**R.S. Graphics Vs. Cce**

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**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

**Decided On :** Nov-28-2000

**Reported in** : (2001)(96)LC323Tri(Chennai)

**Judge** : S Peeran, a T V.K., S T S.S.

**Appellant** : R.S. Graphics

**Respondent** : Cce

**Advocate for Pet/Ap.** : Shri. V. Lakshmikumaran, Shri. J. Sankararaman

**Judgement** :

1. The issue involved in this appeal filed by M/s. R.S. Graphics is whether in the facts and circumstances of the matter, penalty under Rule 173Q(1) of the Central Excise Rules, 1944 is imposable on them.

2. Shri J. Sankararaman, Ld. Counsel for the appellants, submits that the appellants manufacture on job work printed cartons and were clearing the same without following any Central Excise procedure and without payment of duty under the bona fide belief that the printed cartons were not excisable; that when the Excise officers visited their premises and advised them to pay the Central Excise duty they discharged the duty liability amounting to Rs. 26,63,259 /- for the period 1993-94 to 1997-98; that on account of decisions by Tribunal and courts to the effect that printed cartons are treated as products of printing industry, they held the bona fide belief that printed cartons does not attract central excise duty. It was

held that printed cartons would not be treated as products of Printing Industry; that again in the case of Metagraphs Pvt. Ltd. v. CCE , the Apex Court held the printed aluminium labels as products of printing industry as printing was not incidental to its use but primary in the sense that it communicates to the customer about the product; that however, the Apex Court adopted different reasoning in holding that Printing cartons are not products of printing industry in the case of Rollatainers Ltd. v. UOI ; that the Apex CCE v. Indian Coated Cartons (P) Ltd. reported in 1997 (92) ELT 459 (SC) settled the issue by holding that printing cartons are products of packaging industry. The Ld. Counsel submitted that in view of these decisions they entertained the bona fide belief that the cartons in which the printing was done was a product of the printing industry and therefore it did not attract any duty; that the Andhra Pradesh High Court has held in the case of Golden Press v.Deputy Collector that penalty was not leviable as there were conflicting decisions on the issue. He also referred to the decision of the Supreme Court in the case of Hindustan Steel Ltd. v. State of Orissa reported in 1978 ELT-J 159 : ECR C 321 SC wherein it was held that "liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so". The Ld. Counsel also placed reliance on the decision in the case of Siemens Ltd. v. CCE, Allahabad 1999 (34) RLT 831 : 1999 (85) ECR 229 (T) wherein it was held that penalty is not imposable where the assessee has taken corrective steps before issue of show cause notice. He mentioned that in the present matter the appellants had paid duty as soon as they were told that the activities undertaken by them attracts central excise duty.

Finally, he submitted that as no show cause notice has been issued to them and no central excise duty has been confirmed against them, the question of imposing any penalty does not arise. Reliance has been placed by him on the decision in the case of CCE. v. HMM Ltd. .

3. Countering the arguments, Shri S. Kannan, Ld. DR submitted that it is not in dispute that the appellants had neither taken any central excise registration for manufacturing printed cartons nor have they followed any central excise procedure before clearing the goods. It is also not in dispute that they had not paid central excise duty which was payable by them. He emphasised that the mere fact that as soon as the department intimated the non payment of duty they have even without asking for show cause notice paid the duty for the past five years period which goes to show that they were aware of the duty liability on their part in respect of printed cartons manufactured by them on job work basis; that the ratio in the decision in the case of HMM Ltd. (supra) is not applicable as in that case the question of imposing any penalty did not arise as the department was not able to sustain its demand whereas in the present matter the entire demand has been paid by the appellants without disputing the same. He also mentioned that the penalty is imposable under Rule 173Q(1) of the Central Excise Rules if a manufacturer removes any excisable goods in contravention of any of the provisions of the rules or does not account for any excisable goods manufactured by him or engages in the manufacture of any excisable goods without having applied for the Registration Certificate; that in the present matter, the appellants have neither taken registration nor accounted for the goods manufactured by them and have removed them in contravention of the provisions as such the penalty has been imposed on them rightly. Finally he submitted that the decision in the case of Siemens Ltd. (supra) is not applicable as in that case the appellants therein were already registered with the department and they had reversed the Modvat credit wrongly taken by them even before the issue of the show cause notice whereas in the present matter the appellants were completely out of control of the Excise officer as they had not even intimated the facts of the manufacture to the department. The Ld.

DR also submitted that the period involved is 93-98 and according to the appellants themselves before this period the matter has been settled that the printing cartons were to be treated as product of packaging industry and not printing industry and as such they cannot claim to hold bona fide belief that their product is not excisable.

4. We have considered the submissions of both the sides. Show cause notice was issued to the appellants for imposition of penalty as they did not have registration and follow the central excise procedure even though their value of clearance exceeded the exemption limit and they cleared the goods without payment of duty in contravention of the provisions of central excise Rules 9,52 A, 53,173B, 173C, 173F, 173G, 174 and 226 of the Central Excise Rules. The Commissioner had imposed the penalty of Rs. 3 lakhs on them after considering the decisions cited by them and observed that they had not shown any correspondence with the Department about the excisability of their product and, therefore, there was a clear omission on their part for not having taken registration and not discharging the duty. Imposition of penalty depends on the facts and circumstances of the each individual matter and quantum of penalty depends on the appreciation of evidence in each case. Rule 173 Q(l)(a), (b) and (c) provides for imposition of penalty for removing the excisable goods in contravention of the provisions of the Rules, for not accounting for the excisable goods and for not taking the registration under the excise law. All these three sub clauses do not refer to any guilty intention or mens rea for the purpose of imposing penalty. Only Rule 173Q(l)(d) speaks of the intention to evade payment of duty for which penalty can be imposed.

Admittedly the appellants had neither taken the registration nor accounted the goods in the statutory records nor cleared the goods on payment of duty and as such they have made themselves liable to the imposability of penalty. It has been held by the Appellate Tribunal in the case of Reliance Industries v. CCE, Ahmedabad 1995 (8) RLT 759 : 1995 (56) ECR 360 (T) that in regard to the violation of sub Rules (a) (b) and (c) of the Rule 173Q intention of evasion of duty is not prescribed in the statute which is found in Rule 173Q(l)(d) only. When the rules make clear distinction there is no scope for taking mens rea into consideration. The Appellate Tribunal in the case of Reckitt Colman of India Ltd. v. CCE , held that unless there is something in the language of the statute indicating the need to establish the elements of mens rea, it is generally sufficient to prove that the default in complying with the statute has occurred. The Tribunal followed the decision of the Supreme Court in the case of Gujarat Travancore Agency v. Commissioner of Income Tax wherein the Supreme Court held "A penalty imposed for a Tax delinquency is a civil obligation, remedied and coercive in nature, and is

far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws." Similar views were held by the Supreme Court in the case of Director of Enforcement v. MCT. M. Corporation Pvt. Ltd. and Ors.

