Associated Cement Companies Limited vs Collector of Central Excise

Court: CUSTOMS, EXCISE AND GOLD (CONTROL) APPELLATE TRIBUNAL (EAST REGIONAL BENCH), CALCUTTA

Date of Decision: May 3, 1994

Hon'ble Judges: Harish Chander, President, K. Sankararaman, T. P. Nambiar

Judgement

K. Sankararaman, Member (T)

1. This batch of five Appeals has been filed by Messrs Associated Cement Companies Ltd., Chaibasa Cement Works, challenging a common

Order-in-Appeal bearing number: 108 to 112/PAT/90 dt. 29.10.1990 passed by the Collector (Appeals), Customs and Central Excise, Patna, in

terms of which he had confirmed five Orders-in-Original passed by the Asstt. Collector of Central Excise, Jamshedpur imposing a total sum of Rs.

16,000/- as penalty on them besides appropriating a total sum. of Rs. (amount not mentioned)

2. Shri P.R. Biswas, Ld. Consultant along with Shri R.M. Das, Ld. Consultant and Shri P.K. Das, Ld. Advocate appeared for the Appellants. Shri

Biswas stated that in these cases, proceedings had been initiated against them alleging evasion of duty. Violation of Rules 9, 52A and 173F of the

Central Excise Rules, 1944 had been alleged. The Appellants are the leading manufacturer of cement in the country with factories in various

locations and they are following a regular system of payment of Central Excise duty and removal of goods from their factories approved by the

Deptt. Clearance of cement takes place round the clock and Gate-Passes are prepared as required by the procedure. They have been given the

facility of consolidated debit entry in their P.L.A. (Personal Ledger Account) to avoid excessive scriptory work. This debit entry is carried out at

the end of the day. As far as this particular group of cases were concerned it has come on record that Gate-Passes had been prepared. Also, the

P.L.A. Section No. for the purpose of carrying out the consolidated Debit Entry in the P.L.A. had been assigned and entered. In the

circumstances, there is no basis for the allegation that there has been evasion of central excise duty. They had time till the end of the day to make

the debit entry in the P.L.A. As a preparation for this they had prepared the Gate-Passes which had been signed by their authorised signatory also.

The Gate-Passes are not sent by them along with the goods when they are despatched by Rail. This is their usual practice which is known to the

Deptt. The charge is that the Gate-Passes in question (two in number) were lying undetached in the Gate-Passes Book and the time of removal

had not been shown. As had been explained by them to the Departmental Authorities during the impugned proceedings, this is just a clerical lapse

on their part. This was due to the fact that their telephones went out of order on the day in question as a result of which they could not get the

intimation from the Railway Authorities about the actual time of departure of the wagons. This cannot be taken to amount to removal of goods

without payment of duty. These despatches were made to Govt. Agencies through Govt. transport (Railways). There was no scope or intention to

evade any duty, as alleged.

3. Shri Biswas invited our attention to the observation by the Collector (Appeals) in the penultimate paragraph of his impugned order that since the

G.P. Nos. 998 and 999 were fully prepared and were complete in all respects minus the time of removal, it was difficult to conclude that there was

an element of mala-fide suppression on their part. He had also observed in his Order that the findings of the Asstt. Collector also did not indicate

anything mala fide.... All the same he has justified the imposition of penalty. Shri Biswas relied upon the following cases for his contention that no

penalty was called for in these cases.

(i) Hindustan Steels Ltd. reported in AIR 1970 SC 235 : ECR C 321 SC

(ii) Ebenezer Rubbers Ltd. v. Collector of Central Excise, Ahmedabad reported in 1987 (10) ECR 407

(iii) Akbar Badruddin Jhvani v. Collector of Customs reported in 1990 (28) ECR 145 SC : ECR C Cus 1695 SC

(iv) Allen Bradley India Ltd. v. Collector of Customs, New Delhi reported in 1991 (37) ECR 405 Tribunal NRB

He submitted that the Tribunal had held in the Ebenezer case, that penalty cannot be imposed on the basis of material which points out to only a

possibility of clandestine removal. Actually in the present matter, there was not even that possibility. There was all the more justification for not

imposing any penalty. Without prejudice to this proposition, however, Shri Biswas submitted that the quantum of penalty is excessive and beyond

the statutory limits in terms of Rule 52A. This is not a case, he contended, where penalty could be imposed in terms of Rule 9 or 173. If at all it is

held that penalty is imposable under Rule 52A(5) the maximum penalty that could have been considered was Rs. 1,000/-. In the present case, two

Gate-Passes had been issued for two different destinations but five cases were registered as the despatch was in five wagons, making it one case

for each wagon.

