IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

Date of Decision: 27.05.2013

CEA No.27 of 2011

Commissioner of Central Excise, Delhi - III …Appellant

Vs.

M/s Vee Gee Faucets Pvt. Ltd. …Respondent

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MS. JUSTICE RITU BAHRI

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Ms. Ranjana Shahi, Advocate,
for the appellant.

Mr. Sudeep Singh, Advocate,
for the respondent.

HEMANT GUPTA, J.

The present appeal under Section 35G of the Central Excise Act, 1944 arises out of an order dated 25.03.2010 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short 'the Tribunal').

The respondent – M/s Vee Gee Faucets Pvt. Ltd. (for short 'the assessee') is engaged in the manufacture of bathroom and sanitary fittings falling under Central Excise Tariff sub-heading 8481.80 under the brand name 'Guru' and has availed the benefits of Small Scale Industries (SSI) exemption as per Notification No.8/2001. As per the said Notification, no duty is payable up to limit of Rs.1 Crore. The officers of the Central Excise visited the factory premises of the assessee on 11.07.2003 and found that the finished goods i.e. sanitary and bath fittings

as well as packing material were found bearing the brand name 'Guru', which was owned by M/s United Cocks Pvt. Ltd., A122 Shardapuri, Ramesh Nagar, New Delhi. The visiting officers seized the goods valued at Rs.5,89,273/- on the belief that the goods bearing 'Guru' brand name lying finished in the store are intended to be cleared without payment of duty and are liable for confiscation. The stand of the assessee was that the brand name 'Guru' has been purchased by the assessee from M/s United Cocks Pvt. Ltd. on the basis of Memorandum of Understanding dated 02.04.2001 and Assignment Deed dated 01.04.2003. The said firm was engaged in the manufacture of sanitary and bath fittings till February, 2001, when they have to close their production activities due to reallocation scheme by the Delhi Government after the Central Excise Registration was surrendered.

The Adjudicating Authority found that the goods cleared with brand name 'Guru' prior to 02.04.2001 i.e. prior to arriving at Memorandum of Understanding, the assessee was not eligible for SSI exemption and, thus, confirmed the demand of Rs.3,46,148/-. The Adjudicating Authority also returned a finding that the Memorandum of Understanding was not arrived at on the date it purports to bear and that initial stand of the management of the assessee was that of right to use such trade name on account of relationship of the Directors of the assessee and M/s United Cocks Pvt. Ltd. Consequently, it was held that the assessee was using the brand name of another person and had manufactured and cleared goods affixed with brand name of another person, therefore, not eligible to avail benefit of SSI exemption for the period 15.02.2001 to 05.07.2003. Thus, it was ordered that the goods valued at Rs.5,89,273/- are

liable to be confiscated. The Adjudicating Authority also confirmed the demand of Rs.40,00,163/- and imposed penalties on Shri Ashok Sharma and Shri Dheeraj Sharma, Directors of the assessee.

In the separate appeals by the assessee and its Directors, the demand and the penalties imposed were confirmed. However, in further appeals, the learned Tribunal relied upon CCE, Mumbai Vs. Bigen Industries Ltd. 2006 (197) ELT 305 (SC) to observe that the use of the brand name on the basis of consent of the proprietor of the brand name or assignment is permissible. The Tribunal held that plain reading of the Notification nowhere discloses that the exemption under the notification can be availed for the product bearing brand name or trade name of other person on the basis of consent of the proprietor of such brand name or trade name. The Tribunal held that it is difficult to accept the contention on behalf of the appellants that mere consent or the mere assignment deed would entitle the appellants to claim benefit under the said notification. The Tribunal also held that in the absence of the assessee being exclusive proprietor of the brand name and trade name, use of the brand name 'Guru' by the appellant would continue to be a use of a brand name of another person and would disentitle the assessee to the exemption in terms of the conditions incorporated under the Notification. However, the learned Tribunal returned a finding that the goods seized were not liable to be confiscated, as in relation to the goods in question, there was still time for the assessee to file returns. Consequently, the order of confiscation of goods and imposition of penalties under Rule 25 was set aside. The Tribunal also set aside the penalties against the Directors. The Tribunal also returned a finding that interest would be payable only from

11.05.2001, the date when Section 11AB was inserted. Aggrieved against the said order, the Revenue is in appeal.