1996 (12) RLT 365 (SC) : 1996 (33) ECR 349 (SC): It is thus the breach of a "civil obligation" which attracts "penalty" under Section 23(1)(a) FERA, 1947 and a finding that the delinquent has contravened of Section 10 FERA, 1947 would immediately attract the levy of "penalty" under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the 'accused' had the necessary guilty intention or in other words the requisite 'mens rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention of the defaulter itself which establishes his "blameworthy" conduct, attracting the provisions of Section 23(l)(a) of FERA 1947 without any further proof of the existence of "mens rea".

5. In view of these decisions by Apex Court, the penalty is imposable on the appellants in the present matter. The facts in the case of Siemens Ltd. (supra) are different inasmuch as the appellants therein reversed from substantial portion of the Modvat credit wrongly taken by them even before any communication was received from the department whereas in the present matter the appellants would have continued to remove the goods without payment of duty and without following other procedure if the officers had not visited their premises. Similarly the decision in the case of HMM Ltd. (supra) is also not applicable as no duty was confirmed in that matter whereas in the present matter the appellants have accepted the duty liability and have paid the entire amount for the past five years period. The Tribunal has also confirmed the imposition of penalty for irregular maintenance of statutory records Western Transformer & Equipment v. CCE, Jaipur 1995 (9) RLT 175 (T) : 1995 (60) ECR 518 (T), for not accounting, excisable goods in the stock (See Suvarna Polymers Pvt. Ltd. v. CCE, Hyderabad reported in 2000 (12) ELT

148 (T). The Appellants have also not satisfactorily explained the basis for holding the bona fide belief that their product was not product of printing industry and as such not excisable. In view of the fact that they have themselves mentioned in Memorandum of Appeal that the Supreme Court has decided the issue in the case of Rollatainers Ltd. (supra) that printed cartons are products of packaging industry and the issue involved in Meta-graphs P. Ltd. was about aluminium labels and not cartons, it was incumbent on the Appellants to approach the Excise Department. While we hold that the appellants are liable to penalty, the quantum of penalty will depend on the facts and circumstances of each case. As in the present matter the appellants realised their mistake as soon as the department brought it to their notice and they discharged the duty liability even for the past period, in view of this we are of the view that in the interest of justice will be met if they are asked to pay only nominal penalty of Rs. 50,000/-. We accordingly reduce the penalty of Rs. 3 lakhs to Rs. 50,000/-. But for this modification, the appeal is rejected.Separate Order Sd/-(S.L. Peeran) (V.K. Agrawal) 6. We had discussion in this matter in the light of all the case law cited by my brother and also cited herein. In my humble opinion, the matter of non-imposition of penalty under Rule 173 of Central Excise Rules in the facts and circumstances of this particular case is more covered with the ratio of judgements cited herein, than on the citation relied by my learned brother. The admitted facts are that appellant is a small job worker partnership firm. Sri B. Sridhar, Partner has filed his Income tax return for 1996-97 to show that his profit from business was only Rs. 2,05,421/- for the whole financial year and income paid was around Rs. 46,000/- only. This clearly indicates that the appellant was a tiny unit carrying on job work on supply of material by the customers for printing, laminating and bunching on the paper book which is an accepted fact in the show cause notice dated 7.4.1998. The question is as to whether this issue was decided as on the date of show-cause notice by controversial judgements, as to whether there was scope for bona fide belief? On this aspect also there is no dispute that the Government of India as far back as 1978 in Allibhoy Sharufally & Co. as reported in 1978 (2) ELT 145 : 1978 Cen-Cus 247D (GOI) had taken a decision that printed cartons are treatable as products of the printing industry. This judgement was reiterated by the Hon'ble Karnataka High Court in the case Rollatainers Ltd. & Another as . This Single Member judgement

of the said High Court was reversed in Division Bench and there was a contradictory judgement of other High Courts also i.e. of Delhi High Court vide their judgement dated 5.4.1991 in CWP No. 1013/80, in which they did not agree with the Division Bench judgement of Karnataka High Court. In the case of Metagraphs Pvt. Ltd. v. CCE as , the Hon'ble Apex Court while holding the printed aluminium labels as products of printing industry, it also observed that all products on which some printing is done are not the products of printing industry.

If the printing brings into existence a product, the resultant product would be a product of printing industry. It observed that printing on aluminium sheets, which communicates a message to the buyer that makes the sheet as a label unlike carton printed or plain which always remained a carton, therefore, the label announces to the customer that the product is or is not of his choice and his purchase of the commodity would be decided by printed matter on the label. The printing of the label is not incidental to its use but primary in the sense that it communicates to the customers about the product and this serves a definite purpose. Since the printing industry has brought the label into existence that being the position and further the test of trade having understood the label as the product of printing industry, there is no difficulty, the Hon'ble Apex Court observed, in holding that the labels in question are the products of printing industry. It referred to its earlier order in the case of Rollatainers Ltd. and Anr. v. UOI as . The Hon'ble Apex Court in the case of Johnson & Johnson v. CCE as reported in 1997 (94) ELT 286, while dealing with the question under TI 68 of the erstwhile CET and exemption under Sr. No. 24 of Notification dated 1st November, 1982 held that printed labels fall within serial number 24 of the Schedule of exemption, which granted exemption (to all products of printing industry including newspapers and printed periodicals), while following the judgement of its own Court in the case of Metagraphs Ltd. as . However, in the case of UOI v. Vijay Court retained its judgement in the case of Rollatainers v. CCE as , by holding that printed cartons are not to be regarded as product of printing industry. This was the position, till the issue was declared by the Hon'ble Apex Court judgement in this case. Till such time, the controversy did exist and throughout the period, the item was also exempted on account of these judgements which is not in controversy at all. The department was aware of the judgements in favour of the party and manufacturers

carrying on such activity of printing, laminating and bunching were being granted with exemption and no duty was being collected. When the appellant was approached by the Officers, immediately the appellant took registration and started paying duty with effect from 21.2.1998 and the department had accepted the assessment and had accepted the payment of Rs. 26,63,259/- and no action was taken for issue of show-cause notice for computation of duty for larger period, as the appellants themselves paid it and it was only by show cause notice dated 7.4.1998 after narrating the facts of non-payment of duty, on the appellants on their own paying the same and getting all the RT 12 returns assessed called upon them to explain as to why penalty should not be imposed under Section 173Q of the Central Excise Act, 1944 without mentioning any sub-clauses by alleging that there was contravention of Rules 9, 52A, 173B, 173C, 173F, 173G, 174 and 226 of Central Excise Rules, 1944. In this case, the allegation of clandestine removal has not been proved at all nor any allegation of clandestine removal has been made. As during that period, there was decisions from 1978 exempting similar activity of manufacture from duty and therefore, invocation of Rule 9, 52A, 173B, 173C, 173F does not arise at all. As there was no allegation of clandestine removal or no proof of findings recorded in the order impugned, it is only contravention of Rule 173G without quoting any of the sub-clause in the SCN which remains for consideration. The Commissioner in para 14 has come to a conclusion that there was contravention of Rule 173Q(l)(a) and (c) of Central Excise Rules, which has not been invoked in the show cause notice at all specifically.