4. Shri Biswas then raised a plea that the "confiscation of the goods and appropriating certain amount from the security amount towards the value

of the goods due to the goods not being produced on demand, was not in order as there was no proposal in the Show Cause Notice for the

confiscation of goods. He referred to the statement of facts enclosed to the Show Cause Notice and pointed out that in the last para thereof, there

is only a mention that they should pay duty and they are also liable to penalty. Shri Biswas concluded his arguments with the prayer that these

appeals be allowed and the consequential reliefs granted to them.

5. Shri A. Chowdhury, Ld. Departmental Representative, appeared for the Respondent Collector. He supported the findings of Collector

(Appeals) and the Asstt. Collector. He stated that in terms of Rule 173Q(1)(a), the goods shall be liable to confiscation if a manufacturer removes

any excisable goods in contravention of any of the provisions of the Rules and he shall be liable to penalty. He countered the contention of the Ld.

Consultant that in the Show Cause Notice there was no proposal for confiscation of the goods. He pointed out that Shri Biswas had referred to the

enclosure to the Show Cause Notice which is only the statement of facts. In the Show Cause Notice the reference to confiscation of the goods

was there and the Asstt. Collector has decided the matter correctly. On the question of Gate-Pass, he pointed out that the same had not been

prepared and issued as required under Rule 52A(5)(a) of the Central Excise Rules. The goods had been transported from the factory without a

valid Gate-Pass. On the point made by Shri Biswas that where the goods are transported by goods train, the Gate-Passes are not required to be

sent along with the goods, Shri Chowdhury submitted that this is not correct and there is nothing in the Rule exempting the requirement of Gate-

Passes accompanying the goods if they are despatched by train. Gate-Passes are in fact, prepared and handed over to the Railway Authorities for

being taken along with the goods. In the present case, the goods had been found to have left the factory at 7 A.M. in the morning and even at 4

P.M. in the evening when the Central Excise Inspector had visited the factory, the Gate-Passes had not been completed and issued. The Gate-

Passes were found to be still retained in the Gate-Pass Book and had not been detached and issued. The time of removal of the goods had not

been entered in them. The provisions cited have been contravened and the imposition of penalty is justified. Rule 173Q(1)(a) provides for the

imposition penalty on the manufacturer removing goods in contravention of any of the provisions of the Rules. The maximum permissible limit for

the penalty had not been exceeded. In the circumstances, he contended that the impugned decision is correct and deserves to be upheld. He,

therefore, pleaded that the Appeals be dismissed.

6. I have considered the submissions made by both the sides. As pointed out by the Ld. Consultant, the Collector (Appeals) has observed in his

Order that it was difficult to conclude that there was an element of mala fide suppression on their part and that the Asstt. Collector had also not

reached any finding in regard to involvement of mala fide. He has, however, adjudged their failure to issue the Gate-Passes even a long time after

the removal of the goods as a gross lapse. He has held that, even in the absence of mala fide, penalty could be imposed, for which he had relied

upon the decision of the Supreme Court in Gujarat Travancore Agency v. Commissioner of Income Tax that unless there is something in the

language of the Statute indicating the need to establish the element of mens tea it is generally sufficient to prove that a default in complying with the

Statute has occurred. He has also pointed out in his Order that as a matter of routine the Gate-Passes were being issued by the Appellants not at

the time of movement of wagons from the factory but when the R/Rs were recovered after booking of the wagons at railway station.

