

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/2075/2005-2078/2005 - EX[DB]

Date 01/02/2011

Assistant Registrar
 C.E.S.T.A.T, New Delhi

To :
 M/S K.M.GASES PVT LTD, c/o
 M/S.K.M. SUGAR MILLS LTD.(GAS DIVISION)
 MOTINAGAR, FAIZABAD -UP

← 16. SH. HANUMAN SINGH,
 17. SH. R.L. GUPTA,
 18. SH. MADHUKAR MISHRA, Appellant

M/S K.M.GASES PVT LTD

C.C.E.ALLAHABAD

Vs
 Respondent

I am directed to transmit herewith a certified copy of Final order No. 134-137/ 2011 EX[DB] dated 22-12-10
 passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

b h

Assistant Registrar
 (Excise Appeal Branch)

Copy to :

1. Respondent
 C.C.E.ALLAHABAD

2. Adv. / Consult

MR.S.P. OJHA

299, BAGHAMBARI HOUSING
 SCHEME, ALLAHAPUR,

3. C.D.R

4. Bar association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

7. Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

10. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)

12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

13. Office Copy

14. Guard file

15. HON'BLE PRESIDENT.

b h

Assistant Registrar
 (Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I**

Excise Appeal No. 2075-2078 /2005-Ex(BR)

[Arising out of Order-in-Appeal No. 42 to 46/CE/Alld/ 2005 dated 1.1.2005 passed by Commissioner (Appeals) Customs & Central Excise, Allahabad]

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

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- | | | |
|--|---|------------|
| 1. Whether Press Reporters may be allowed to see :
the Order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982? | : | <i>Yes</i> |
| 2. Whether it should be released under Rule 27 :
of the CESTAT (Procedure) Rules, 1982 for
publication in any authoritative report or not? | : | <i>Yes</i> |
| 3. Whether Their Lordships wish to see the fair :
copy of the Order? | : | <i>Yes</i> |
| 4. Whether Order is to be circulated to the :
Departmental authorities? | : | <i>Yes</i> |
-

Excise Appeal No. 2075 /2005-Ex(BR)

M/s. K.M. Gases Pvt. Ltd.

Appellants

Vs.

Commissioner of Central Excise
Allahabad

Respondent

Excise Appeal No. 2076 /2005-Ex(BR)

Hanuman Singh

Appellants

Vs.

Commissioner of Central Excise
Allahabad

Respondent

Excise Appeal No. 2077 /2005-Ex(BR)

R.L. Gupta

Appellants

Vs.

Commissioner of Central Excise
Allahabad

Respondent

Excise Appeal No. 2078 /2005-Ex(BR)

Madhukar Mishra

Appellants

Vs.

Commissioner of Central Excise
Allahabad

Respondent

Appearance:Shri S. P. Ojha, Consultant for the Appellants
Shri N. Anand, DR for the Respondent**CORAM:** Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

Date of Hearing/decision : 22.12.2010

FINAL ORDER 134-137 / 2011-EX**Per Shri Justice R.M.S. Khandeparkar** (for the Bench):

Since all these appeals arise from common impugned order and involve common questions of law and facts, they were heard together and are being disposed of by this common order.

2. These appeals arise from order dated 31.3.05 passed by the Commissioner (Appeals), Allahabad. By the impugned order, the Commissioner (Appeals) has dismissed the appeals filed by the appellants herein against the order passed by the adjudicating authority. By order dated 30.11.2004, the Jt. Commissioner, Faizabad had

confirmed the demand of Rs.1,42,373/- in relation to the amount received by the appellant company towards acetoning charges while appropriating sum of Rs.17,014.90p which was already paid by the appellants. It has also confirmed the demand of Rs.1,80,276.38p against the appellant company on account of the amount collected towards price variation while appropriating the said amount which was already deposited. The Joint Commissioner has also confirmed the demand of Rs.4,78,213.82p against the appellant company in respect of the amount collected from the customers towards repairing and handling charges. The said demand has been confirmed along with interest payable thereon in terms of section 11AB of the Central Excise Act, 1944 and has also imposed penalty of Rs.8,00,863.41 under section 11AC of the said Act read with Rule 173Q of the erstwhile Central Excise Rules, 1944. Besides personal penalty of Rs.25,000/- has been imposed against the appellant Shri R.L. Gupta, Rs.50,000/- penalty was imposed against the appellant Shri Madhukar Mishra and penalty of Rs.5,000/- against the appellant Shri Hanuman Singh while exercising powers under Rule 209A and 210 of the erstwhile Central Excise Rules, 1944. The penalty of Rs.50,000/- has also been imposed against one Shri P.R.Yadav, General Manager of the appellant company. However, he expired during pendency of the proceedings in his appeal filed before the Commissioner (Appeals), and his appeal was, therefore, disposed of as infructuous.