There was a clear ambiguity on the stand of the department in the show-cause notice itself. Rule 173Q(1)(a) & (b) read as follows: (a) removes any excisable goods in contravention of any of the provisions of these rules; or (b) does not account for any excisable goods manufactured, produced or stored by him; From the above provisions, it is clear that there has to be removal of any excisable goods in contravention of any of these provisions of Rules or does not account for any excisable goods manufactured, produced or stored. It follows that this contravention has to be proved in terms of Rule 9, which deals with removal of excisable goods from any place where they are produced until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed

in this rule or the Commissioner may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the proper form. There has to be a contravention of this rule for the purpose of invocation of Rule 173Q(l)(a) and (b) and in the present case, there has been no such contravention and the question of even going to intention of removals need not be gone into.

The allegations are required to be proved under Rule 9 and the other rules quoted for upholding the imposition of penalty under Rule 173Q and there is no specific mention of sub-rule and in absence of sub-rule be invoked, it cannot be presumed that there was invocation of Rule 173Q(l)(a) or (b) for removal of goods without permission, without payment of duty or without knowledge of the department. The contention is that there was no intention to evade duty and in circumstances of dispute pertaining to product and controversial judgements being in existence, no penalty is imposable and this contention has been well laid down by the Hon'ble Apex Court in large number of judgements. The judgement of Hon'ble Apex Court in the case of Director of Enforcement v. MCT Corporation Ltd. (supra) quoted by learned Member (T) deals with contravention of Section 23(1) (a) of FERA Act, which is not in consideration with the present case. We have to look into the provisions of Central Excise Act for the purpose of imposition of penalty and not the Apex Court judgement cited above, which deals with provisions of Section 23(1)(a) of FERA Act and under that section mens rea was not required to be proved. This position in the Excise Act and in the light of the judgements that are required to be seen as hereinbelow: 7. In the case of Tata Yodogwa Ltd. v. CCE as , wherein the Patna High Court held that if the petitioners were under honest and general belief that duty was not payable on the goods and therefore, did not apply for licence or did not file revised classification list, in such circumstances imposition of penalty was not justified. It further held that merely because the petitioners disputed the classification of goods, it cannot be said that there was contravention of any rules and upheld the petitioner's contention for non-imposition of penalty and the imposition of penalty was held to be unsustainable. In the case of Bajaj Tempo Ltd. v. CCE as , a Bench of Three Members of the Tribunal held that in the absence of any controversion of the evidence that the departmental officers had acquiesced in the misinterpretation of the concession available under

Notification 101/71-CE dated 29.5.1971, it is sufficient to go by the findings of the Board and set aside the penalty imposed under Section 173Q(1) and 210 of the Central Excise Rules, 1944. Although in this case, the Tribunal held that the concession under Notification availed by the party after filing declaration etc. was wrongly used, the demand for duty was held to be in order. However, looking into the facts that the departmental officers had acquiesced in the misinterpretation of the concession, the Tribunal held the penalty to be not leviable.

8. The law therefore, indicates as on this date that there has to be an intention to evade duty with preparation of mind towards that end. It is not just non-deposit of duty on the belief of item being non-dutiable, that by itself will give rise to penal liability. Penalty is a penal consequence against a person for his action in not following the rigour of law and paying duty at the time of clearances of goods.

During the clearance of goods, the party was under bona fide belief that it was not dutiable and had kept clearing it without any intention to evade duty and there were circumstances in the form of various judgements to the effect of goods being non-dutiable in appellants favour. In such circumstances the Courts have ruled that no penalty is to be levied as there was no intention to evade payment of duty while removing the goods. Penalty is a quasi-criminal proceeding to penalise a person for his deliberate action in defaulting in payment of dues to government. Therefore, it has been held that in such circumstances, the department is required to prove that the person had cleared the goods clandestinely, without the knowledge of the department, and with an intention to evade duty. In the present case, large number of judgements prevailed in the appellants' favour and hence under such circumstances, the department could not have even invoked larger period under the proviso to Section 11A of the Central Excise Act. The Hon'ble Apex Court as can be seen in the case of Tamil Nadu Housing Board v.CCE requires intention to evade payment of duty, then it is not mere failure to pay duty that attracts larger period, it held that it must be some thing more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word "evade" in the context means defeating the provision of law of paying duty. The Apex Court further held that it is made more stringent by use of the word "intent". In other words, the assessee must deliberately avoid payment of

duty which is payable in accordance with law. The Apex Court further set aside the invocation of Larger period under Section 11A on the ground that the initial burden on the department has not been discharged with regard to the appellants guilty in this regard. It has further been held that it would have been better if the appellants would have examined the officer who was advised not to take licence, but mere non-examination of officer could not give rise to an inference that the appellant was intentionally evading payment of duty. When the appellant was found not to have been making any profit and it had taken out licence for concrete unit then in absence of any other material to prove any deliberate act of the appellant the presumption of reasonable doubt of the appellant cannot be said to have been successfully rebutted. It negatived the findings of the Tribunal that there was an intention on the part of the appellants to evade payment of duty has not been based on any material and that it was an inference drawn by the Tribunal for which there was no basis.

9. In the present case also, it is an admitted fact that there was favourable decisions in appellants favour and the industry was not paying any duty. The High Court of Andhra Pradesh in the case of Golden Press v. DCCE as in a similar facts and circumstances of the case set aside the penalty imposed on the ground that printed cartons are not products of printing industry but of packaging industry. The party had pleaded in that case also that they had thought bona fide that its products viz. printed cartons, were not liable to duty and that they need not to take out a licence. A similar plea is made out in the present case. This plea has not been negatived in the present case by the department and which was what the High Court also said that their plea had not been negatived by the department.

Therefore, in such circumstances, the High Court held that levy of penalty on mere ground of not taking out licence is not warranted in the facts and circumstances of the case. It drew strength from the fact that Government of India itself was previously of the opinion that the printed cartons are exempted. Subsequently, the Central Government revised its opinion which had been followed by the Collector, which was also set aside by the High Court and hence the plea of the petitioner and the explanation was held to be not out of place and therefore, held that levy of penalty is bad and the same was set aside.