7. I find that while the Collector (Appeals) had justified the imposition of penalty on account of the non-issue of Gate-Passes in time, he has

observed that he did not find anything wrong with the Orders-in-Original. These Orders have been passed by the Asstt. Collector imposing

penalties and appropriating different amounts from the Security Deposits holding them to be guilty of offences attracting Rules 9(1), 52A and 173Q

for not having issued Gate-Passes at the time of removal and evaded payment of duty. He had stated in his order that they did not make debit

entry in their P.L.A. for the clearances in question effected on 18.7.1986 till 21.7.1986. There is no specific finding by the Collector (Appeals) in

his Order as far as this charge of evasion of duty and non-debit of P.L.A. is concerned. However, he has upheld the entire Order as he did not find

anything wrong with the Order. This has been countered by the Appellants pointing out that they have been permitted, in terms of the Proviso (ii) to

Rule 173Q(1) to make consolidated debit entry at the end of the day. In this case, the Section No. in the P.L.A, for debits relating to the impugned

clearances had also been allotted and entered in the Gate-Passes. The Gate-Passes Book containing the undetached two Gate-Passes covering

the particular despatches in question had been seized by the officers and the Appellants had taken up the matter with the Central Excise Officers

for their return to enable them to carry out the debits in the P.L.A. In the circumstances, the charge of having evaded payment of duty does not

stand. The delay or failure to carry out the consolidated debit entry in time has been explained as due to non-availability of the Gate-Pass Book

which had been seized by the officers.

8. What remains then against the Appellants is the non-indication of the time of removal of the goods in the Gate-Passes and their non-issue at the

time of removal. They have explained that even if it is a lapse it is only a clerical one. Even this was actually due to the fact that they did not get the

information from the Railway Authorities about the time of removal of the goods because their telephones went out of order that day. A messenger

had to be deputed from the railway yard to their factory to inform the Despatch Section for noting down the time of removal on the Gate-Passes. I

do not follow why the Appellants have to depend upon the Railway Authorities for the information regarding the time of removal of the goods.

What is required to be entered in the Gate-Passes is the time of removal of the goods from the factory. This should be within their knowledge. The

availability of the Railway Receipt or the departure of the wagons from the Railway Station should not affect the preparation of the complete Gate-

Passes including the time of removal. Their explanation for their failure to show the time of removal in the Gate-Passes is not satisfactory.

However, we are satisfied that this is not a serious lapse. Their explanation about the other lapse of not having issued the Gate-Passes at the time

of removal of the goods from their factory is that they do not issue them if they despatch the goods by rail. The Gate-Passes are sent, not along

with the goods, but separately, say, by post. In that case, it is not clear how the Deptt. has suddenly proceeded against them in these cases only

when this is reported to be their regular practice. In any event, the charge of removal of goods without payment of duty is not valid. The non-

mention of the time on the Gate-Passes is a failure and a lapse but in the given circumstances, this is not a serious offence warranting imposition of

penalty. Though, on the strength of Gujarat Travancore Agency judgment of the Supreme Court, the imposition of penalty, even without the

element of mens rea had been upheld by the Collector (Appeals), I feel the said Judgment has not been correctly applied in the present case. While

observing, as has been reproduced in the impugned order, that unless there is something in the language of a Statute indicating the need to establish

the element of mens rea, it is generally sufficient to prove that a default in complying with the Statute has occurred, the Supreme Court had in the

said Judgment pointed out that there was nothing in Section 271(1)(a) of the Income Tax Act (with which they were concerned in the said case)

which required that mens rea must be proved before penalty can be levied under that provision. The said Section provides that a penalty may be

imposed if the Income Tax Officer is satisfied that any person has, without sufficient cause, failed to furnish the return of total income. The Supreme

Court observed that in the cases of such a proceeding the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a

remedy for such loss. It was, in this context, held that the element of mens rea was not required to be proved in the proceedings taken by the

Income-tax Officer under Section 271(1)(a) of the Income-tax Act against the Assessee for the assessment years 1965-66 and 1966-67. As a

matter of detail, we take note of the fact that in the said case the Appellants had filed their Return of Income for the assessment year 1965-66

neither before the due date - 30.6.1965 nor before 31.8.1966 which extension was granted to them on their application but only on 23.9.1967

after a notice was served on them under Section 139(2) on 22.9.1967. Similarly, for the assessment year 1966-67, no Return was filed upto

30.6.1966, the due date. No application for extension of time was made either. After a notice under Section 139(2) was served on them they filed

their Return on 23rd September, 1967. These facts would show that the said case was quite different from the present issue before us. The