Learned counsel for the assessee has raised a preliminary objection that an appeal under Section 35G of the Act is not maintainable before this Court, as the order impugned is an order determining question in relation to rate of duty of excise or to the value of goods for the purposes of assessment and, therefore, in terms of Section 35G of the Act, an appeal against such an order of the Tribunal lies only before the Hon'ble Supreme Court. In support of such contention reliance was placed upon the judgment of Hon'ble Supreme Court in Navin Chemicals Manufacturing & Trading Co. Ltd. Vs. Collector of Customs 1993 (68) ELT 3 as well as on the judgment of Bombay High Court in Commissioner of Customs & Central Excise, Goa Vs. Primella Sanitary Products (P) Ltd. 2002 (145) ELT 515. It is also contended that the assessee has filed an appeal before the Hon'ble Supreme Court aggrieved against the duty demanded and that such appeal has since been dismissed on 13.12.2010, therefore, the order of the Tribunal having merged with the order of the Hon'ble Supreme Court, this Court is precluded from examining the legality of the order passed by the Tribunal against the Revenue.

In view of the arguments raised, we find that the following substantial questions of law arise for consideration:

> "(i) Whether the demand of duty claiming exemption as per Notification No.8/2001 relates to the determination of 'rate of duty of excise' or to the 'value of goods', which may lead to exclusion of jurisdiction of this Court in an appeal under Section 35G of the Act?

(ii) Whether dismissal of an appeal by the Hon'ble Supreme Court at the instance of assessee precludes the Revenue from availing the remedy of appeal under Section 35G of the Act?"

Before we examine the above questions, it would be expedient to extract Section 35G of the Act. The relevant provision of Section 35G reads as under:

> "**35G. Appeal to High Court** – (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order 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), if the High Court is satisfied that the case involves a substantial question of law.
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> xxx xxx xxx"

A reading of the said provision along with the judgment of Hon'ble Supreme Court in Navin Chemicals Manufacturing & Trading Co. Ltd. case (supra) shows that an appeal to the Hon'ble Supreme Court is provided; when the questions in issue, relating to the rights of duty or the value of goods for the purposes of assessment, have relevance not only for the parties concerned, but for other importers as well. The relevant extract from Navin Chemicals Manufacturing & Trading Co. Ltd. case (supra) reads as under:

> "9. The importance of the present appeal lies not so much in deciding which appeals can be heard by a member of CEGAT sitting singly and which by a Special Bench thereof as in determining where a reference can be made by CEGAT to the High Court and in which cases an appeal against an order of CEGAT can be filed directly before the Supreme Court. Where an appeal lies to the Supreme Court, the necessity of a reference on a question of law to the High Court is obviated. An appeal to this Court is provided where, as aforementioned, the questions in issue, relating to the rates of duty or the value of goods were for the

> purposes of assessment, have relevance not only for the parties there concerned, but for other importers as well."

The issue in the present *lis* is regarding benefit of exemption under Notification No.8/2001 available to an assessee, a Small Scale Industry. It is not an issue relating to rates of duty or the value of goods, but only to the effect whether the assessee is entitled to exemption granted to a Small Scale Industrial Unit on the basis of trade mark of another concern. Any decision thereon, is relevant only inter-parties and has no wider ramification within the jurisdiction of this Court much less in the Country. Therefore, such localized dispute does not fall within the exception of Section 35G of the Act. Thus, this Court will have jurisdiction to entertain the appeal in respect of clandestine removal of goods claiming benefit of exemption as per Notification No.8/2001. Thus, the first question of law is answered holding that claim of the benefit of a notification by an assessee does not give rise to an issue relating to 'rate of duty' or the 'value of goods' for the purposes of assessment, therefore an appeal would be maintainable before this court.

In respect of second question of law, we find that the assessee has filed Civil Appeal bearing Diary No.35099 of 2010. Such appeal was dismissed by the Hon'ble Supreme Court on 13.12.2010 by passing the following order:

> "Delay condoned.
> The Civil Appeal is dismissed."

The Hon'ble Supreme Court in a judgment reported as Kunhayammed & others Vs. State of Kerala & another, (2000) 6 SCC 359 examined the doctrine of merger in relation to the person, who has filed an appeal and/or special leave to appeal. It was held that the review before the

court after the appeal was dismissed would not be maintainable. It was held to the following effect:

> "34. The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed – there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits – in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave – the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it."