10. In the case of Shree Baidyanath Ayurved Bhawan Ltd. and Anr. v. CCE as , a similar dispute pertaining to ayurvedic medicine raised by the department, wherein the party had claimed it as ayurvedic while the department held it to be not so, after 1st March, 1975, when the residuary item 68 was introduced in Central Excise Tariff Schedule. On a careful consideration, the Tribunal held that Rule 9(2) was not applicable when the assessment was not only provisional but also refund was grantable. It also held that the goods were not only cleared with the knowledge of the department but refund had been granted and given and hence, in such circumstances, it cannot be held to be clandestine removal under Rule 9(2). Likewise, it held that no penalty under Section 173Q is imposable, when even the department was not sure whether the goods were classifiable either under item 14E or 68 of the Central Excise Tariff.

11. A similar situation arose in the case of S.N. Sunderson (Minerals) Ltd. v. Supdt. (Preventive) C. Ex., Indore as and there was a lot of controversy with regard to the activity of crushing of lime stone into lime stone chips of specific size amounting to manufacture or not and bringing into existence of new goods. There was lot of controversial judgements from the Tribunal including the issue of the item being goods under Madhya Pradesh General Sales Tax Act. The similar plea of the item being not goods and larger period not invokable besides penalty being not imposable under Rule 173Q was pleaded. The Hon'ble High Court of Madhya Pradesh held that under Rule 173Q of Central Excise Rules, 1944, if any manufacturer, producer or licensee of a warehouse (a) removes any excisable goods in contravention of any of the provisions of rules, or (b) does not account for any excisable goods manufactured, produced or stored by him or enters wilfully any wrong or incorrect particulars in the gate pass issued for the goods removed by him with intent to facilitate the buyer to avail of credit of the duty in respect of such goods which is not permissible under the rules or engages in the manufacture, production or storage of any excisable goods without having applied for the licence required under Section 6 of the Act; or contravenes any of the provisions of the rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and shall be liable to penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to above has been committed or Rs. 5,000/- whichever is greater.

The High Court held that the principal object of the Act is not to levy penalty, its object is calculation and enforcement of payment for Central Excise duty. The manufacturer is liable to pay penalty on account of certain acts or omissions committed by them. The findings given by the High Court on this issue in paras 16 to 19 are reproduced hereinbelow: 16. The principal object of the Act is not to levy penalty, its object is calculation and enforcement of payment of Central Excise duty. The manufacturer is liable to pay penalty on account of certain acts or omissions committed by them. Under Rule 173Q of the Central Excise Rules, 1944, a maximum amount of penalty which could be levied is provided and, therefore, the penalty could not be wholly disproportionate to the incidence of infringement. In Hindustan Steel Ltd. v. State of Orissa An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

This decision was followed and approved in later decisions of the Supreme Court in Cement Marketing Co. of India v. Asstt. S.T. Commissioner 17. Law on the subject is whether the crushing of the lime stone is a process of manufacture and resultant goods lime stone chip are excisable item under the Act was not settled in Madhya Pradesh. In a case decided by this Court under the M.P. General Sales Tax Act in Bedaghat Mineral Industries v. Divisional Deputy Commissioner of Sales Tax, decided on 10th April 1987, a Division Bench of this Court has ruled, while considering Section 2(j) and 2(i)(ii) of the M.P. General Sales Tax Act, 1959 that dolomite lumps broken into chips and powder for convenience in use retain the same characteristics and qualities of dolomite limps, therefore, there is no

manufacture by crushing dolomite lumps into chips or powder. In S.A.I.L. v. Collector of Central Excise, CEGAT had held that crushing of lime stone into lime powder does not amount to manufacture as lime powder not being known and recognised as a distinct commodity in the market. In Ajanta Marble & Chemical Industries v. Collector of Central Excise, CEGAT it was held that crushing, grinding and sieving of lime stone to obtain lime stone chips and powder amounts to 'manufacture'. Thus, there are divergent views of Courts raising bona fide doubt in the mind of the petitioners whether the crushing of lime stone lumps to obtain lime stone chips will amount to manufacture and consequently excisable under the Act? The statement recorded of the Law Officer of the petitioner company also indicates that as on 31.8.1989 there was bona fide belief in the mind of the petitioner that the process of crushing does not amount to manufacture. The aforesaid state of affair clearly indicate that the breach in payment of excise duty flows from a bona fide belief of the company that they are not liable to pay excise duty, as they were not engaged in the 'manufacture' of lime stone chips. Conversion of lime stone lumps into lime stone chips was never taken to be a 'manufacturing' process by the petitioners.

18. The proceeding for imposition of penalty being quasi-criminal in nature, the burden to prove the alleged offence is on the excise department. No acts or circumstances are brought about by the department nor are considered by the 2nd respondent to show deliberate avoidance of payment of duty. There is nothing in the Excise Act or the Rules framed thereunder that the authority is bound to imposed penalty, the moment there is default in payment of duty. The petitioners were under a bona fide belief that they are not liable to pay excise duty on the lime stone chips. The Collector Central Excise, while passing orders (Annexures M & N) imposing penalty has not at all taken into consideration this aspect of the case. Therefore, we are of the opinion, that as the petitioners were under a bona fide belief about their liability to pay excise duty the Collector, Central Excise has acted rather harshly in imposing penalty of Rs. 5,00,000/- and Rs. 50,000- under Annexures M & N. 19. Consequently, this petition is partly allowed. The orders (Annexures M & N) so far as they relate to, imposition of penalty, are hereby quashed. There shall be no order as to costs. The outstanding amount of security be refunded to the petitioners.

From a plain reading of the above findings, it is very clear that imposition of penalty being quasi-criminal nature the burden to prove the alleged offence is on the Excise department. Likewise, in the present appellants' case also no evidence or circumstances has been brought out by the department nor the same was considered by them to show deliberate avoidance of payment of duty. As held in para 18, there is nothing in the Excise Act or the Rules framed thereunder that the authority is bound to impose penalty, the moment there is default in payment of duty. Therefore, as held in the above case, the appellants in the present case are not liable to pay Excise duty on the cartons manufactured by them. So also, they are in a tiny unit and hardly made any profits and the above ratio of the High Court decision is squarely akin to the present case, as the entire Section 173Q has been examined and has also taken into consideration the provisions of Rule 173Q(1)(a), (b), (c) and (d). Therefore, learned Brother's finding that the department can proceed under Rule 173Q(1)(a), (b) & (c) and not under (d) is not correct reading of the above judgement. As the said judgement clearly analysed all the four provisions from (a) to (d) and lays down the law, Rule 173Q cannot be read in isolation, but it has to be read in conjunction as has been done in the above cited judgement.

We cannot proceed to look into the provisions of 'mens rea' as has been defined and gone into in the case of Director of Enforcement v. MCT.M.Corporation Pvt. Ltd. and Ors. cited supra, which deals with the provisions of penalty under Section 23(1)(a) of the FERA Act, 1947, which does not have similar provisions under Rule 173Q of the Central Excise Act. It is well settled principle of interpretation of statute that only those statutes which are akin and are of identical nature and are pari materia, which could be applied. In the present case, the Central Excise Act is a self-contained legislation and the interpretation laid down by the Tribunal/High Court/Apex Court under these provisions are alone to be applied and not of the other legislations which are not pari materia to the Central Excise Act/Customs Act.