3. The appellants were engaged in manufacture of dissolved acetylene gas (hereinafter referred to as DA gas) classifiable under Chapter 2901.10 of Central Excise Tariff Act, 1985. They were availing SSI exemption benefit. Pursuant to investigation carried out by the department, it was revealed that the appellants were engaged in suppression of value of DA gas as also under-valuation thereof with intention to evade payment of duty. The appellants had not included the value of acetone supplied in cylinders, i.e. acetoning charges amounting to Rs. 12,51,821.61p being the value of DA gas supplied to various parties during the period from February, 1995 to November, 1999, thereby evading the Central Excise duty to the tune of Rs.1,42,373.21p; the appellants had not paid duty amounting to Rs.1,80,276.38p on account of an amount of Rs.11,47,818.97 p collected by them from Railways on account of price variation by issuing supplementary bills for the period from 20.9.95 to 27.3.99; and the appellants had received additional amount in the garb of repair and handling charges whereas same was not included in the original price of DA gas and consequently, the Central Excise duty payable thereon was not paid, by artificially suppressing the value of DA gas, for the purpose of disclosing its price for inclusion in the assessable value and part thereof being shown as repair and handling charges resulting in evasion of central excise duty to the tune of Rs.4,78,213.82ps for the period from February, 1995 to November, 1999.

4. In the course of investigation, various statements came to be recorded including that of Shri R.L.Gupta and Shri P.R. Yadav. Consequently, a show cause notice dated 31.1.2000 came to be issued to the appellants. The same was contested by the appellants and the proceedings in respect thereof culminated in passing of the order dated 30.11.04 by the Joint Commissioner as stated above. The appeal carried against the same did not yield favourable result to the appellants and hence, the appellants are before us.

5. As far as the charge of non-payment of duty to the tune of Rs.1,80,276.30 ps is concerned, the same relates to the amount collected on account of price variation by issuing supplementary bills from Railways, and the appellants have already paid the same and have not contested the order in that regard. The issues in these appeals, therefore, are confined to two items, one relating to acetoning charges and other pertaining to the repair and handling charges. The appellants have also disputed the personal penalty imposed and have also raised the issue relating to bar of limitation.

6. The learned advocate for the appellants placing reliance in the decision in the matter of Government of India vs. Madras Rubber Factory Ltd. reported in [1995 (77) ELT 433 (SC)], Indian Oxygen Ltd. vs. Collector of Central Excise reported in [1988 (36) ELT 723 (SC)], Baroda Electric Meters Ltd. vs. Collector of Central Excise reported in [1997 (94) ELT 13 (SC)], Collector of Central Excise, Bombay III vs. Century Spg. & Mfg. Co. Ltd. reported in [1997 (94) ELT 16(SC)];,

Saurabh Gases vs. Commissioner of Central Excise, Meerut reported in [2005 (183) ELT 401 (Tri-Del.)], M.Hariraju vs. CCE, Hyderabad reported in [1998 (100) ELT 203 (Tri)], S.R. Jhunjhunwala vs. CCE, Mumbai II reported in [1999 (114) ELT 890 (Tri)], Vijayawada Bottling Co. Ltd. vs. CCE, Guntur reported in [1997 (94) ELT 433 (SC)], and Benzo Chem Industries (P) Ltd. vs. CCE, Jalgaon reported in [2007 (216) ELT 94 (Tri-Mum)], and drawing our attention to the provisions of Rule 35, 36 and 37 of Gas Cylinders Rules, 2004 as well as to the Circular No. 7/89-CX.I, dated 7.7.1989 issued by the Board submitted that the appellants under the statutory provisions have to take preparatory steps in relation to packing material for the LP gas and such an expenditure in relation thereto cannot be included in the manufacturing cost and, therefore, cannot form part of assessable value. Referring to Rule 37 of the Gas Cylinders Rules, 2004, learned advocate submitted that the provisions contained thereunder apparently disclose that any solvent used in the process of filling of LP gas in the container cannot be one capable of chemical reaction with the acetylene gas or with the pores substance or with the metal of the cylinders and if the acetone is used as a solvent, it has to comply with the requirements of IS:170. The quantity of acetone including the gas in solution has to be such that cylinders meet the requirement of additional tests specified in IS:1312. The requirement of compliance of these provisions of the Rules, according to the learned advocate, itself discloses that the acetone gas is not consumed by the customers and it is returned along with the