In Mauria Udyog Ltd. Vs. Commissioner of Central Excise, Delhi-II (2003) 9 SCC 139, the Supreme Court was examining the effect of dismissal of revenue's appeal by the Tribunal and the application for restoration of the assessee's appeal before the Tribunal itself. The Tribunal declined the application for the reason that the order passed by the Commissioner (Appeals) stands merged with the order of the Tribunal, when the appeal of the Revenue was dismissed. The Court held to the following effect:

> "4. It is evident from the facts noticed above that the principle of merger has no applicability. The appeal of the Revenue was restricted to the reduction of the penalty amount by the Commissioner (Appeals). In the appeal of the appellant, the challenge was not only to the penalty but to the entire order including the order of the Commissioner confirming the demand and holding that the freight expenses of the appellant's factory to the buyer's factory are includible in the assessable value. The restricted question which was the subject matter of the appeal of the Revenue, under

> these circumstances, cannot result in the dismissal of the appellant's appeal by application of the principle of merger. The said principle on the factual situation herein has no applicability whatsoever. Mr. Raval, the learned Additional Solicitor General very rightly did not support the order on the ground of the applicability of the principle of merger."

Similar issue arose subsequently in another judgment reported as Commissioner of Central Excise, Delhi Vs. Pearl Drinks Limited (2010) 11 SCC 153. The Supreme Court held that the doctrine of merger would have no application in such circumstances for the plain and simple reason that the subject matter of the appeal filed by the assessee was limited to disallowance of two out of eight deductions claimed by the assessee. The Tribunal had no occasion to examine the admissibility of the deductions under the remaining six heads, as the assessee's appeal did not question the grant of such deductions. The Court held to the following effect:

> "18. Applying the above test to the case at hand the doctrine would have no application for the plain and simple reason that the subject matter of the appeal filed by the assessee against the adjudicating authority's order in original was limited to disallowance of two out of eight deductions claimed by the assessee. The Tribunal was in that appeal concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of the deductions under the remaining six heads obviously because the assessee's appeal did not question the grant of such deductions. Admissibility of the said deductions could have been raised only by the Revenue who had lost its case qua those deductions before the adjudicating authority.
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> 19. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the Tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads which were not the subject matter of scrutiny before the Tribunal.
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> xxx xxx xxx
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> 21. The Tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may be partly in

> favour and partly against a party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the appellate Court or authority but dismissal on merits or otherwise of any such appeal against a part only of the order will not foreclose the right of the party who is aggrieved of the other part of this order. If the doctrine of merger were to be applied in a pedantic or wooden manner it would lead to anomalous results inasmuch as a party who has lost in part can by getting his appeal dismissed claim that the opposite party who may be aggrieved of another part of the very same order cannot assail its correctness no matter the appeal earlier disposed of by the Court or authority had not examined the correctness of that part of the order."

In view of the ratio of the above-stated judgments, the order dated 13.12.2010, as reproduced above, dismissing Civil Appeal leads to merger of that part of the order alone, which was against the assessee. Once the assessee has availed the remedy of appeal and such appeal has been dismissed, the findings of the Tribunal, which are against the assessee, stands affirmed and stood merged with the order of the Hon'ble Supreme Court. It is more so, when the appeal was dismissed without notice to the Revenue and the Revenue had no opportunity to point that it intends to file an appeal against an order of the Tribunal. Therefore, the findings against the Revenue could be disputed before the competent Court of law.

In view of the above, we hold that the doctrine of merger would be applicable only in respect of findings, which were disputed by the assessee before the Hon'ble Supreme Court and not in respect of findings, which were recorded by the Tribunal in favour of the revenue.

The appellant – Revenue has claimed the following substantial questions of law arising from the order of the Tribunal:

> "(i) Whether in the facts and circumstances of the case, the Hon'ble Tribunal erred in setting aside the confiscation and

penalty under Rule 25 of the Central Excise Rules, especially so when duty liability and clandestine removal has been confirmed?

