

evidence adduced to prove wastage/process loss at every stage of production and generation of output, we do not consider that the appellant has brought to record any invisible loss that contributed to the quantum of production claimed by the appellant. The appellant has failed to bring its facts to fall within the fours of the judgments. Therefore, we have no reason to differ with the conclusion drawn by Learned Adjudicating Authority.

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 imposition penalty of Rs. 5.00 Lakhs would meet end of justice while interest shall be realizable according to law.

6. In the result appeal of the Appellant is partly allowed to the extent indicated above. Cross objection by revenue without any new ground other than supporting the order of adjudication does not call for any determination. Accordingly the same is dismissed.

(Pronounced on 24.05.2007)