Appellants herein had not defaulted to any considerable extent and there was no loss of Revenue or delayed payment of duty, either. The default

was limited, as pointed out earlier, to their not entering the time of the removal of the goods from their factory in the two Gate-Passes which were

otherwise complete including the proposed Section No. of the P.L.A debit entry for payment of duty which they could make before the close of

the day. Their not detaching the two Gate-Passes in question from the Book for issuing them at the time of removal has not been held to be with an

intention to evade any duty. There was sufficient balance in the P.L.A. and in the normal course, the debit would have been made before the end of

the day as permissible under the relevant provisions which facility had been granted to them. Having prepared the Gate-Passes with the particulars

of the goods like quantity, value, consignee, destination, duty amount etc., there was no way they could have retained the amount in the P.L.A.

without effecting the debit. The Departmental Officials have blown the matter out of all proportion for their lapse in not showing the time of removal

of the goods. It has also been explained that for goods removed in Railway wagons, they used to send the Gate-Passes separately to the

consignees and that the same were not issued along with the goods to accompany them. Only where goods were despatched by lorries, the Gate-

Passes would be issued simultaneously with the removal to accompany the goods. This practice appears to have been acquiesced by the Deptt.

There is no finding either that the Gate-Passes did not accompany the goods. The objection taken is that the Gate-Passes were not issued and that

they were not detached from the Book. Had the Appellants detached the Gate-Passes in question from the Book, they would have saved

themselves the trouble that awaited them. Such failure to detach the Gate-Passes from the Book is even less of an irregularity as compared to the

non-recording of the time of removal of the goods in the Gate-Passes Their explanation for this lapse, namely, failure of their telephone and the

non-receipt of the information from the Railway Authorities is not convincing but this lapse did not point to any irregularity or evasion of duty or

delay in payment thereof. The Appellants did nothing to gain by their non-insertion of the information in the Gate-Passes, say, for effecting repeat

clearance of other goods against the same Gate-Passes. No such allegation has also been made. The penalty not exceeding Rs. 1,000.00 provided

under Rule 52A(5)(a) for carrying or transporting excisable goods without a valid Gate-Pass would not apply to this case where the Gate-Passes

had been prepared but the goods had been despatched by Railway wagons without the Gate-Passes, as per their practice which was in the

knowledge of the Deptt. The ratio of Gujarat Travancore case is not applicable as discussed already. This decision which is dt. 2.5.1989 in the

context of Section 271(1)(a) of the Income-tax Act does not constitute a departure from what was laid down by the Supreme Court in Hindustan

Steel Limited v. State of Orissa since the same had been relied upon by them in the case of Akbar Badruddin Jiwani of Bombay v. Collector of

Customs, Bombay decided on 14.2.1990 which was reported in 1990 (28) ECR 145 (SC) as cited above. In the latter judgment at para 60 the

Supreme Court observed as follows:

We refer in this connection to the decisions in Merck Spares v. Collector of Central Excise and Customs, New Delhi, 1983 ELT 1261 : 1983

ECR 1473D (Cegat), Shama Engine Valves Ltd. Bombay v. Collector of Customs, Bombay , wherein it has been held that in imposing penalty the

requisite mens rea has to be established. It has also been observed in Hindustan Steel Ltd. v. State of Orissa by this Court that:

The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party were deliberately in

defiance of law, or is guilty of contumacious or dishonest conduct, or acts in a. conscious disregard of its obligation; but not in cases where 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.

They observed that even if it was assumed for argument''s sake that the stone slabs imported were marble, still in view of the finding of the Tribunal

that they were imported on a bona fide belief that they were not marble, the imposition of a heavy fine was not at all warranted. They set aside the

Order of the Tribunal. In the said case the irregularity alleged was unauthorised importatio, while the present case is a far less serious matter. As

regards the lapse in non-mention of the time of removal in the Gate-Passes, we feel they may be given the benefit of doubt. The penalty and the

appropriation of amounts from the Security Deposits towards the value of the goods are not justified. Accordingly, I set aside the impugned order

and allow the Appeal. The Appellants would be entitled to the consequential reliefs including the return of the amounts recovered from them.

17.12.1991

Sd/-(K. Sankararaman)Member (T).