12. Likewise the Tribunal in the case of Jumbo Rolls Audio (I) Ltd. held after due analysis of various judgements that the process as noted therein amounted to manufacture as new marketable product has come into existence and confirmed

the duty but set aside the penalty on the plea that prior to commencement of investigation by the department, the assessee was acting under bona fide belief that such process do not amount to manufacture and therefore, it held that Rule 9(2), 52A was not invokable for imposing penalty. In the present case also merely because the controversy was settled by one of the judgements of the Tribunal, it does not mean that intention not to pay duty has suddenly cropped up by wiping out the bona fide belief. As can be seen from the Larger Bench judgement of Three Hon'ble Judges of Hon'ble Apex Court in the case of CCE v. Paper Print & Products Co. as reported in 1996 (88) ELT 317 : 1996 (67) ECR 692 (SC) the issue pertaining to wrappers obtained by cutting unwaxed printed paper and used for packing are product of packaging industry and not product of the printing industry even though printing was still alive and was determined. The issue of like nature came up for consideration in the following decisions: (a) Johnson and Johnson Ltd. v. CCE as , wherein the Tribunal held that printed plastic labels are not the products of printing industry as printing on the label is merely incidental to their use. The same decision also decided about the printed cloth labels also being not of printing industry and so also printed aluminium labels.

(b) Metagraphs Private Ltd. v. CCE (supra), wherein the Hon'ble Apex Court clarified that the products would fall under printing industry.Garden Silk Mills v. CC wherein the question of Darey Cancard Blankets imported for printing fabrics in textile industry were being entitled to the benefit of the description under the said Notification for use in the printing industry was considered by the Hon'ble Apex Court and it has been held that 'printing industry' would not cover textile industry even though textile mill may be engaged in printing of fabrics. In this case also, the Hon'ble Apex Court followed the decision rendered in the case of Rollatainers Ltd. v. UOI as .CC v. Indian Coated Cartons (P) Ltd. as reported in 1997 (92) ELT 459 (SC), wherein the Apex Court considered the decisions of Rollatainers and that of Metagraphs Pvt. Ltd. cases and held that printed cartons are classifiable as products of packaging industry and not as products of printing industry.

(e) The issue was again considered by the Tribunal in the case of CCE v. New Jack Printing Works Pvt. Ltd. as reported in 1997 (93) ELT 78 : 1997 (71) ECR 108 (T) in the light of the Apex Court judgements wherein the issue of

classification of printed wrapping paper meant for wrapping cadbury chocolate bars was considered and held that wrapper is not 'other product of the paper printing industry' as printing function was incidental of packaging.

In view of the above controversy being still alive, it cannot be said that the issue came to an end with the decision of the Hon'ble Apex Court in the cases of Rollatainers Ltd. and Metagraphs Pvt. Ltd. as the Tribunal and Hon'ble Apex Court was still re-considering the issue in subsequent cases and hence there was still controversy lingering in the matter for parties to hold bona fide belief of item being not dutiable.

On three occasions, the matter had been referred to Larger Bench of the Tribunal of Five Members in respect of Printed Shells and Printed H.L.

Blanks being articles of paper pulp, paper board etc. are items of cartons, boxes, as can be seen from (i) CCE v. Vijay Flexible Containers (P) Ltd. of (iii) Vijay Flexible Containers Pvt. Ltd. v. CCE vide final order No. 106/2000 dated 28.2.2000. In all these cases, the judgement of Rollatainers Pvt. Ltd. (supra) of the Hon'ble Apex Court and that of CCE v. Paper Printing & Products Co. as reported in 1996 (88) ELT 317 : 1996 (67) ECR 692 (SC) was referred to. Therefore, I am of the considered opinion that controversy did not end with the judgement of Hon'ble Apex Court laying down its ratio in the case of Rollatainers Pvt. Ltd. 's case.

13. In the case of CCE v. HMM Ltd. as reported in 1995 (76) ELT 496 (SC) : 1997 (71) ECR 331 (SC), the Hon'ble Apex Court again reiterated its view that penalty is not imposable unless the department is able to sustain its demand by show cause notice under challenge on the ground of limitation and invocation of, provisions of Rule 9(2) read with Rule 173Q. Therefore, it follows that for the purpose of invocation of Rule 173Q, provision of Rule 9(2) and proviso to Section 11 A, the charges are required to be proved. In the present case, the department had fully accepted the payment of duty made by the appellants on their own.

At the time of accepting the duty, the department did not enforce the show cause notice for invoking larger period as the law on invocation of larger period was clear and no duty for larger period would have been sustainable in the facts and

circumstances of the case. The appellants on their own having paid the larger sums than what the department would have recovered on issue of show cause notice clearly indicates the appellants intention that no penalty was imposable in the case. Therefore, the judgement of the Hon'ble Apex Court in the case of HMM Ltd. would clearly apply to the facts of the present case. As in that case also it was observed that mere non-declaration of waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of Excise duty due on the said product. The plea of the counsel in that case for bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list and was accepted by the Apex Court and the Apex Court held that "per se" cannot go to prove that there was intention to evade payment of duty or that the assessee was guilty of fraud, collusion, mis-conduct or suppression to attract the proviso to Section 11A(1) of the Act. There is a considerable force in this contention and if the department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from 6 months to 5 years.

Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said subsection are more than one and if the Excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. The Apex Court further held that in the instant case, that having not been specifically stated, the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or byproduct) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty. For the above reasons, the Hon'ble Apex Court dismissed the appeal as there was no merit.

14. The position of law as far back as 1978 also stood in the same way as held in the above noted judgement of Hon'ble Apex Court on the issue of penalty. There were number of judgements on the same line of thinking and it laid down that for the penalty proceedings under the Excise Act, that there has to be an intention for evasion of duty either in terms of clandestine removal in terms of Rule 9(2) or in terms of proviso to Section 11A of the Act. In the case of Haryana State Electricity Board v. CCE of Three Members upheld the contention of the appellants that Larger period was not invokable on the demands made by the department in respect of component parts cleared by them, as they believed that it was not excisable. It also noted that show cause notice did not allege mis-statement, suppression of statement, suppression of facts, fraud with intention to evade payment of duty for extension of larger period of five years. It laid down that for the purpose of penalty, there has to be allegations of intention to evade duty by incorporating the allegations and the Tribunal held that merely because the party has not been complied with, the appellants being under bona fide impression that no duty was payable and there was no need to observe the procedural requirements and in that light imposition of penalty was not called for as no mala fide intention for evasion of duty and in the present case also no such mala fide intention has been proved as even though they are not required to pay duty and the same was accepted by the department without issue of show cause notice, as observed, if show cause notice was issued by the department for invoking the larger period, then the Court would have struck down.

