

(2016) 05 OHC CK 0001
In the Orissa High Court
Case No : W.P.(C) No.810 of 2016

Jindal Steel & Power Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-05-2016

Acts Referred:

Central Excise Rules, 2002 — Rule 25, Rule 27

Central Excises and Salt Act, 1944 — Section 11AA, Section 11AC

Citation : (2016) 122 CutLT 407

Hon'ble Judges : Indrajit Mahanty and Dr. D.P. Choudhury, JJ.

Bench : Division Bench

Advocate : M/s. Ravi Raghavan, Mukesh Panda, V. Jena and L. Sahoo, Advocates, for the Petitioner; Mrs. Mrinalini Padhi, Standing Counsel, Central Excise, Service & Customs, for the Opposite Parties

Final Decision : Disposed off

Judgement

Dr. D.P. Choudhury, J. - In the captioned writ petition challenge has been made to the order dated 30.11.2015 passed by the opposite party No.2- Commissioner of Customs, Central Excise and Service Tax, Rourkela confirming the duty demand of Rs.63,73,51,977/- under Section-11A of the Central Excise Act, 1944 (hereinafter called "the Act"), along with applicable interest and equal penalty under Sections-11AA and 11AC of the Act, respectively, read with Rule 25 of the Central Excise Rules, 2002 (hereinafter called "the Rule"), along with penalty of Rs.5,000/- under Rule 27 of the Rules, 2002. Challenge has been made further to the aforesaid order as perverse and contrary to the provisions of law, HSN Explanatory Notes, and Circular issued by the Board and the judgment of the Hon"ble Apex Court.

FACTS :

2. The factual matrix leading to the case of the petitioner is that petitioner-Company is engaged in the business/activity of manufacturing Iron and Steel items. For the purpose of manufacture of the said items, the petitioner also

carries out the activity of mining and extraction of Iron Ores from various locations in their own captive mines at Tensa, in the district Sundargarh of the State of Odisha. After extraction of the Iron Ore, the petitioner used to carry out the process of crushing and screening of the Iron Ores in order to reduce the size of the Ores in two categories, i.e., "fines" below the size of 5 mm and "lumps" within the size of 5 mm and 200 mm. As such the petitioner has been engaged in production of sized Iron Ore, i.e., "lumps" and "fines" since 2011. It is further stated that the petitioner was not registered with the Central Excise Department during the relevant period as the sized Iron Ore produced by it was exempted from payment of excise duty under Notification No.4/2006-CE dated 1.3.2006 which exempts Ores under Chapter Headings 2601 to 2617 of Chapter 26 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter called "CETA, 1985") from the payment of Excise Duty.

3. In the Union budget for the year 2011-2012, Chapter Note 4 to Chapter 26 of the First Schedule to the Central Excise Tariff Act, 1985 was inserted to state that the process of converting Ores to Concentrates will amount to manufacture and after such insertion the opposite party-Department started investigation into the processes undertaken by the petitioner to find out whether it amounts to manufacture.

4. The petitioner carries out the mining of Iron Ore to obtain the Run of the Mines (for short, ROM) which is a term referring to the material extracted from the Mines. It is explained in the petition that ROM excavated from the mines is brought to the Crushing Plant of the petitioner and this ROM consists of "lumps" of different sizes. Neither of the terms "lumps" nor "fines" are either defined in Chapter 26 of the First Schedule to the Central Excise Tariff Act, 1985 or in the HSN Explanatory Notes. It is stated that ROM transported from mines was first put into Crusher to make the ROM in small pieces of size up to 200 mm. then Screening of the same is made to separate the size up to 5mm. Thereafter the Iron Ore above 5 mm is sent for secondary Crushing and the size becomes 20 mm. But by the Union Budget for the year 2011-2012, Chapter Note 4 was inserted in Chapter 26 of the First Schedule to the Central Excise Tariff Act, 1985 by stating that the process of converting Ores into concentrates amounts to manufacture and as such the petitioner is liable to pay Central Excise duty after registration under Central Excise. Accordingly, letter was sent by the Department to the petitioner on 19.3.2011. The petitioner replied on 14.4.2011 to the Department stating that he has undertaken the process, i.e., crushing of Iron Ore into smaller sizes and separation of different sizes do not amount to concentration and the products are not concentrates. But thereafter the correspondence between the Department and the petitioner continued. Petitioner has also disclosed the details of the sized Iron Ores during the relevant period by disclosing the same as value of the total 1,76,863.800 Metric Tons of sized Iron Ore was Rs.78,46,63,365/-.