(ii) Whether penalty on Shri Ashok Sharma and Shri Dheeraj Sharma under Rule 26 of the Central Excise Rules, 2002 have been set aside wrongly by the Hon'ble Tribunal, when Shri Ashok Sharma and Shri Dheeraj Sharma's role are clearly brought out in para Nos.39 & 41 of Order-in-Original. These paras show that those persons have knowingly concerned themselves in removing, keeping, concealing etc. of excisable goods which they have reason to believe that the same are liable for confiscation?"

The Revenue has disputed that part of the order, whereby the penalties imposed under Rules 25 & 26 of the Central Excise Rules, 2002 (for short 'the Rules') were set aside. The relevant Rules read as under:

"25. Confiscation and penalty — (1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, -

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause

> (d) has been committed, or [rupees two thousand], whichever is greater.
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> (2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.
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> 26. Penalty for certain offences – (1) 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 the duty on such goods or two thousand rupees, whichever is greater.
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> (2) Any person, who issues –
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> (i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or
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> (ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."

Learned counsel for the Revenue argued that the penalty under Rule 25 of the Rules was imposed not only in respect of goods, which were not cleared, but also in respect of goods which have been cleared without payment of duty on the strength of exemption under the Notification No.8/2001 though such benefit was not admissible to the assessee. The penalties under Rule 26 are imposable, when the Directors of the assessee have concealed the storage or dealing with the goods from the premises of the assessee so as to impose penalty under Rule 26.

In Associated Cement Co. Ltd. Vs. CTO (1981) 4 SCC 578, the Supreme Court noticed that tax, interest and penalty are three different

concepts. Penalty ordinarily becomes payable when it is found that an assessee has willfully violated any of the provisions off the taxing statute.

In Hindustan Steel Ltd. v. State of Orissa, (1969) 2 SCC 627, the Supreme Court held that 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, the penalty is not imposable. It observed as:

> "8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(*a*) of the Act. But the 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. 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. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

The Supreme Court in a judgment reported as Grauer & Weil (India) Ltd. Vs. CCE (1995) 1 SCC 77 relied upon its earlier judgment in Hindustan Steel Ltd.(supra).

In Director of Enforcement Vs. M.C.T.M. Corporation (P) Ltd. (1996) 2 SCC 471, the Supreme Court observed that expression 'penalty' is a word of wide significance. Sometimes, it means recovery of

an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in 'adjudicatory proceedings' and not by way of fine as a result of 'prosecution' of an 'accused' for commission of an 'offence' in a criminal court.

In Union of India Vs. Dharamendra Textile Processors (2008) 13 SCC 369, the Larger Bench of the Supreme Court approved the judgment in Chairman, SEBI Vs. Shriram Mutual Fund (2006) 5 SCC 361 and held that the penalty under Section 271(1)(c) of the Income Tax Act is a civil liability and willful concealment is not an essential ingredient for attracting civil liability, as is the case in the matter of prosecution under Section 276-C of the Income Tax Act. In Shriram Mutual Fund's case (supra), the Court held that it is not necessary that *mens rea* must be proved before penalty can be imposed under the provisions of Section 15 of the Securities and Exchange Board of India Act, 1992. The Court held that once the contravention is established, then the penalty has to follow and only the quantum of penalty is discretionary. The Supreme Court observed as under:

> "29. Under a close scrutiny of Sections 15-D(*b*) and 15-E of the Act, there is nothing which requires that *mens rea* must be proved before penalty can be imposed under these provisions. Hence, we are of the view that once the contravention is established, then the penalty has to follow and only the quantum of penalty is discretionary. Discretion has been exercised by the adjudicating officer as is evident from imposition of lesser penalty than what could have been imposed under the provisions. The intention of the parties is wholly irrelevant since there has been a clear violation of the statutory Regulations and provisions repetitively, covering a period of 6 quarters. Hence, we hold that the respondents have wilfully violated statutory provisions with impunity and hence the imposition of penalty was fully justified."