empty container to the appellants and, therefore, the value thereof cannot form part of the assessable value. Referring to para 2 and 3 of the circular dated 7.7.1989, it was contended that the Board itself has clarified that the maintenance and repair charges of such containers cannot be included in the assessable value. Being so, the authorities below erred in confirming the demand in relation to acetoning charges. He further, submitted that the decisions relied upon would clearly support the contentions of the assessee which has been totally ignored by the authorities below. It was further sought to be contended that as regards the repair and handling charges, the findings arrived at by the authorities are without any basis and ignoring the fact that the price variation in relation to the price of the product supplied to the Railways and that to the others was essentially based on the difference in the volume of demand by two types of customers and that therefore, there was no statutory bar for such price variation.

7. The DR on the other hand, relying upon the decision in the matter of Kota Oxygen (P) Ltd. vs. CCE, Jaipur reported in [2000 (121) ELT 369 (Tri)] as well as in 2001 (128) ELT 68 and Best Liquifiable Gases Ltd. vs. CCE, New Delhi reported in [1997 (95) ELT 228 (Tri)] submitted that the authorities below after taking into consideration, the process of manufacturing and use of acetone by the appellants has arrived at correct finding regarding liability of duty on acetylene charges and this finding is clearly borne out from the records and in that regards, drew our attention to the contents of the show cause notice,

reply thereto and the contents of the orders passed by the authorities below. He, further submitted that the statements of Shri R.L. Gupta and Shri P.R.Yadav clearly disclose admission of the relevant facts which lend clear support to the findings arrived at. He further, submitted that both the deponents had clearly admitted the peculiar modus operandi adopted by the appellants in relation to collection of acetoning charges and regarding the bifurcation of the value of DA gas, a part thereof being included in the amount disclosed in the invoice to form part of assessable value whereas part thereof being included in the repairing and handling charges.

8. It was also sought to be contended on behalf of the appellants that undisputedly, the demand relates to period from February, 1995 to November, 1999 whereas the show cause notice was issued in January, 2000 without any justification for invoking the extended period of limitation. It was further, submitted that all the necessary facts were clearly disclosed by the appellants in the invoices and other statutory documents required to be filed by the assessee and, therefore, there was no case of any suppression of relevant facts to justify invocation of extended period of limitation. It was also contended that the orders passed by the authorities below nowhere disclose that the officer of the company who has been subjected to personal penalty had either knowledge or by reason to know that any excisable goods were liable to confiscation and therefore, no personal penalty could be imposed under Rule 209A of the elsewhere Central Excise Rules. It was further

contended that Rule 210 of the said Rules is also not attracted in the case of individual unless he/ she himself/ herself is the assessee.

9. The DR on the other hand, submitted that the authorities below have clearly found from the records that the relevant facts in relation to both the issues were never disclosed by the appellants and the same came to light in view of the investigations carried out by the department.

10. As regards the first point for consideration, which relates to duty on acetoning charges, the Commissioner (Appeals) has clearly observed in the impugned order that it is an admitted fact that the appellants are engaged in manufacture of dissolved acetylene gas and for keeping the gas in a dissolved condition, acetone is used as a solvent and a specific quantity of solvent is filled in the cylinders to keep it in the dissolved condition. Considering the same, the authorities below have arrived at a finding that for manufacture of acetylene gas in dissolved form, the process of acetoning is essential and, therefore, directly connected with the manufacturing process of acetylene gas. In that regard reliance has been placed in the decision of the Tribunal in the matter of Best Liquifiable Gases Ltd. cited supra as well as in the matter of Collector of Central Excise vs. Rishi Gases Pvt. Ltd. reported in [1989 (42) ELT 423 (Tri)].