5. It is further stated that the Department issued notice to show cause

demanding Central Excise duty amounting to Rs.08,08,20,327/- on the said quantity of sized Iron Ore valued at Rs.78,46,63,365/- for the period from March 2011 to January 2012 on the ground that the Concentrates as covered in Chapter 26 are products which emerge to render the ores in lumps and as such it is the Mineral products under Chapter 26 of HSN and therefore, the product of the petitioner is exigible. The petitioner submitted that Notification No.4/2006-CE dated 1.3.2006 has provided that Ores falling under different headings is exempted but it does not apply to Concentrates making them dutiable. The petitioner replied to the show cause mainly submitting that the petitioner had not undertaken the activity of washing or beneficiation of the Ore in their mines and hence there was no concentration undertaken for which he is not liable to pay any duty on the Ore cleared in their factories. But the Department slapped with two more show cause notices vide C.No.V(26)15/Adjn/B-II/89/2014/3699-A dated 25.2.2015 and C.No.V (26)15/Adjn/B-II/28/2015/7447A dated 16.4.2015 demanding an amount of Rs.42,45,70,233/- for the period of February 2012 to March 2014 and an amount of Rs.17,96,15,969/- for the period from April 2014 to November 2014, respectively. The personal hearing was granted to the petitioner and the petitioner submitted that the case has already been decided in their favour vide CBEC Circular No.332/1/2012-TRU dated 17.2.2012 and the demand made should be accordingly dropped. Learned Commissioner concluded the hearing and without visiting the mines and understanding the process undertaken by the petitioner, passed the impugned order on 30.11.2015 by confirming the demand of Rs.63,73,51,977/- under Section 11A of the Central Excise Act, 1944 along with equal amount of penalty under Section 11 AC of the Central Excise Act read with Rule 25 of the Central Excise Rules, 2002 with an additional penalty of Rs.5,000/- under Rule 27 of the Central Excise Rules, 2002 for not taking Central Excise Registration. Not only this but also the learned Commissioner charged the interest under Section 11AB/AA of the Act without considering the argument of the petitioner and without taking the CBEC Circular dated 17.2.2012 into consideration as the said Circular specifically states that the process of crushing and screening of Iron Ores does not result in Iron Ore Concentrate. Since the impugned order was palpably wrong and perverse one, the present writ petition is filed to set aside the impugned order with various prayers including the constitutionality of the circular issued by the Finance Department by including the prayer to declare the Circular No.984/08/2014/CX issued under F.No.390/Budget/1/2012-JC Government of India Ministry of Finance Department of Revenue (Central Board of Excise and Customs), New Delhi dated 16.09.2014 as unconstitutional and ultra vires the Act and further to declare the CESTAT Circular F. No.15/CESTAT/General/2013-14 dated 14.10.2014 as unconstitutional and ultra vires. But during course of argument, learned counsel for the petitioner abandoned the said prayers to declare such circulars as unconstitutional and ultra vires.

6. Opposite party No.2 filed counter stating that the writ petition is not maintainable on fact and law. It is further stated that the CBEC Circular dated

17.2.2012 as submitted by the petitioner is not acceptable as the Circular is clarificatory in nature but not a decision. In the Union Budget 2011-2012 Chapter-26 of the Central Excise Tariff Act, 1985 (herein after called "CETA 1985") was added with the clause "the process of converting ore to concentrates shall amount to manufacture". The HSN note to the Chapter 26 states "for the purpose of Heading 26.01 to 26.17, the term "concentrate" applies to ores which have had part or all of the foreign matters removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operation or with a view to economic transport". So, the process of crushing, screening, grinding, washing etc. to remove foreign materials so as to make it fit for economical transportation and subsequent use in the metallurgical operations can be termed as Iron Ore Concentrate for which the same is dutiable. When process of converting ore to concentrates is required, it amounts to manufacture coming under Chapter 26 of the CETA Act, 1985 to show the Tariff under Chapter 26 covers both "Ores and Concentrates" which have been submitted to process normal ore to the metallurgical industries.