15. In a similar circumstances ,the Hon'ble Apex Court in the case of CCE v. Chemphar Drugs & Liniments as held that for invocation of larger period it has to be established that the duty of excise has not been levied or paid or short levied or short paid, or erroneously refunded by reasons of either fraud or collusion of wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts & circumstances there was any fraud or collusion or/wilful misstatement or

suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case.

16. The same finding was reiterated by the Hon'ble Supreme Court in the case of Padmini Products v. CCE wherein also there was invocation of Rule 9(2) of Central Excise Rules and the controversy of not having taken licence on the imported dhoop sticks for levy of duty. The parties had taken a plea that they were under bona fide belief and the impugned goods were exempted under the item 'handicrafts'. The said plea was accepted by the Hon'ble Apex Court by setting aside the findings of the Tribunal by laying down the law in para 8 which is extracted hereinbelow: 8. Shri V. Lakshmikumaran, learned Counsel for the appellant drew our attention to the observations of this Court in Collector of Central Excise, Hyderabad v. Chemphar Drugs and Liniments, Hyderabad where at page 131 of the report, this Court observed that in order to sustain the order of the Tribunal beyond a period of six months and up to a period of 5 years in view of the proviso to Sub-section (1) of Section 11A of the Act, it had to be established that the duty of excise had not been levied or paid or short levied or short paid, or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. It was observed by this Court that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise is required before it is saddled with any liability beyond the period of six months had to be established. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal, however, had held contrary to the contention of the appellants the Tribunal noted that dhoop sticks are different products from agarbaties even though they belonged to the same category and the Tribunal was of the view that these were to be treated differently. Therefore, the clarification given in the context of the agarbaties could not be applicable to dhoop sticks etc., and the Tribunal came to the conclusion that inasmuch as the appellant had manufactured the goods without informing the Central Excise authorities and had been removing

these without payment of duty, these would have to be taken to attract the mischief of the provisions of Rule 9(2) and the longer period of limitation was available. But the Tribunal reduced the penalty. Counsel for the appellants contended before us that in view of the trade notices which were referred to by the Tribunal, there is scope for believing that agarbaties were entitled to exemption and if that is so, then there is enough scope for believing that there was no need of taking out a licence under Rule 174 of the said Rules and also that there was no need of paying duty at the time of removal of dhoop sticks, etc. Counsel further submitted that in any event apart from the fact that no licence had been taken and for which no licence was required because the whole duty was exempt in view of Notification No, 111/78, referred to hereinbefore, and in view of the fact that there was scope for believing that it was exempt under Schedule annexed to the first notification, i.e., 55/75, being handicrafts, the appellants could not be held to be guilty of the fact that excise duty had not been paid or short-levied or short-paid or erroneously refunded because of either any fraud or collusion or wilful misstatement or suppression of facts or contravention of any process of the Act or Rules made thereunder. These ingredients postulate a positive act.

Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. Shri Ganguly, appearing for the revenue, contended before us that the appellants should have taken out a licence under Rule 174 of the said Rules because all the goods were not handicrafts and as such were not exempted under Notification No. 55/75 and therefore, the appellants were obliged to take out a licence. The failure to take out the licence and thereafter to take the goods out of the factory gate without payment of duty was itself sufficient, according to Shri Ganguly, to infer that the appellants came within the mischief of Section 11A of the Act. We are unable to accept this position canvassed on behalf of the revenue. As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11A of the Act, In the facts and circumstances of this case, there were materials, as

indicated to suggest that there was scope for confusion and the appellants believing that the goods come within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licensed, would not attract the penal provisions of Section 11A of the Act. If the facts are otherwise, then the position would be different. It is true that the Tribunal has come to a conclusion that there was failure in terms of Section 11A of the Act. Section 35L of the Act, inter alia, provides that an appeal shall lie to this Court from any order passed by the Appellate Tribunal relating, among other things, to 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. Therefore, in this appeal, we have to examine the correctness of the decision of the Tribunal. For the reasons indicated above, the tribunal was in error in applying the provisions of Section 11A of the Act. There were no materials from which it could be inferred or established that the duty of excise had not been levied or paid or short levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made thereunder.

The Tribunal in the appellate order has, however, reduced the penalty to Rs. 5000/- and had also upheld the order of the confiscation of the goods. In view of the fact that the claim of the revenue is not sustainable beyond a period of six months on the ground that these dhoop sticks, etc. were not handicrafts entitled to exemption, we set aside the order of the tribunal and remand the matter to the Tribunal to modify the demand by confining it to the period of six months prior to issue of show cause notice and pass consequential orders in the appeal on the question of penalty and confiscation. The appeal is allowed to the extent indicated above and the matter is, therefore, remanded to the Tribunal with the aforesaid directions. This appeal is disposed of accordingly.

On a plain reading of the above findings it is clear that mere failure or negligence on the part of manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where

there was scope for doubt whether goods were dutiable or not, would not attract Section 11A of the Act.

This judgement, in my opinion, would settle the controversy in the present case also.

17. We can even go little further to examine the part materia provisions under Customs Act in the case of Jain Exports Pvt. Ltd. v.UOl as , wherein the Hon'ble Apex Court held that while determining the question of quantum of redemption fine, it is essential to consider the facts & circumstances relevant to the bona fide conduct of the importer in importing the goods therefore, the refusal of the Tribunal to take into account the extenuating circumstances leading to the import of the disputed goods for purposes of determining the quantum of redemption fine is incorrect. Although, it deals with redemption, in this case the plea of bona fide was under consideration.

the issue of imposition of penalty under Section 112 of the Customs Act, 1962 was under consideration. The Tribunal held that penalty is not imposable when medical certificate showing the accused in the hospital on the date of occurrence of the offence.Karnataka Public Service Commission v. B.M. Vijaya Shankar considered the situation under which bona fides are not pleadable. In that case there were clear instructions to the candidates not to write roll number on the answer books and such directions were clear and explicit. Such instructions were issued to ensure fairness in the examination and to infuse confidence into the public. The Hon'ble Apex Court while examining the plea of bona fide and honest mistake in writing numbers in the answer book, it held that such a plea is not acceptable for the reason that competitive examinations are required to be conducted by the Commission for public service in strict secrecy to get the best brain. It also held that public interest requires no compromise on it, any violation of it should be visited strictly. It further held that rule of hearing has been construed strictly in academic disciplines. It held that it should be construed more strictly in such cases where an examinee is competing for Civil Service Post, The very nature of the competition requires that it should be fair, above board and must infuse confidence. It held that if this is ignored then, it is not only against the public

interest but also erodes the social sense of equality. Therefore, bona fide plea is rejectable only in such circumstances and not in the case of taxation, as it has been held to be a good ground of defence for nonpayment of duty, if such a belief is held about an item being non-dutiable.

