IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 122 OF 2005

The Commissioner of Central Excise } Appellant
versus
M/s. Hindustan Petroleum Corpn. Ltd. } Respondent

Mr. Y. R. Mishra with Ms. S. D. Bhosale for the Appellant.

Ms. Padmavati Patil i/b. M/s. CEN-EX Services for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.

DATED :- FEBRUARY 27, 2015

ORAL JUDGMENT :-(Per Sunil P. Deshmukh, J.)

This Appeal had been admitted on the following two substantial questions of law, as have been referred to in the order dated 13th January, 2006.

> "(i) Whether the assessee is liable for penalty under Rule 173Q for removal of goods without payment of duty?
>
> (ii) Whether the penalty under Rule 173Q is leviable if the assessee removes the goods without payment of duty and even though the duty has been paid subsequently by the assessee before issue of SCN?"

2) A show cause notice was issued to Respondent/Assessee alleging that goods were cleared without payment of Central Excise Duty and as such in contravention of Rules 173G and 173-G(1) read

with Rule 9(1) of the Central Excise Rules, 1944 as were applicable at that time. The Assessee, on 1st October, 1991 debited Central Excise Duty of Rs.33,57,360/- instead of September, 1991 and as such there is contravention of the Rules.

3) In reply to the notice, the Assessee had submitted that it is a Government Company engaged in the business of refining of crude oil into various petroleum products and marketing thereof, covered under self removal procedure as per Chapter VIIA of Central Excise Rules. Due to industrial unrest from July, 1991 to November, 1991 day to day activities were adversely affected and the estimated quantities cleared could not be posted in the PLA Account and daily balance could not be arrived at. Deposits were therefore being made on provisional basis to cover the possible withdrawal for each day. It was submitted that there was no intention to evade payment of duty while the goods had cleared. It was submitted in such a case penalty could not be imposed, it being discretionary and the breach being unintentional and had occurred in the circumstances and purported to rely upon the decision of the Hon'ble Supreme Court in the case of *Hindustan Steel Limited vs. State of Orissa* reported in **1978(2) ELT 3159.** Reliance was also placed on a Judgment in the case of *M/s. Jay Engineering Works Ltd. vs. Collector of Central Excise* reported in **1984(16) ELT 534** impressing upon that the

authority competent to impose penalty can waive it if it was only technical and unintentional. The mistake was unintentional and not deliberate.

4) In the order-in-original, however, the Assistant Commissioner of Central Excise purported to consider that Accounts for the month of September, 1991 does not reflect sufficient balance in the PLA Account, which would take care of the duty amount payable and as such he considered that there was breach of the Rules and imposed penalty of Rs.10 lacs.

5) The matter was taken in Appeal by the Respondent Assessee. The Tribunal considered that on noticing error a corrective action had immediately been taken and the amount was paid even before the show cause notice was issued. The Tribunal, in view of the same, relied upon a Larger Bench decision in the case of *Machino Montel (I) Ltd.* **2004 (168) ELT 466** and has set aside the order of the Commissioner.

6) Mr. Mishra appearing for the Appellant/Revenue submits that from the position that no proper balance had been maintained in the PLA Account which would have taken care of the duty dues then and rule 173Q being specific and mandatory, no fault should have been

found with the order-in-original passed by the Assistant Commissioner, which is in accordance with the rules and procedure. For said purpose he purports to rely on the case of *Rajasthan Spinning and Weaving Mills vs. Commissioner of Customs and Central Excise* **(2009) 13 SCC 448**, wherein, according to him, the payment made before or after issuance of show cause notice does not alter liability of penalty.

7) Facts of said cited case in the matter of *Rajasthan Spinning and Weaving Mills* (supra), it appears that there was deliberate deception with intention to evade duty by adopting the means referred to in the order. It was a case based on 11AC and *Explanation* to section 11AC, in case of short levy, non levy, short payment or in the case of erroneous refund is, by reason of fraud or collusion or willful suppression of facts and in contravention of the rules with an intention to evade payment of duty, there will not be exoneration from liability of penalty. Mr. Mishra further refers to a Judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Hyderabad-III vs. Prudential Spinners Ltd.* Reported in **2011 (115) SCC 536** to contend that the authority would have no discretion in quantifying the amount and penalty must be imposed. However, it is not disputed by the learned Counsel on either side that present case is governed by the Rules as were subsisting till 1991 and section 11AC has

been incorporated subsequently. Even otherwise, in the present matter, there is neither any allegation of fraud, deception nor any willful action with an intention to evade payment of duty or any willful breach of rules with such an intention.

8) Ms. Padmavati Patil the learned Counsel appearing for the Respondent submits that reliance being placed by the Revenue on the decisions is misplaced. For, the case does not relate to Rule 173Q as is applicable in present matter. It is further being submitted that the imposition of penalty had to be with reference to the facts involved in the case and power could be invoked following and getting guided by sound judicial principles in exercise of discretion. In the present matter, the facts are not disputed at all. There was no intention of evasion of duty underlying non payment of excise duty when it was due and on noticing the lapse, corrective measures have been taken and requisite duty has been paid.

9) Learned Counsel appearing for the Respondent relies upon a Division Bench Judgment of this Court in the case of *Union of India vs. Kirloskar Oil Engines Ltd.* **2006 (206) ELT 85** urging that Tribunal having exercised discretion adhering to sound judicial principles, it does not require any interference with by this Court. It cannot be said that the discretion has been perversely exercised by the Tribunal. He further

submits that the factual position about the aberration occurring in delayed payment of duty was unintentional and not deliberate is not in dispute. In such a case, the questions which have been posed in the present matter deserve to be answered in the negative. He further buttresses his submissions with the case of *Commissionerof Central Excise, Delhi-III, Gurgaon vs. Machino Montell (I) Ltd.* Reported in **2004 (168) ELT 466 (Tri. - LB)** to point out that while it is not in dispute that duty has been paid by the Assessee even before the Show Cause Notice had been issued, in such a case, no penalty could be imposed.

10) In this case, the position is undisputed that the Assessee has paid the duty on 1st October, 1991. The show cause notice had been subsequently issued. The veracity of explanation for delayed payment of duty has not been disputed by the Revenue. In such a case, there does not appear to be an element of deliberation or for that matter intentional delayed payment of duty. The duty for September, 1991 has been paid immediately on 1st October, 1991. The delay is attributable to disturbance in industrial relation. In the prevailing situation that the balance in PLA accounts could not be maintained covering the duty liability. This is not alleged to be intentional or deliberate.

11) Having regard to this position, we do not think that this is a fit case and it would be appropriate to interfere with the discretion exercised judicially and properly. It is to be further taken into account that the duty payment had been made even before the issuance of show cause notice, which, to a large extent, goes to show that the aberration had occurred unintentionally and further that on realisation, there had been immediate action by making payment of duty.

12) Looking at aforesaid, it cannot be said that the Assessee can be held liable for penalty under Rule 173Q. As such, both the questions as have been framed are answered in the negative. The Appeal stands dismissed. No costs.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**