T.P. Nambiar Member (J)

9. I have perused the Order prepared by my Ld. Brother Member (Technical). He has come to the conclusion that the impugned orders are to be

set aside. With great respect I am not able to agree with the reasonings furnished in the above-said Order.

10. The facts of the case as well as the arguments advanced by both sides were squarely spelt out in the above-said Order and it is not necessary

for me to reiterate the same again.

11. It is now seen that the Appellants have not indicated the time of removal of the goods in the Appellantses. Further, they have not issued these

Appellantses at the time of removal of the goods in question. It was their explanation that this is only a clerical lapse. They also stated that this was

actually due to the fact that they did not get the intimation from the Railway Authorities about the actual time of departure of the wagons since their

telephones went out of order on the material day. A messenger had to be deputed from the railway yard to their factory to inform the Despatch

Section for noting down the time of removal on the Gate-Passes. As mentioned by my Ld. Brother Member (T) it is not understandable as to why

the Appellants have to depend upon the Railway Authorities for the information regarding the time of removal of the goods. What is required to be

entered in the Gate-Passes is the time of removal of the goods from the factory. This was well within the knowledge of the Appellants. Admittedly

the time of removal was not at all mentioned in the Gate-Passes. Though the goods were cleared at 7 A.M. and when the officers checked the

premises at 3 P.M. these entries were not made. Therefore, the availability of the Railway Receipt or the departure of the train should not affect the

preparation of the complete Gate-Passes. I entirely agree with the observations made My Ld. Brother that their explanation for this failure, is not

satisfactory.

12. But in my opinion, it cannot be said that it is a technical lapse. The Gate-Passes were not issued at the time of removal of the goods from their

factory. It was necessary that they should have issued the Gate-Passes along with the goods in question. The Appellants'' factory is manufacturing

cement which are operating as per Self Removal Procedure as prescribed under Chapter VIIA of the Central Excise Rules, 1944. Under the

S.R.P. it is the Appellants'' responsibility to see that the duty is properly paid on the excisable goods and the procedure prescribed under Rule

173G read with Rules 52A and 173F of the Central Excise Rules, 1944 is followed. As per these Rules no materials should be removed from the

factory unless duly covered by a Gate-Pass and proper debit entry in P.L.A. Under Rule 173G(6)(i) & (ii) every removal of the goods shall take

place under a Gate-Pass or Gate-Passes. In accordance with the provisions of Rule-52A if the proper officers counter-sign the Gate-Pass, such

Gate-Pass shall also show the receipt of the amount of duty in question, paid on goods at the time of its actual removal from the factory. Under

Rule 52A no excisable goods shall be delivered from a factory except under a Gate-Pass signed by he owner of the factory and counter-singed by

the proper officer. In the Explanation it is clearly stated that Gate-Pass shall mean as a Gate-Pass in the proper form. It is stated under 52A(5) if

any person carries any excisable goods without a valid Gate-Pass, he shall be liable to penalty and the goods are also liable for confiscation.

Admittedly, the goods in question were removed without a valid Gate-Pass. The Gate-Passes were not even separated from the Gate-Pass book

and the time of removal is also not mentioned in the Gate-Pass. In my opinion, this is not a mere technical lapse on the part of the Appellants. It is a

serious lapse which will be viewed seriously. The G.P. I is a statutory clearance document and the same should be given due importance under the

S.R.P. These Rules are enumerated in the Act to cover any mala fide or misuse of the Gate-Pass The same is required to be signed before issued

by a competent representative of the Appellants. But in this case, the material aspect of time of removal of the goods is missing and the goods are

sent without the Gate-Pass. These Rules are prescribed in order to see that no Gate-Pass is misused by the Assessees. Any default in compliance

with these Rules, cannot be said to be a technical lapse.

13. I entirely agree with the conclusion of my Ld. Brother that the Explanation of the Appellants i.e. failure of the telephone and the non-receipt of

the information from the Railway Authorities are the reasons for not sending the Gate-Pass along with the goods, is not convincing. It is no doubt

true that the Ld. Collector of Central Excise (Appeals) had held that there was no mala fide on the part of the Appellants. It may be that the

Appellants had nothing to gain by their non-insertion of the time of removal in the Gate-Pass. During the course of arguments it was contended by

the Ld. Consultant, Shri P.K. Biswas that whenever the Appellants removed goods to railway wagons, the Appellants used to send Gate-Passes

separately to the consignees and the same were not issued along with the goods to accompany them. It was stated that, only where the goods

were despatched by lorries, the Gate-Passes would be simultaneously issued along with the goods. But there is no evidence to show that the

officers have permitted the Appellants to follows this procedure while sending the goods through Railway. In fact, in reply to the Show Cause

Notice, the Appellants had not stated this fact. This was also not pleaded by them either before the Asstt. Collector or before the Collector of

Central Excise (Appeals). It was for the first time when the Appeal was argued before the Tribunal, this point was taken up. The Ld. JDR, Shri A.