However, in CCE Vs. Pepsi Foods Ltd. (2011) 1 SCC 601, a three Judges' Bench examined the provisions of Section 11-AC of the Central Excise Act, 1944. The Court held that criminal intent or '*mens rea*' is a necessary constituent. Relevant extract from Pepsi Foods Ltd. case (supra) reads as under:

> "20. In the instant case in the order-in-original a penalty has been imposed which is equal to the amount of duty. Such penalty has been imposed in exercise of power under Section 11-AC of the Act. Section 11-AC of the Act as it stood at the relevant point of time runs as under:
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> > "11-AC. *Penalty for short-levy on non-levy of duty in certain cases*.—Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded *by reasons of fraud, collusion or any wilful misstatement or suppression of facts*, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of Section 11-A, shall also be liable to pay a penalty equal to the duty so determined:
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> > * * *
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> > Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account:" (emphasis supplied)
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> 21. From a perusal of the aforesaid section, especially the underlined portion, it is clear that in order to attract the penalty provision under Section 11-AC, criminal intent or "mens rea" is a necessary constituent. In the reply to the show-cause notice the stand which has been taken by the respondent is that it has been paying the duty and there is no mala fide intention on its part to evade the payment of duty. The further stand is that the goods were cleared from the factory only on payment of duty. This stand which has been taken in the reply to the show-cause notices was not found to be incorrect in the order-in-original. As such the imposition of penalty of the equal amount of duty under the order-in-original cannot be sustained.

22. It is well settled that when the statutes create an offence and an ingredient of the offence is a deliberate attempt to evade duty either by fraud or misrepresentation, the statute requires "mens rea" as a necessary constituent of such an offence. But when factually no fraud or suppression or misstatement is alleged by the Revenue against the respondent in the show-cause notice the imposition of penalty under Section 11-AC is wholly impermissible.

23. The Court in this connection may remind itself of the fundamental principle: (AC p. 496 E)

> "… that an accused person cannot be convicted without proof of mens rea, unless, from a consideration of the terms of the statute and other relevant circumstances, it clearly appears that that must have been the intention of Parliament."
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> (See the decision of the House of Lords in *Vane* v. *Yiannopoullos 1965 AC 486* and the opinion of Lord Reid at AC p. 496 E : All ER p. 823.)

24. In *Vane* v. *Yiannopoullos 1965 AC 486*, the word "knowingly" was used in the statute as a condition of creating liability.

25. The aforesaid dictum of Lord Reid has been followed by this Court also. A reference in this connection may be made to *Union of India* v. *Rajasthan Spg. & Wvg. Mills (2009) 13 SCC 448*. This Court considering Section 11-AC of the Act held in ELT para 19 at p. 12 of the Report as follows: (SCC p. 459, para 29)

> "*29*. From the aforesaid discussion it is clear that penalty under Section 11-AC, as the word suggests, is punishment *for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section*." (emphasis supplied)

26. Following the aforesaid well-settled principles, this Court quashes that part of the order-in-original which imposes penalty without any finding of fraud or misstatement against the respondent. This part of the order-in-original is quashed."

With these judgments of the Supreme Court, we now examine the scope of the Rules in question. Rule 25 and Rule 26 of the Central Excise Rules confer the power to impose penalty on the Adjudicating

Authority subject to provisions of Section 11-AC of the Act. Penalty is imposable under Rule 25, if any producer, manufacturer, registered person of a warehouse or a registered dealer, contravenes any of the provisions of these Rules or the notifications issued under these rules '*with intent to evade payment of duty*'. It also contemplates that '*penalty shall not exceed the duty on the excisable goods*'.

A reading of clause (d) of Rule 25 shows that the penalty is imposable if there is intention to evade payment of duty. Thus, *mens rea* becomes a necessary ingredient before imposition of penalty under Rule 25. The Tribunal has set aside the order of imposing penalty finding that it is a bona fide belief of the assessee in using the brand name of its sister concern. Therefore, such user is not with intent to evade payment of duty and, thus, levy of penalty has been rightly set aside.

In respect of penalties imposable under Rule 26, again the penalty is payable if a person acquires possession of, or in any manner deals with any excisable goods *'which he knows or has reason to believe'* are liable to confiscation under the Act. Such provision again makes the *mens rea* a necessary ingredient for imposition of penalty, as held by the Supreme Court in Pepsi Foods Ltd. case (supra).

In view of the above, we find that the Revenue has not been able to prove the intention to evade the payment of duty or the fact that the assessee knew or has reason to belief that the goods used are liable to be confiscated under the Act. The Tribunal is right in setting aside the order of imposition of penalty.

Consequently, we do not find that any substantial question of law arises for consideration by this Court in the present appeal. The same is accordingly dismissed.

(HEMANT GUPTA)
JUDGE

27.05.2013 **(RITU BAHRI)**
Vimal **JUDGE**