Tribunal held that delayed payment of duty was also not a ground for imposition of high penalty as bona fide misapprehension on the part of the appellant with regard to its duty liability was held to be a good ground for minimising the imposition of penalty.

while examining the provisions of penalty and fine under Section 112 and 125 of the Customs Act, the High Court took into consideration various judgements of the Hon'ble Apex Court to hold that it is well settled that in the matter of imposition of redemption fine and/or penalty mens rea and/or conduct and/or attending extenuating circumstances are material and relevant. This view had earlier been reiterated by the Hon'ble Apex Court in the case of Akbar Badruddin Jiwani v. CC as wherein, it has been held that the quantum of penalty and fine in lieu of confiscation was extremely harsh, excessive and unreasonable bearing in mind the bona fides of the appellant. Therefore, the plea of bona fide is to be considered not only for Rule 173Q(1)(d) alone but it applies to entire Rule 173Q as held by the High Court of Madhya Pradesh in the case of S.N. Sunderson (Minerals) Ltd. v. Supdt. (Preventive) C.Ex., Indore (supra).

22. The Tribunal reiterated the similar view earlier in the case of Indian Motor Works v. ACCE as , wherein in light of the judgement of Punjab & Haryana High Court and that of the case of Hindustan Steel Ltd. v. State of Orissa Thus the action of the appellants in making payment of duty though not the result of show cause notice or demand, followed an enquiry by the department in this regard. Seeing the inevitability of further developments they paid up the duty. A case of virtue out of necessity. Neither at the time of the removal of the goods without payment of duty nor during the proceedings before the Additional Collector had they raised a plea that the goods were exempt from duty. This point, seeking support from the judgement of the Hon'ble Punjab & Haryana High Court has been raised in the appeal to strengthen their case for setting aside the penalty. Though

goods had been cleared without payment of duty without any apparent conviction that the goods were eligible for duty-free concession but simply removed without payment of duty, the fact that the classification of the goods in question has been the subject matter of decisions contrary to the stand of the department would support their case for setting aside the penalty imposed on them. The fact that they were apparently not guided by the said judgement in effecting the clearances without payment of duty would not make the position difficult for them. Had they been aware of the judgement even the duty may not have been paid by them. The Additional Collector while imposing the penalty had observed in his order that he was taking a lenient view. In the circumstances of the case, we feel the leniency should extend further and accordingly we allow the appeal and set aside the order imposing penalty.

As can be seen from the above ruling that the fact the appellants were apparently not guided by the said judgement in effecting the clearances without payment of duty would not make the position difficult for them.

Had they been aware of the judgement even the duty may not have been paid by them. Therefore, the Tribunal held that the leniency given by the Additional Commissioner to impose lesser penalty was in the facts and circumstances of the case is extended further in setting aside the entire penalty. In my humble opinion, this judgement would also squarely apply to the facts of the present case, Hence, I accept the appellants' pleas and set aside the impugned order imposing penalty under Rule 173Q of the Central Excise Act.Chennai.

(S.L. Peeran)Dated : 21.9.2000 Member (J) In view of the difference of opinion between the two Members, the matter is referred to Third Member to determine the points arising therefrom for decision: (a) Whether the penalty is imposable in the present case as held by Member (T) and the same is to be reduced to Rs. 50,000/- in the facts and circumstances of the case? (b) Whether the penalty is not imposable in the facts and circumstances of the case as analysed by Member (J) in his order and appeal to be allowed has held by him? Sd/- Sd/-(V.K. Agrawal) (S.L. Peeran) Member (T) Member (J) 23. This matter has been referred to me to resolve the difference of opinion between the learned Member (T) and the learned

Member (J). The facts are not repeated as they have been recorded in the order of learned Members.

24. This matter was heard on 27.10.00 when Shri J. Sankararaman learned Counsel for the appellants and Shri S. Kannan learned DR for the Revenue appeared and after considering the submissions made by Shri S.Kannan, that the decision of the Hon'ble Supreme Court in the case of Rollatainers as has settled the issue and the cartons being finished product would be dutiable and the reasons arrived at by the learned M(T) in the order reiterated with further submission that in this case the department detected the case and there was no suo motu payment of duty and if there was any bona fide belief or otherwise, the appellants should have approached the department for clarification which was not done. He further submitted that mere contravention is sufficient for imposition of penalty under Rule 173Q(1)(a)(b) for which mens rea is not required since it is a civil liability. Section 6 is mandatory requirement and for not taking the licence under Rule 174, penalty could be imposed. He relied upon the decision in the case The learned Counsels . reiterated the entire grounds and took me through the period of demand and the decisions of the Karnataka High Court and the Supreme Court on the issue to contend that whether the products in question viz. printed carton would be liable to excise duty was a matter of confusion and a bona fide belief was held by the appellants that it was not liable to excise duty. As the process undertaken by them did not amount to manufacture, therefore, penalty was not called for in the facts of this case. As regards the Karnataka High Court decision, learned Counsel in turn relied upon the decision of the Supreme Court in the case of Akbar Badruddin as and for the submission that for bona fide belief, penalty could not be imposed, he relied on the decisions in the case of HMM as and Siemens Ltd. v. CCE as reported in 1999 (34) RLT 831 (CEGAT) : 1999 (85) ECR 229 (T) were relied upon wherein the decision of the Govt. of India in the case of Dhampur Sugar Mills Ltd. as reported in 1990 (46) ELT 400 (GDI) : 1990 (26) ECR 503 (GOI) was relied. The Govt. of India in the case of Dhampur Sugar Mills had observed that penalty was not imposable where the assessee had taken corrective steps before the issue of show cause notice. The Counsel further submitted that there was no case for imposition of penalty.

Having the benefit of going through the order of the learned Member (T) and the learned Member (J) and after considering the material on record I find: (a) Learned Member (T) in his order has strongly relied upon the fact that no correspondence was shown for having approached the Central Excise authorities and therefore, there was omission on the part of the appellants and penalty could be imposed in the facts and circumstances and evidence would determine the quantum of the same.

Examining the provisions of Rule 173Q(l)(a)(b)(c)(d), he came to the conclusion that since Sub-rule (a)(b) and (c) of Rule 173Q(1) did not bring out any requirement of mens rea. He relies on the decision reported in 1995 (8) RLT 759 and 1992 (62) ELT 388 and and as observed by the Hon'ble Supreme Court for penalty for tax delinquency of civil obligations, the remedy is penalty and as different term penalty for crime therefore he concludes that penalty could be imposed or simpliciter contravention of Rule 173Q(l)(a)(b)&(c).