Chowdhury stated that the Deptt. has not allowed the Appellants to follow that procedure with respect to the goods sent through railway. The

Appellants have not produced any evidence to show that the Departmental Officers have permitted them to follow this procedure. In fact, this

procedure was not even pleaded either in the reply to the Show Cause Notice or before the lower authorities.

14. It is thus clear that the Appellants have not followed the Rule 173G read with Rule 52A in sending these goods, and the time of removal of the

goods was also not filled up in the Appellants. No doubt, the Ld. Collector (Appeals) stated that there was no mala fide intention on the part of the

Appellants. It was not the intention of the Appellants which matters (illegible). The question is whether the Gate-Pass in the present form could

have been mis-utilised by the Appellants or not.

15. In this connection, the Supreme Court in the decision reported in (in the case of Gujarat Travancore Agency v. Commissioner of Income Tax)

as follows:

4. ...In this connection, the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the Statute

indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In

our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision.

We are supported by the statement in Corpus Juris Secundum, Volume 85, page 580, paragraph 1023:

A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its 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.

5. Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income tax Officer under

Section 271(1)(a) of the Income-tax Act against the assessee for the Assessment years 1965-66 and 1966-67.

The principles laid down in that decision that unless there is something in the language of the Statute indicating the need to establish the element of

mens rea it is sufficient to prove that a default in complying with the statute has occurred. In this case, such a default has occurred.

In all such cases the principles laid down are to be applied to the facts of this case without reference to the facts involved in that case, In this

connections, I may quote the decision of the Supreme Court reported in in the case of Indra Bahadur v. Bar Counsel, Allahabad, Para 26 of the

said decision reads as follows:

A decision ordinarily is a decision on the case before the Court, which the principle underlying the decision would be binding as a precedent in a

case which comes up for decision subsequently. Hence, while applying decision to a later case, the Court which is dealing with it, should carefully

try to ascertain the true principle laid down by the previous decision. A decision often takes its colour from the questions involved in the case in

which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation.

It is thus seen that a decision ordinarily is a decision in the case before the Court. But what is important is that the principles underlying the1

decision is binding as a precedent. That principle is binding on all the Courts, which comes up for decision subsequently. Therefore, after

ascertaining the true principles laid down in the above decision it is clear that in the absence of any mens rea required in the above-said Rules, it is

sufficient to prove that there is a contravention of the Rules and for that contravention the Appellants are liable to be finalised under Section 173Q

of the Central Excise Rules, 1944 and the goods are also liable for confiscation. The Supreme Court has taken the very same view in another

decision reported in in the case of Dinesh Chandra Jamnadas Gandhi v. State of Gujarat wherein it was held as follows:

8. The offences under the ''Act'' are really acts prohibited by the police-powers of the State in the interests of public-health and well-being. The

prohibition is backed by the sanction of a penalty. The offences are strict statutory offences. Intention or mental-state is irrelevant.

and

12. The Statute we are concerned with prescribes a strict liability, without need to establish mens rea. The Actus Reus is itself the offence. There

might be cases where some mental element might be a part of the Actus Reus itself. This is not one of those cases where anything more than the

mere doing of the prescribed Act requires to be proved. There is thus no merit in the second point either.

This decision clearly goes to show that the Rules with which we are concerned prescribe a strict liability, without need to establish mens rea. The

Actus Reus is itself an offence.

16. In the decision of the Supreme Court reported in 1990 (28) ECR 145 SC : ECR C cus. 1695 SCin the case of Akbar Badruddin Jiwani v.