7. It is stated in the counter that processes undertaken by the petitioner are normal to the metallurgical operation for extraction of metals and therefore, nothing but the crushing, screening, grinding, washing etc. are meant to separate the impurities associated with the natural ores. These processes are carried out for transporting the ores from the pit mouth of the mines to the metal extracting plants, otherwise there will be heavy transportation cost. Thus, the concentrates as covered under Chapter 26 of CETA, 1985 are products which emerge as to render the ores as they emerge from mines to a stage capable of be used in metallurgical process. Since Chapter 26 of CETA, 1985 deals with "mineral products" under Section-V of HSN classification, it deals with natural products as they emerge as ores in Chapter 26 as the abbreviated HSN clearly explains, it is mere physical transition from "ores in lumps" to "ores in concentrate" which the chapter covers. Moreover, sub-heading 26011110 covers iron ore lumps (60% Fe or more), 26011120 covers "Iron Ore Lumps (below 60% Fe), same being the case with iron ore fines whereas "Concentrates" are covered under sub-heading 26011150 as the Ferrous content is of relevance for "Ores", "Concentrates" are products emerging in the physical process of metallurgy and herein percentage of Ferrous content is not relevant. As the Explanation is only in respect of "Ores", it does not apply to "Concentrates". Accordingly, "Concentrates" are dutiable. So, the learned Commissioner, Central Excise, Customs & Service Tax, Rourkela has rightly confirmed the demand made against the petitioner.

8. It is stated that the contention of the petitioner that crushing and screening are not special process is not correct as the crushing and screening are physical process undertaken by the petitioner amounts to manufacture as per the HSN Note and resultant product is nothing but Iron ore "Concentrate" falling under Chapter 26011150 of CETA, 1985. So far as demand made by the Department is justified, opposite party No.2 has also correctly confirmed the demand made

against the petitioner. Hence, it is submitted to dismiss the writ petition and affirm the impugned order of the Commissioner, Central Excise, Customs & Service Tax, Rourkela.

SUBMISSIONS :

9. Mr. R. Raghavan, learned Senior Advocate for the petitioner submitted that the Commissioner has failed to consider the CBSE Circular No.332/1/2012-TRU dated 17.2.2012 which is binding on him and as such erred in law by passing the impugned order. Learned Commissioner has failed to rely on the portion of the said Circular which states in clear and unequivocal terms that the process of "crushing and screening" does not amount to "special treatment" and therefore, the product that emerges after the process of crushing and screening cannot be considered as Iron Ore concentrate. It is reported in *Paper Products Ltd. v. Commissioner of Central Excise*, reported in 1999 (112) E.L.T. 765 (S.C.) where Their Lordships observed that Department circulars and clarifications are binding on the Department's Officers. But in the instant case the learned Commissioner has failed to follow the circulars of the Department and as such did not obey the decision of the Hon'ble Apex Court for which said impugned order is illegal. Learned counsel for the petitioner further submitted that the final product is merely Iron Ore in similar sizes (sized ore) and is not a concentrated as the process of crushing and screening do not amount to Concentration. According to him under CETA of 1985 there is no definition of term "Concentrates" but term "Ores" is defined under Chapter Note 2 of Chapter 26 of the First Schedule to the CETA 1985 stating that for the purpose of headings 2601 to 2617, the term "Ores" means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury. Again it is stated that headings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry. As the term "concentrate" is not defined in the First Schedule to the CETA, 1985 for which HSN Explanatory Notes may be referred to as the said Note defined "Concentrates" by stating that "Concentrates" applies to Ores which have had part of all of the foreign matter removed by special treatments. Since the loose materials are required to be removed from "Ore" by a simple mechanical process of screening and making them to ores, such a process will not amount to any process of Concentration as the ore is not being subjected to any special treatment. So, it is submitted that the learned Commissioner has failed to distinguish between the Concentrates and the Ore.

10. Mr. R. Raghavan, learned Senior Advocate further submitted that crushing and screening do not amount to concentration as per HSN Explanatory Notes and Technical Literature. The Department of Revenue is of the opinion that the crushing and screening do not amount to Concentration for which the Commissioner has passed the impugned order which is otherwise illegal, improper and against the instruction of the Revenue Department. As per Scheme of the Central Excise Tariff also, iron ore "Concentrates" are different from Iron