11. In Best Liquifiable Gases Ltd., the Tribunal dealing with similar issue having arisen in similar set of facts placing reliance in the decision in the matter of Rishi Gases Pvt. Ltd., had held thus:-

“4. The connection between acetone and acetylene gas has been considered by the Tribunal in the decision in Collector of

Central Excise v. Rishi Gases Pvt. Ltd. [1989 (42) E.L.T. 423 (Tribunal)]. The Tribunal referred to Kirk Othmar's Encyclopaedia of Chemical Technology which stated that acetone is a solvent for acetylene and that a specified quantity of solvent is added to cylinders as it dissolves many times its own volume of acetylene and its purpose is to increase the amount of acetylene that may be safely charged and shipped. It was also noticed that acetylene is highly explosive substance and cannot be marketed without acetone. It is thus clear that the excisable product manufactured and cleared by the appellant is acetylene gas dissolved in acetone and packed in metal containers. That being so, acetoning charges should be part of the assessable value." [emphasis supplied].

12. The Commissioner (Appeals) has clearly arrived at a finding that, "it is process only to keep the acetylene gas in a dissolved state and since the goods manufactured by the appellants are dissolved acetylene gas, the process to keep the gases in dissolved condition is not but manufacturing process and its cost is includable in the assessable value of the goods. It cannot be equated as service and maintenance charges of cylinders". It is pertinent to note that the gas is required to be cleared for the customer's use in the dissolved form which would disclose that till the time of clearance of the relevant product, the acetones' presence along with the acetylene gas is absolutely necessary which itself would disclose that till the completion of manufacturing process and clearance of the product in question for the use of the customers, acetone plays an important part and its function in that regard, cannot be disputed. Being

so, it forms part of manufacturing process as has been observed by the authorities below.

13. In Indian Oxygen Ltd. case, attention was drawn to para 5 thereof wherein it was held that the duty of excise is a tax on the manufacture, not a tax on the profits made by a dealer on transportation. Once it is clear that for free presence of acetylene gas in dissolved state the acetone plays pivotal role, question of classifying the acetone as forming part of transportation does not arise.

14. In Baroda Electric Meters Ltd., the Apex Court had observed that in Indian Oxygen case it had ruled that duty of excise is a tax on the manufacture and not a tax on the profits made by a dealer on transportation. Considering the same, the decision of the Tribunal in that case was held to be bad in law. However, the said decision can be of no help to the appellants and this is apparent from the very first sentence of the said order which reads thus: "The Tribunal accepted the position that equalised freight was charged by the appellant from everyone, but proceeded to say that even though freight cannot be a part of the assessable value that wherever freight actually paid was less than the amount collected by way of freight and transportation charges the difference was appropriated by the appellant and, therefore, the same would be a part of the assessable value." Apparently, it was in totally different set of facts.

15. In Century Spg. And Mfg. Co. Ltd. case, the Apex Court refused to interfere in the order of the Tribunal wherein it had been held that the

cost of packing would include expenses on maintenance and repairs of tonners / cylinders which were durable and returnable and further, that show cause notice admitted that the maintenance and service charges were cost of packing. As already held above, acetone has nothing to do with the packing or maintenance or repairs of the packing material.

16. In Saurabh Gases case, while relying upon the decision of the Apex Court in Vijayawada Bottling Co. Ltd. vs. CCE reported in [1997 (94) ELT 433 (SC)], it was held that unloading, testing, repair and rental charges of the cylinders are not includible in the assessable value of the industrial gases. Needless to say that acetone does not relate to the activities relating to unloading, testing, repair and rental charges of the cylinders.