Collector of Customs, relied upon by the Ld. Consultant, Shri P.R. Biswas for the Appellants, their Lordships were dealing with a case of import

under the Customs Act, 1962. In that case, their Lordships held that even if it was assumed that the stone slabs imported by the Appellant were

marbles, still in view of the findings of the Tribunal that they were imported on a bonafide belief that they were not marbles, the imposition of

penalty was not warranted. Their Lordships were dealing with Section 112 of the Customs Act 1962, wherein mens rea was essential to impose a

penalty. But in this case, the mere contravention of the Rule is sufficient for imposing penalty without establishing any mens rea. In that case, their

Lordships referred to the principles laid down in Hindustan Steel Ltd. v. State of Orissa reported in .

It was held in that decision that a penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of

contumacious or dishonest conduct, or acts in a conscious disregard of its obligation. In the instant case, the removal of the goods without issue of

the Gate-Pass and the non-mention of the date and time of removal in the Gate-Pass, is an act done by the Appellants in conscious disregard of its

obligation or in the alternative, the Appellants acted deliberately in defiance of the Rules. This cannot be termed as a technical or venial breach. It

cannot also be said that this is done under a bona fide belief. The facts of that case are not applicable to the facts of this case. In this view of the

matter, I am of opinion that the lower authorities were justified in imposing the penalty and appropriating the amounts in question as held in the

impugned order. Hence I dismiss the Appeal filed by the Appellants.

10.4.1992

Sd/-(T.P. Nambir)Member (J)

17. I have perused the Order written by my Ld. brothers Shri K. Sankararaman, Member (Technical) and Shri T.P. Nambiar, Member (Judicial).

Shri K. Sankararaman, Member (Technical) has recorded the facts very elaborately and as such, I need not reproduce the same. The following

points of, difference have been referred to me:

(i) Whether in the facts and circumstances of the instant case the authorities below were justified in imposing a penalty on the Appellants under

Rule-173Q of the Central Excise Rules, 1944; and

(ii) Whether on the facts and circumstances of the case the authorities were justified in ordering the appropriation of the Security Deposits in the

above-said appeals?

Shri P.R. Biswas, the Id. Consultant with Shri P.K. Das, Advocate has appeared. Shri P.R. Biswas pleaded that the only issue in the matter is the

levy of penalty and the penalty has been imposed by the Adjudicating Authority on account of a technical lapse as no time was mentioned on the

Gate-Passes. Shri P.R. Biswas pleaded that as per practice of the Appellants where wagons are involved, Gate-Passes are to be sent by post.

The Gate-Passes were not detached from the Gate-Passes book and these are detached after the wagon leaves and thereafter consolidated entries

in the P.L.A. account at the end of the working day are made which means mid-night. He pleaded that the officer came back from the railway

station at 5.00 PM. There is no mala fide intention on the part of Appellants. Shri P.R. Biswas pleaded that there is complete absence of element

of mens rea and as such, no penalty should be levied. He relied on a decision of the Hon''ble Supreme Court in the case of Hindustan Steel Ltd. v.

State of Orissa reported in 1978 ELT (J 159). Shri P.R. Biswas relied on the Order passed by Member (Technical) Shri K. Sankararaman and

referred to the following decisions:

(1) Jay Engineering Works Ltd. Bansdhani v. Collector of Central Excise, Calcutta reported in .

(2) Kellner Pharmaceuticals Ltd. Kanpur v. Collector of Central Excise, Kanpur reported in .

He pleaded that mere reliance by the Member (Judicial) Shri T.P. Nambiar is on the decision of the Hon''ble Supreme Court in the case of Gujarat

Travancore Agency v. Commissioner of Income Tax reported in 1989 (42) ELT 350 (S.C.). He pleaded that the Order passed by Member

(Technical) is correct and the Appeals should be allowed. Shri D.K. Saha, the Ld. SDR who has appeared on behalf of the Respondent reiterated

the facts. He pleaded that 6 railway wagons are involved. There is no time mentioned of removal on Gate-Pass and Gate-Pass was not removed

from the book and P.L.A. entry was made later on. He pleaded that the goods left the factory for railway station at 7.00 AM. He referred to Rule

52A of the Central Excise Rules, 1944. Shri Saha pleaded that Rule 52A clearly prescribes that no excisable goods shall be delivered from a

factory except under a Gate-Pass signed by the owner of the factory and countersigned by the proper officer and Sub-rule (2) provides that the

Gate-Pass shall be presented to the proper officer for counter-signature at least one hour before the actual removal of the goods from factory.