Ore "lumps" and iron ore "fines" which are actually material produced by the petitioner because heading 2601 of the Central Excise Tariff provides different classifications for Iron Ore lumps (26011110 and 26011120 for Fe content of 60% or more and below 60% respectively), Iron Ore fines (26011130 and 26011140 for Fe content of 62% or more and below 62% respectively), and Iron Ore concentrates (26011150). It is submitted by the learned counsel for the petitioner that from the aforesaid analogy it is evident that Iron Ore lumps, Iron Ore fines and Iron Ore Concentrates are all different products. It is reported in *Union of India v. Delhi Cloth and General Mills*, 1977 (1) E.L.T. (J 199) (S.C.) where Their Lordships observed that manufacture is generally understood to mean as "bringing into existence a new substance" but do not mean merely "to produce some change in a substance." So, the Iron Ore in the ROM even after crushing and screening continues to Iron Ore all of different sizes as compared ores excavated from the Mines and fed into crusher.

11. Mr. R. Raghavan, learned Senior Advocate for the petitioner while distinguishing the complete processes than on crushing and screening cited various decisions, they are (a) *Bheraghat Mineral Industries v. Divisional Deputy Commissioner of Sales Tax* 1992 (61) E.L.T. 560 (MP); *Collector of C. Ex., v. Mahavir Minerals Store Supply Co.* 1988 (38) E.L.T. 171 (Tribunal); *Commissioner of Central Excise BBSR v. Ispat Chrome Ltd.* 2001 (134) E.L.T. 236 (Tri.- Kolkata); *Indian Rare Earths Ltd. v. Commissioner of Central Excise, BBSR-I* 2002 (139) E.L.T. 352 and *Commr. of Cus. and C. Ex., JSR and BBSR 12 II v. Steel Authority of India Ltd.* 2003 (154) E.L.T. 65 (Tri.-Kolkata). Learned Commissioner has erred in law by observing that the petitioner's argument of revenue neutrality cannot be accepted as show cause notices have alleged suppression and misstatement and therefore, credit in terms of Rule 9 (1)(b) of the Cenvat Credit Rules, 2004 will not be available.

12. Mr. R. Raghavan, learned Senior Advocate for the petitioner also submitted that provisions of Section 35B of the Act is not applicable in the present case and the order of the Commissioner is passed being violative of Articles 14, 19 (1) (G) and 265 of the Constitution of India. It is submitted that in case of appeal under Section 35-B the compulsory pre-deposit under Section 35-F of the Act is hardship on the part of the petitioner and as such the impugned order itself violates the fundamental right of the petitioner. The impugned order is violative of principles of natural justice as it is well settled that same order has been passed without application of mind and demands are therein ex facie, unsustainable for any reason. It is also submitted for the petitioner that no penalty is imposable and no interest is chargeable although the learned Commissioner has erred in law by imposing the penalty and the charge interest on the demand. He cited the decision of the Commissioner of Central Excise, *Aurangabad v. Balakrishna Industries*, 2006 (201) E.L.T. 325 (S.C.) in support of his contention. It is also submitted that no efficacious alternative remedy is available with the petitioner for which the present writ petition has been filed. So, ultimately it is prayed by the learned counsel for the petitioner to set aside

the order of the Commissioner, Central Excise and allow the writ petition.

13. Mrs. Mrinalini Padhi, learned Standing Counsel for the Revenue submitted that the reliefs prayed for by the petitioner are not acceptable because the CBEC Circular No.332/1/2012-TRU dated 17.2.2012 is clarificatory in nature but not a decision to be followed by the opposite party No.2. It is also submitted that the processes of crushing, screening, grinding, washing etc. undertaken by the petitioner make the Iron Ores fit for economical transportation and subsequent use in the metallurgical industries and therefore, in the Union Budget 2011-12 the amendment was brought in Chapter 26 of CET Act, 1985 to the effect that process of converting ore to Concentrates shall amount to manufacture. Since the Iron Ore is the Concentrate product of the petitioner and the petitioner has not registered to pay Central Excise duty thereon, rightly the show cause notice was issued making demand to pay such amount by the petitioner. She further submitted that the contention of the learned Senior Advocate for the petitioner that the petitioner only makes product of the Ores and not Concentrate is not correct because for the purpose of Heading 26.01 to 26.17 the term "Concentrates" applies to ores which have had part or all of the foreign matter removed by special treatments either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport. The processes undertaken by the petitioner are normal to the metallurgical operations for extraction of metals. The processes undertaken by the petitioner like crushing, screening, grinding, washing etc. are meant to separate the impurities associated with the natural ores for their transportation from the pit mouth of the mines to the metal extracting plants. So, the contention of the learned counsel for the petitioner that the crushing and screening are simply meant for preparing the sizes of the Iron ore but not the "concentrates" is not correct.