17. In Vijayawada Bottling Co. Ltd. case, the dispute was related to service charges relating to process of packing after the manufacture of aerated waters and not in relation to any activity in the course of manufacture of aerated waters. The circular dated 7.7.89 in para 2 thereof observed that Board was of the opinion that in case of durable and returnable containers, their value is not required to be included in the assessable value and therefore, the question of inclusion of any maintenance or repair charges of such containers in the assessable value does not arise. The said observation was made taking into consideration the decisions of the Apex Court and the Tribunal. We fail to understand how the said circular can be of any help to the appellants in the facts and circumstances of the case. It clearly relates to the

containers and not in relation to any item used in the process of manufacture of final product.

18. It has been strenuously contended on behalf of the appellants and even repeated in the course of order being dictated that the appellants did not avail Cenvat credit in relation to acetone. Merely because assessee chooses not to avail certain benefit, that cannot give rise to any right in favour of the assessee to claim another benefit to which he is not entitled to claim in terms of provisions of law.

19. As regards the second point relating to repair and handling charges, as rightly pointed out by DR, department had elaborately clarified the modus operandi adopted by the appellants whereby the cost of acetoning was included in the repair and handling charges in the case of supply of product to the parties other than Railways, and thereby it was avoided to be included in assessable value. Details in that regard including statements made by Shri R.L. Gupta, P.R. Yadav, as also Shri Ram Pujan Verma, DA plant operator of the appellant company were stated in the show cause notice issued to the appellants and all those facts including the statements of those officers were never disputed by the appellants in their reply. Rather the reply filed by the appellants confirmed the said modus operandi adopted by the appellants. The contention of the appellants was however that merely because the price of the final product charged to the private parties was different from the one charged to Railways, that itself could not be a justification to insist for inclusion of such cost in the assessable value. In other words, the

defence of the appellants to such charge was that acetone being filed in the containers to keep the acetylene gas in dissolved condition till that container is used by the customers, the activity in that regard related to repair and handling charges and therefore, it could not be included in the assessable value. As already seen above, the acetone forms part of the manufacturing process and apart from contention that the same does not form part of the manufacture, no other reason has been disclosed to exclude the cost thereof from the assessable value. Because the same was not disclosed in the invoice, the respondents are justified in contending that there was clear suppression of the said fact from the department with intention to evade the payment of the proper duty by the appellants.

20. Being so, on this count also, we do not find any fault with the impugned order.

21. The next point that is sought to be raised is in relation to bar of limitation. The authorities below in this regard, after referring to various facts which have been placed on record and duly corroborated by cogent evidence have arrived at the finding that the appellants were fully aware of the collection of charges in relation to above factors, which were not disclosed to the department and this is revealed from statements recorded by Shri P.R. Yadav, Shri R.L. Gupta and others. We have not been pointed out any material which could disclose the said findings to be contrary to the records or being not borne out from the records. I find this fact having been clearly stated in the show cause notice by

referring to the admission of the said persons and same having been not rebutted by the appellants even when they have filed reply to the show cause notice, it goes without saying that the department had clearly discharged their burden to justify invocation of the extended period of limitation.

22. This takes us to the last point raised which relates to the penalty aspect. The decision of Madras Bench of the Tribunal in the case of M. Hariraju had observed that the authorities had not elicited any information in regard to knowledge or having reason to believe that the goods which were removed were liable for confiscation and, therefore, it was held that the provisions of Rule 209 A were not attracted.

23 In S.R. Jhunjhunwala case, it was held by the Tribunal that there was no elaboration as to how conclusion regarding the assessee's knowledge about the excisable goods were liable for confiscation was arrived at and how the ingredients of Rule 209A were satisfied and therefore, penalty was quashed.

24. In Benzo Chem Industries (P) Ltd., the learned Single Member of the Tribunal held thus:-

"7. From the above reproduced portion of the order, it is very clear that the adjudicating authority, it seems, mis-read the provisions of Section 11AC. If the appellant has committed any error prior to 28-9-96, then no penalty is imposable on the appellants under Section 11AC, as the penal provisions under Section 11AC came into statute from that date. As regards the

penalty imposable the appellants subsequent to 28-9-96, I find that the adjudicating authority has not given any bifurcation of the amount of demandable subsequent to 28-9-96. Further, I find that the adjudicating authority has imposed equivalent amount of penalty under Section 11AC and Rule 173Q without showing as to how much amount is imposable as penalty under Section 11AC and how much amount is imposable under Section 173Q(sic) (Rule 173Q). In the absence of any such bifurcation, it is settled law that combined penalty is not imposable on the appellants and the same is liable to be set aside. In the absence of exact amount of penalty attributable against the relevant provisions, the penalty imposed on the appellant is liable to be set aside and I do so."

