IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Ex. Reference No. 14 of 2003 &
Ex. Reference No.1 of 2008.

Judgment reserved on: 28.7.2009.

Date of Decision: 31st July, 2009

Ex.Ref. No.14 of 2003:

Commissioner, Central Excise … Petitioner.
Versus
Himachal Rolling Mills, Kangra … Respondents.

Ex.Ref.No.1 of 2008:

M/s. Himachal Rolling Mills …Petitioner
Versus
Union of India and others …Respondents

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting? No

For the Union of India : Mr.Sandeep Sharma, Assistant Solicitor General of India.

For Himachal Rolling Mills : M/s.Surjeet Bhadu & Deepak Bajaj, Advocates.

Deepak Gupta, **J**.

Excise Reference No.14 of 2003 has been admitted on the following questions of law:-

"i)Whether the Hon'ble Tribunal was justified in not taking note of the fact that in the show cause notice penalty was sought to be imposed under Section 11 AC of the Central Excise Act, 1944 read with Rule 173Q of Central Excise Rules, 1944 and that

> under Rule 173Q the penalty can be imposed even for the period prior to 28.9.96?
> ii)that the learned Tribunal has erred in law in not considering the fact that Rule 173 Q under which the penalty was sought to be imposed was applicable at the relevant time and was inserted under the rule making power of the Act vide Notification No.74/74-C.E., dated 6th April, 1974 much prior to section 11 AC which was inserted vide Notification No.33/96-C.E.(N.T.), dated 28.9.1996. That even if section 11 AC was not applicable Rule 173 Q was applicable and therefore the penalty could be imposed. The notice was issued under Section 11AC read with Rule 173Q and Rule 226 of the Central Excise Rules 1944 which were applicable at the relevant time."

As far as Excise Reference No.1 of 2008 is concerned it would be pertinent to mention that in fact the assessee had filed CWP No.307 of 2004 which was dismissed by this Court on 2.12.2004 but while dismissing the petition this Court allowed the request of the counsel for the petitioner and directed that the petition be treated as Cross Objections in Central Excise Reference No.14 of 2003.

Brief facts necessary for decision of the case are that the Himachal Rolling Mills Kangra (hereinafter referred to as the respondent) is engaged in manufacture of untrimmed copper circles out of the gullies (billets) received from its sister concern M/s. Himachal Metal

Industries Ltd. M/s. Himachal Metal Industries Ltd. manufactured these billets from scrap of old and used copper utensils fully exempt from duty. The respondent had claimed benefit of notification No.178 of 88 and paid duty at reduced rates. According to the Revenue since no duty had been paid on the scrap the assessee was liable to pay duty at the rate fixed and not entitled to any benefit which was taken by it. According to the Revenue the assessee never disclosed that the copper circles were manufactured out of the non-duty paid copper billets.

A notice for recovery amounting to Rs.7,23,203/- was issued and penalty under Section 11 AC of the Central Excise Act, 1944 and Rule 173Q and Rule 226 of the Central Excise Rules, 1944 was also sought to be imposed. The assessee was issued a show cause notice in this behalf on 27.3.1997. After considering the reply of the assessee the Assessing Officer came to the conclusion that the assessee did not fulfil the conditions laid down in the notification in question since copper scrap used by the assessee for the manufacture of copper articles was not duty paid. The Assessing Officer specifically held that the evidence on record shows that the parties claim that they had availed all the concessional duty correctly was

incorrect since they knew that it had not purchased any duty paid copper scrap. When no duty paid scrap was purchased the question of availing any credit did not arise. Consequently, the demand of Rs.7,23,203/- was confirmed and penalty of the same amount under Section 11AC read with Rule 173Q of the Rules was imposed. The appeal filed by the assessee before the Commissioner (Appeals) was rejected. Thereafter, the assessee approached the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) which upheld the demand of Central Excise Duty. In respect of penalty it held as follows:

> "…However, we find force in the submissions of the learned Advocate that penalty under Section 11AC cannot be imposed on the Appellants for the reason that Section 11AC was inserted in the Central Excise Act with effect from 28.9.1996 whereas the demand pertains prior to the said date. Accordingly, we set aside the penalty imposed on the Appellants. The appeal is thus partly allowed."

This part of the order is under challenge by the Revenue.

As observed above the penalty was imposed not only under Section 11AC but also under Rule 173Q. This Court has dealt with an identical question of law in **Commissioner, Central Excise vs. M/s.Indian Magnetics**

Ltd. and another, Ex.Reference No.9 of 2001 decided on 10.4.2009 wherein this Court held as follows:

> "There can be no manner of doubt that as far as Sections 11AB and 11AC are concerned, the Tribunal was right in holding that since these provisions came into the statute book w.e.f 28.9.1996 only, the authorities could not have relied upon these provisions to impose penalty and interest in respect of the proceedings relating to the period prior to 28.9.1996. However, we find that Rule 173Q of the Rules also provides for imposition of penalty up to three times of the value of the goods. In the present case the penalty imposed is only equivalent to the duty imposed on the goods. Even if Sections 11AB and 11AC were not applicable the authorities had also made reference to Rule 173Q and derived power under this Rule to impose penalty. Therefore, in our view the order of the learned Tribunal vacating the penalty is against law."

The present case is squarely covered by the law laid down by us. Even in the present case the penalty is only equal to the value of the goods and as such there is no error in the order imposing penalty since such penalty was also imposed under Rule 173Q. Therefore, the order of the learned Tribunal setting aside the order in respect of the penalty is bad and is accordingly quashed.

Learned counsel for the assessee then pressed his Excise Reference No.1 of 2008. As we have already noted above no question of law has been framed in this Excise Reference. It was only treated as a cross objection.

The main grounds raised are that the assessee had disclosed all the facts and the officials of the Excise Department had verified the facts and therefore the assessee had not mis-represented any facts. According to the learned counsel the limitation would therefore be only six months and not five years. All the authorities below including the CEGAT have held that there was mis-representation of facts by the Respondent. This is a pure finding of fact and cannot be called in question in these proceedings.

In view of the above discussion, we partly allow the Excise Reference No.14 of 2003 and set-aside the order of the CEGAT in so far as it set-aside the penalty and restore the orders of the Assessing Officer and the Appellate Authority regarding the imposition of penalty. The Excise Reference No.1 of 2008 is rejected.

Both the References are answered in the aforesaid terms.

(Deepak Gupta),J.

July 31, 2009. (Surinder Singh),J.
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