14. It is submitted by the learned Standing Counsel for the Revenue that the "Concentrate" have reference to physical rate of strengthening the "ores in lumps" minus "mud and gang materials" to a form to be used for metallurgical process and in that scheme no way of metallurgical content is to decide on the classification as per the HSN Note to Chapter 26 of CETA, 1985. It is clear that while Ferrous content is of relevance for "Ores", "Concentrates" are products emerging in the physical process of metallurgy for which the percentage of ferrous content is not relevant. According to her, the process of crushing and screening of iron ores by petitioner gives rise to Iron Ore concentrate in terms of Chapter Note 4 of Chapter 26 of the First Schedule to Central Excise Tariff Act, 1985 for which such process amounts to manufacture. So, the order passed by the opposite party No.2 making the product of the petitioner dutiable is undoubtedly correct order.

15. It is submitted by the learned Standing Counsel for Revenue that crushing and screening are physical operation for manufacture of iron ore concentrate from iron ore and the two phases of crushing and screening makes liberation of

sized iron ore from gangue materials and impurities. As such, crushing, screening and physical process undertaken by the petitioner amounts to manufacture as per HSN Note and the resultant product is nothing but Iron Ore Concentrate falling Under Chapter 26011150. So, the contention of the learned Senior Advocate for the petitioner that crushing and screening are not special treatment undertaken by the petitioner is not acceptable so as to avoid to bring it under the HSN Note. She further stated that the exemption Notification No.4/2006-CE dated 1.3.2006 is to be interpreted as the Legislature has intended to treat ores and concentrates as two distinct items and such Notification HSN exempts only "ores" for which the concentrates automatically falls outside the purview of the notification. Therefore, the petitioner is not entitled to get benefit extended under Notification No.4/2006-CE dated 1.3.2006.

16. Learned Standing Counsel for the Revenue further submitted that sized iron ore continues to be identified under the Central Excise Tariff as iron ore concentrate but not as iron ore as submitted by the learned Senior Advocate for the petitioner. In view of the judgment passed in *M/s. Star Industries v. Commissioner of Customs (Imports), Raigarh* in Civil Appeal No.6088 of 2013 by the Hon'ble Apex Court the contention of the petitioner that the entire judgment is Revenue neutral does not stand in the eye of law. The case law relied upon by the petitioner cannot be pressed into the facts and circumstances of this case as they are prior to 1.3.2011 on which date CETA, 1985 was amended and excise duty was levied on Iron Ore concentrate. Since the petitioner has suppressed material facts and evaded payment of Central Excise Duty, the impugned order asking for payment of demand along with interest charged with penalty is undoubtedly correct. Since the petitioner has deliberately cleared Iron Ore concentrate without payment of Central Excise duty, also he is liable to pay interest, penalty and additional penalty under the Central Excise Act and Rules made thereunder.

17. Mrs. Padhi, learned Standing Counsel for the Revenue further submitted that there is efficacious remedy available to the petitioner by filing appeal against the impugned order for which the present writ petition is not maintainable and the Court may reject the writ petition directing the petitioner to file appeal, if so advised, and may raise all such contentions there.

18. Points for consideration :

(i) The first and foremost point is to be decided whether the writ petition is maintainable in view of the pleadings made by both the parties.

DISCUSSIONS :

POINT No. (i) :

19. After dropping the prayer for declaring the concerned Circular of the CBEC as ultra vires, there remains only prayer to quash the impugned order of the Commissioner of Central Excise as the same is illegal, improper. Further it is

prayed to direct the Central Excise, Customs, Service Tax Appellate Tribunal (hereinafter called "CESTAT") not to insist for pre-deposit under Section 35-F of the Act in the event of filing appeal before the CESTAT. On the other hand, the learned Standing Counsel for the Revenue has strongly contended that there is clear provision under Section 35-B of the Act to file appeal before the CESTAT against the impugned order passed by the Commissioner of Central Excise and this is not a case where the writ petition should lie when there is efficacious remedy available under the statute. Learned counsel for the petitioner submitted that even if there is efficacious remedy available under Section 35-B, yet the writ is maintainable.