After counter-signature, the proper officer shall return the original and triplicate copies of the Gate-Pass to the manufacturer retaining the duplicate

for his record. The original copy shall accompany the consignment to its destination and triplicate retained by the manufacturer. Shri D.K. Saha

pleaded that it is an admitted fact by the Appellants that the consolidated entry was made in the P.L.A. account at the end of the day. He relies on

the Order passed by Member (Judicial) and refers to para No. 7. He argued that the wagon had left the factory at 7.00 AM. He also referred to

para No. 13 of the Order passed by Member (Judicial). He pleaded that there are 5 cases and penalty of Rs. 16,000/- each has been imposed.

He pleaded that there is no infirmity in the Order. In support of his arguments, he relied on a decision of the Andhra Pradesh High Court in the

case of Nizam Sugar Factory Ltd. v. Collector of Central Excise & Others reported in . He argued that penalty has been imposed under Rule

173Q of the Central Excise Rules and the seized goods were cleared under bond. He relied on the Order passed by Member (Technical) and

pleaded for rejection of the Appeals.

18. The Ld. Consultant Shri P.R. Biswas reads the last sentence of the Order passed by the Collector and also states that the Appellants were

following self removal procedure and the consignment was to be despatched to M/s. N.T.P.C., Bhagalpur and one to S.D.O., Rajan(?),

Newadah. He again relied on another decision in the case of Travancore Sugars and Chemicals Limited v. Collector of Central Excise, Cochin

reported in . He pleaded that the Order passed by the Member (Technical) is correct and the same should be accepted.

19. I have heard both the sides and have gone through the facts and circumstances of the case. It is an admitted fact that Appellants are following

self removal procedure and the self removal procedure casts very heavy responsibility on the excise licensee. There is no physical control of the

Revenue Authorities and Revenue Authorities expect that every manufacturer should maintain true and honest accounts. Rule 52A of the Central

Excise Rules provides that the goods are to be delivered on Gate-Passes. For prop appreciation, Rule 52A of the Central Excise Rules is

reproduced below:

RULE - 52A. Goods to be delivered on a Gate-Pass-[(1) No excisable goods shall be delivered from a factory except under a Gate-Pass signed

by the owner of the factory and counter-signed by the proper officer.

Explanation-In this Rule, and in any other Rule, where the term ''Gate-Pass'' is used, it shall mean

(i) Gate-Pass in the proper form; or

(ii) Assessee''s own such delivery invoice, challan or advice or other document of similar nature in which all the particulars contained in Gate-Pass

in the proper form are also given; or

(iii) such other form as the Collector may in any case or class of cases specify.]

[(2) The Gate-Pass shall be made out in triplicate with indelible pencil using double sided carbon and shall contain no mutilations, over writings,

corrections or erasures. The Gate-Pass shall be presented to the proper officer for counter signature at least one hour before the actual removal of

the goods from factory. After counter-signature, the proper officer shall return the original and triplicate copies of the Gate-Pass to the

manufacturer retaining the duplicate for his record. The original copy shall accompany the consignment to its destination and tripicate retained by

the manufacturer. The manufacturer may, with the approval of the proper officer, make extra copies of a Gate-Pass for his own use, clearly

marked "EXTRA COPY-NOT FOR COVERING TRANSPORT". The original copy shall be produced by the carrier on demand by any

Central Excise Officer while the goods are enroute to such destination from the factory:

Provided that in respect of removal of excisable goods consumed within the factory for manufacture of other goods in a continuous process the

manufacturer may make out a single AGate-Pass at the end of the day.]

(3) If all the packages comprising a consignment are despatched in one lot at any one time, only one Gate-Pass shall be made out in respect of the

consignment. If, however, a consignment is split up into two or more lots each of which is despatched separately either on the same day or on

different days, a separate Gate-Pass shall be made out in respect of each such lot. In case a consignment is loaded on more than one vehicle,

vessel, pack animal or other means of conveyance which do not travel together but separately or at intervals, a separate Gate-Pass shall be made

out in respect of each vehicle, vessel or pack animal or other conveyance.