(b) Learned Member (T) has differentiated the findings in the case reported in 1999 (34) RLT 831 : 1999 (85) ECR 229 (T) (Siemens Ltd.) by observing that, that was a case of MODVAT reversal and in the case of HMM, 1975 (76) ELT 497 (SC) : 1997 (71) ECR 331 (SC), no duty was confirmed, while in the present case duty liability has been accepted by the appellants. He concluded that no suitable explanation for the basis for bona fide belief exists and penalty could be imposed and he relied upon the decision in the case reported in 1995 (9) RLT 175 (T) : 1995 (60) ECR 518 CD and in and thereafter he reduced the penalty from Rs. 3 lakhs to Rs. 50,000/-, without arriving at any reason why the leniency shown by the lower authority is not sufficient and how and why Rs. 50,000/- would be adequate and justified, and therefore, imposition of penalty of Rs. 3 lakhs was incorrect and not called for.

(c) I have considered the facts of this case, from the show cause notice in the paper book and I find that there was no demand for duty issued and the show cause notice is only for imposition of penalty. The show cause notice itself observes that the assessee had submitted RT 12 returns for the period from 1/98 to 3/98 with the Range office mentioning about the past clearances and the duty

was discharged by them for the period from 1993-94 to 1997-98. The same have been verified by the Range Office. They have found that duty paid by the assessee was correct and the same has been communicated to the assessee by letter dated 6.4.1998. Hence the show cause notice mentioned that duty paid by the assessee has been adjusted against the duty liability for the above period and therefore no demand lies against the assessee. The larger Bench of the Tribunal in the case of Jay Yuhshin Ltd. v. CCE as has held that: ...as regards the contention of the appellants that the SCN issued under Section 11A(1) would apply only to a situation where a duty payment is subsisting at the time of issue of notice and where no such outstanding duty liability exists at the time of issuing the SCN, we are of the view that a careful reading of Section 11 A(l) does not allow such construction to be put on the said provision. In as much as Section 11A(1) gives power to the Central Excise Officer to serve a notice within a period of six months from the 'relevant date' from the date when non-levy/non payment or short levy/short payment has occurred, we are of the view that so long as it is not in doubt that there has been an occurrence of non-levy/short levy/or non-payment/short payment on the relevant date the pre-conditions for issuance of SCN under Section 11A(1) are fully met and notice validly issued. In the instant case there is no dispute that clearance of excisable goods on short payment of duty had taken place. The fact that the differential duty was subsequently debited (albeit voluntarily') by the assessee before the issue of SCN will not debar the issuance of SCN in relation to the short payment occurring on the relevant date Therefore, a show cause notice for demand of duty, could have been and should have been issued to determine the duty liability. If that has not been done, I find no hesitation in coming to a finding that no demand of duty has been made in the show cause notice. Possibly, if a" -demand was made, the same could not be sustained in the facts of this case being barred by limitation. Therefore, I find that the Supreme Court decision in the case of HMM is applicable that penalty was not imposable unless the department is able to sustain its demand made in the show cause notice would be the law applicable, which was binding on the department and this Tribunal to come to a finding that no penalty was imposable. I, therefore, cannot subscribe to the differentiation being made by the learned M (T) about this case and its applicability in the facts of this case.

(d) I have considered the detailed reasoning of the learned M (J) in the order prepared by him and would agree with his findings and I cannot persuade myself to believe that the ruling of the Supreme Court as adopted by the learned M (T) in the case which was a case under the Income Tax Act a direct tax, and the case of 1996 (12) RLT 364 (SC) : 1996 (63) ECR 349 (SC) which was a case of penalty under Section 23(1) of FERA Act, 1947, a regulating Act to be applicable, to a proceeding under the Central Excise Act, 1944. Since penalties under a direct tax would be a 'civil obligation' distinct from penalties under 'indirect tax' like Central Excise law where the assessees are only collecting agents for the goods manufactured and produced by them and the actual tax burden is passed on to the actual consumer of the goods. The nature of levy under the Central Excise and Income tax being a tax on the assessee himself, cannot be equated in concept and in law.

Therefore, the concept of penalty under these two laws cannot be equated. As regards the FERA Act, that law was regarding prohibitions and regulations imposed as regards Foreign Currency & Exchange, it is not a tax statute, therefore the concept of penalty in a regulating law i.e. FERA Act, cannot be equated with the concept of penalty in the Indirect tax Act, i.e. Central Excise Act, 1944. Therefore, reliance on the Supreme Court decision for imposition of penalty under Income Tax law and the FERA law will not be applicable in the case under Central Excise law.

(e) Though mens rea is not a stipulated ingredient essential in some of the clauses of Rule 173Q, to levy penalty, however, visit of penalty itself would depend upon its existence. Quoting the decision of the Supreme Court in the case of Hindustan Steel Ltd. as , Badruddin Jiwani v. CCE , Jain Exports P. Ltd. , Navinchandra v. UOI , the Tribunal decisions in the case , , would be relevant and relying on them one can come to a finding that penalty could not be imposed if there is a technical violation or venial breach only of any statutory provisions and/or imposition of penalty for failure to carry out statutory obligations is a result of quasi-criminal proceedings and penalty will not be ordinarily imposed unless the party obliged or acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty need not be

imposed merely because it is lawful to do so and even if imposition of penalty is prescribed, the authorities competent to impose penalty is justified in refusing to impose such penalty when the breach flows from the bona fide belief that the offender was not liable. The Calcutta High Court after exhaustive discussion in the case of Extrusion v. CC Calcutta on the subject observed that mem rea, conduct and/or attending extenuating circumstances are material and relevant and the Tribunal must consider all such material circumstances before redemption fine and penalty are visited upon a person. It is only if there was a device to save duty, if it is detected, penalty could be imposed. Therefore, under the clause of Rule 173Q where mens rea has been excluded non compliance of the terms of those clauses though well established, levy of penalty will depend upon the existence of mens rea and the Tribunal will be justified in not levying penalty in view of the judgement of the Supreme Court in the case of Hindustan Steel Ltd. (supra). In the case before me, when I find that the levy of duty on Printed Cartons was under a doubt, the bona fide belief and subsequent conduct of immediate compliance indicating the same lead me to the finding that no penalty is called for.

(f) In the present case penalty of Rs. 3 lakhs was imposed by the lower authority considering the lenient view taken by him which is reduced to Rs. 50,000/- in the order prepared by learned M(T).

However no reasons have been arrived at as to why Rs. 3 lakhs was excessive and Rs. 50,000/- should be justified. To my mind, no imposition of penalty in this case was called for.

25. In view of my findings, I would respectfully agree with the findings of learned M(J) and cannot persuade myself to accept the findings of learned M(T) and consider imposition of penalty in this case under Rule 173Q(l)(a)(b)(c).

The matter may be placed before the original bench for further orders.

Sd/- In the light of the majority view, the impugned order is set aside and appeal allowed.

Sd/- Sd/- (V.K. Agrawal) (S.L. Peeran) Member (T) Member (J)