20. Having considered the contentions of the respective parties, we are of the view that in this writ petition there are several contentions raised relating to dutiability of the product of the petitioner requiring adjudication of facts. Moreover, it is available from the petition that the Commissioner of Central Excise had fixed for spot visit but without going to the said Mines has passed the impugned order, thus, requiring further materials to be gone through by the fact finding authority. If the facts required to be decided will prove the way to decide the issues arising between the parties, same can only be decided either by the Commissioner of Central Excise or by the appellate authority but not the same can be entertained in the writ petition. Section 35-B(1) of the Central Excise Act, 1944 states as follows :

35-B. Appeals to the Appellate Tribunal : (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order :

(a) a decision or order passed by the (Principal Commissioner of Central Excise or Commissioner of Central Excise) as an adjudicating authority;

(b) an order passed by the [Commissioner (Appeals)] under section 35-A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate [Commissioner of Central Excise] under section 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the [Principal Commissioner of Central Excise or Commissioner of Central Excise], either before or after the appointed day, under section 35-A, as it stood immediately before that day :

[Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to :

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods, exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

[(d) credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998 :]

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where :

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order, does not exceed [two lakh rupees];

From the aforesaid statutory provision, it appears that against any decision passed by the Commissioner of Central Excise as an adjudicating authority, the appeal lies to Appellate Tribunal. It is already discussed in the above para that there are certain facts raised before us are required to be adjudicated in appeal and the same cannot be adjudicated in the writ petition. Reliance is placed on a decision of this Court in *Larsen & Toubro Limited v. State of Orissa and others*, 1998 (111) STC 75 (Orissa) where it is held that if petitioner could avail the statutory remedy by filing an appeal, the court would not entertain the writ petition.

21. It is submitted by the learned counsel for the petitioner that this Court in *Sonic Electrochem (P) Ltd. v. State of Orissa and others*, 1994 (92) STC 117 (Orissa) held that even an alternative remedy is available, the High Court can interfere under Article 226 of the Constitution if extraordinary circumstances are made out. The decision cited by the learned counsel for the petitioner is not applicable to the facts and circumstances of the case for which it is not followed in this case. It is also submitted that the impugned order passed by the learned Commissioner of Central Excise is due to non-application of judicial mind and same is passed mechanically. Since the impugned order was passed violating the principles of natural justice and not in accordance with law, same is only be set aside by the order of this Court passed under Article 226 of the Constitution of India. According to him even if the efficacious remedy is available but the writ jurisdiction will lie in view of the impugned order passed without application of mind and against the principle of law. On the other hand, the learned counsel for

the opposite party No.2 vehemently opposed the contention stating that the Writ Court cannot adjudicate on facts and the impugned order does not suffer from any vices requiring this Court to intervene.

22. In the aforesaid para we have already observed in this writ petition that further facts are to be adjudicated and same can only be addressed before the appellate court. Moreover, there is clear-cut provision under Section 35-B to file appeal. It is available from the contention of the learned counsel for the petitioner that in an earlier occasion when the petitioner manufactured the same product, the petitioner was served notice by the Department in the year 1996 asking to pay duty as same was iron ore concentrate chargeable to duty. Petitioner had also challenged the same before this Court in W.P.(C) Nos.13201 and 13437 of 1996 and this Court vide order dated 30.7.1997 dismissed the writ petition directing the parties to file appeal as the alternative remedy is available. Now the same party with same contention has come up to this Court of course due to demand made by the O.P. No.2 basing on amendment to Ch.26 w.e.f. 1.3.2011.

23. In view of the aforesaid analysis, we refrain from deciding any issue raised before us. We are of the considered view that since efficacious remedy by way of filing appeal before the CESTAT is available, we hereby direct the petitioner to challenge the impugned order before the appellate authority under Section 35-B of the Act and raise all such contentions raised before us within a period of two weeks from today and in the event of filing appeal, the appellate authority will dispose of the same early by hearing both the parties and both parties are free to raise respective contentions as raised before us and also any other materials to which they think it proper to address. In view of hardship pleaded by petitioner, we further direct that the petitioner would make 5% of the demand of duty as pre-deposit under Section 35-F of the Act while filing appeal and rest of the demand of duty, interest and penalty will remain in abeyance till disposal of the appeal and the CESTAT will not insist to deposit the rest of the demand of duty, interest and penalty directed to be paid under the impugned order.

The writ petition is disposed of accordingly. Interim order stands vacated.

I. Mahanty, J. : I agree.