25. As far as Rule 209A is concerned, same reads thus:

"Penalty for certain offences. – Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

Plain reading of the said Rule would disclose that in order to impose personal penalty, a person must be shown to have knowledge or reason to believe that excisable goods were liable for confiscation under the Act. The contention on behalf of the appellant that there is no finding by the authorities below about those relevant aspect of the provisions of law and therefore, imposition of penalty under Rule 209A is bad in law. Indeed the orders passed by the authorities below nowhere disclose any

such finding nor any other finding which could reveal the authorities having considered this relevant aspect of the provisions of law with reference to the facts of the case.

26. As far as penalty under Rule 210 is concerned, said Rule reads thus:-

“A breach of these rules shall, where no other penalty is provided herein or in the Act, be punishable with a penalty which may extend to one thousand rupees and with confiscation of the goods in respect of which the offence is committed.”

27. It is sought to be contended that no penalty could be imposed under the said provision unless the person is the assessee himself. In other words, penalty under this provision of law cannot be imposed upon the Director or the officer of the Company. Apart from the contention in that regard, it has not been shown to us as to how the provision of Rule 210 is restricted only to the assessee. Infact, it is a residuary clause in relation to penalty provision. It clearly says that whenever there is breach of any of the Rules, and if no other specific penalty is provided for any such breach, a penalty could be imposed under Rule 210. Obviously, therefore, it cannot be said that it will apply only to the assessee.

28. The another point which was canvassed in relation to the penalty is that the provision comprised under Rule 11AC came to be introduced only from 28.9.1996 whereas the period involved is from November 1995 to November, 1999 and therefore, penalty under section 11AC

could not be imposed in relation to faults sought to have been committed prior to 28.9.96. Besides there could not have been composite penalty as such. It is contended that the penalty has been imposed not only under Section 11AC but also under Rule 173Q. Heavy reliance is placed in this regard in the decision of Tribunal in the matter of Benzo Chem Industries (P) Ltd.

29. In Benzo Chem Industries case, the learned Single Member had held that since there was no bifurcation of the amount of penalty demandable during the period prior to 28.9.96 and subsequent thereto, therefore, the penalty imposed under both provisions of law i.e. under section 11AC and Rule 173Q was bad in law. While observing that "it is settled law that combined penalty is not imposable...". With utmost respect, we are unable to agree with the said view expressed by the learned Single Member. It is true that there cannot be double penalty for same offence but if the same offence involves default of different nature, and if the different provisions prescribe different penalties for such different defaults, nothing can prevent the competent authority from imposing penalties under all such provisions. In other words, it all depends upon the statutory provisions as regards the authorities power to impose penalty, not to forget the provisions of Article 20 and 21 of the Constitution of India. Undisputedly, the penalty imposed in the case in hand, could have been imposed under Rule 173 Q for the default prior to 28.9.96. Similarly, penalty imposed could be lawfully imposed under section 11AC with effect from 28.9.96. Being so, we do

not find any infirmity in the imposition of penalty while exercising the powers under section 11AC in relation to period from 28.9.96 and exercising the power to impose penalty under Rule 173Q in relation to the period prior to 28.9.96.

30. As far as the claim regarding Cenvat credit is concerned, since the same is required to be claimed in accordance with the provisions of law before the competent authority which has to satisfy himself on the basis of materials to be placed before him in support of such claim, it is too pre-mature to deal with this aspect. Nothing prevents the appellants from taking necessary steps in accordance with the provision of law.

31. In the result, therefore, while appeals filed by Shri Hanuman Singh, Shri R.L.Gupta and Shri Madhukar Mishra succeed as far as they relate to personal penalty imposed under Rule 209. However, they fail as far as penalty under Rule 210 is concerned. The penalty cannot exceed one thousand rupees for each of them. The appeals are accordingly, partly allowed by reducing the penalty to one thousand rupees each. As far as appeal filed by M/s. K.M.Gases is concerned, the same fails and is dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member(Technical)