
(1976) 09 MP CK 0003
In the Madhya Pradesh High Court
Case No : M.P. No. 1571 of 1975

Universal Cables Ltd., Satna

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 14-09-1976

Acts Referred:

Central Excise (Amendment) Act, 1985 — Section 4, 4(a)
Central Excises and Salt Act, 1944 — Section 4, 4(a), 6
Companies Act, 1956 — Section 446
Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3
Income Tax Act, 1961 — Section 147, 254(4), 256

Citation : (1977) JLI 862

Hon'ble Judges : S.M.N. Raina, J;G.P. Singh, J

Bench : Division Bench

Advocate : S.J. Sorabjee, for the Appellant; R.P. Sinha, for the Respondent

Final Decision : Allowed

Judgement

G.P. Singh, J.—By this petition under Article 226 of the Constitution the petitioner, Universal Cables Ltd., calls into question 13 orders passed by the Collector, Central Excise, Nagpur on 10th/11th September 1975 under Rule 173 Q of the Central Excise Rules, 1944, imposing penalty, to the tune of nearly Rs. 2? crores in respect of properzi rods removed by the petitioner from its properzi mill from 1st May 1970 to 23rd May 1971. The petitioner also prays for quashing of 15 show cause notices which were issued by the Assistant Collector before the said 13 orders were passed by the Collector.

2. The petitioner is an existing Company within the meaning of the Companies Act, 1956. The petitioner carries on business of manufacturing and dealing in cables and conductors required for transmission of electricity. The petitioner has its cable factory at Satna. For the purpose of manufacturing cables and conductors, the petitioner requires aluminium wire rods commonly known as properzi rods as an essential raw-material. The petitioner has a properzi mill at

Satna for converting aluminium ingots into properzi rods. The petitioner acquires aluminium ingots-primarily from two leading manufacturers in India, namely, Hindustan Aluminium Corporation Ltd., Renukoot (Hindalco) and Indian Aluminium Co. Ltd., Belgium (Indal). The petitioner converts the aluminium ingots into rods and uses them in its cable factory. In order to fully utilise the capacity of the properzi mill, the petitioner also converts aluminium ingots belonging to other cable or conductor manufactures. These other manufactures send aluminium ingots of Hindalco or Indal Brand to the petitioner who converts the ingots into rods and realises conversion charges.

3. Before 1st March 1970, excise duty on aluminium including ingots, wire rods etc. was linked with Weight. As the duty was the same on ingots and wire rods, no duty was payable on the manufacture of properzi rods from duty paid aluminium ingots. From 1st March 1970, excise duty on aluminium ingots, wire bars and wire rods became leviable on the basis of rate ad valorem. However, by a notification dated 1st March 1970, exemption from duty was granted in respect of aluminium ingots, wire bars, wire rods etc. By this exemption, no excise duty was payable on the manufacture of aluminium wire bars and rods including properzi rods. But by another notification issued on 26th March 1970; exemption granted in respect of aluminium wire bars and wire rods including properzi rods was withdrawn. The result therefore, was that from 26th March 1970 excise duty became leviable on properzi rods on ad valorem basis. There was some confusion for certain period about the effect of the withdrawal of this exemption and the procedure laid down for removal of properzi rods under the Central Excise Rules was not strictly followed till 26th April 1970. We are, however, not concerned with this period in this petition.

4. The procedure for removal of properzi rods by the producers and manufacturers is contained in Chapter VII-A of the Central Excise Rules. This chapter applies to such excisable goods as the Central Government may by notification issued under Rule 173-A specify. By a notification issued on 11th May 1968, this Chapter has been applied to a number of excisable goods including aluminium. This Chapter consists of Rules 173-A to 173-Q. Before removing any excisable goods, every assessee has the file before the proper officer for approval a list in such form as the Collector may direct under Rule 173-B showing full description of the goods produced or Manufactured by him the item number of the First Schedule to the Act, under which each such goods fall, the rate of duty leviable on each such goods and such other particulars as the Collector may require. The proper officer after such inquiry as he deems fit approves the list with such modifications as are considered necessary and returns a copy of the approved list to the assessee who determines the duty payable on the goods in accordance with the list. Rule 173C requires the assessee to file a price list of goods which are assessable ad valorem in such form and in such manner as the Collector may require. The proper officer approves the price list after making such modifications as he considers necessary. The assessee determines the duty on the goods in accordance with

the list approved by the proper Officer Rule 173-C has an important bearing in this case. This rule omitting the amendments, which were made later and with which we are not concerned in this petition, reads as follows:

173-C: (1) Every assessee, who produces, manufactures or ware-houses goods which are chargeable-with duty at a rate dependent on the value of the goods, shall file with the proper Officer for his approval a price list, in such form and in such manner and at such intervals as the Collector may require, showing the price of each of such goods and the trade discount if any allowed in respect thereof to the buyers.

(2) The proper Officer shall approve the price list after making such modifications as he may consider necessary so as to bring the value shown in the said list to the correct value, for the purpose Of assessment as provided in section 4 of the Act, He shall thereafter return one copy of the list-approved as aforesaid to the assessee who shall, unless otherwise directed by the proper Officer, determine the duty payable on the goods intended to be removed in accordance with such list.

(3) If in the list approved by the proper Officer under sub-rule (2) any alteration becomes necessary for any reason, the assessee shall likewise file a fresh list or an amendment of the list already filed for the approval of such Officer.

Note : After the initial submission of the price list by an assessee, it will not normally be necessary for him to submit any further list unless there is a change in the prices of excisable goods produced by him. The responsibility, however, is clearly, fixed on the assessee to intimate in advance the changes made in the price lists already submitted by him for approval by the proper Officer.

(4) Notwithstanding the provisions of sub-rules (1) to (3), the Collector may having regard to the nature of goods manufactured and the frequency of market price fluctuations of such goods allow an assessee or a class of assessees to declare the price transacted by the said assessee or assessees for the particular wholesale consignment on the gate pass or accompanying challan or advice note and to determine the duty payable on such goods intended to be removed on the basis of the said declared price.

Provided that where the price thus declared on the gate pass or accompanying challan or advice note does not represent the value as determined u/s 4 of the Act. the proper Officer may, after such further inquiry, as he may consider necessary reassess the duty due and thereupon the assessee shall pay the deficiency, if any, by a debit in his account current or in case of excess payment take credit of the amount paid in excess in the manner prescribed in sub-rule (2) of R. 173-I.

Rule 173-D requires the assessee to furnish information regarding principal raw material if so required by the Collector. After the assessee complies with the provisions of Rules 173-B, 173-C and 173-D, he himself determines his liability

for the duty on the excisable goods intended to be removed and can remove the goods after payment of duty so determined. The procedure for payment of duty is contained in Rule 173-G which lays down that every assessee has to keep an account current with the Collector separately for each excisable goods and he has to pay the duty determined by him for each consignment by debit to such account current before removal of the goods. This rule further requires every assessee to submit monthly returns in the proper form showing inter alia the quantity of excisable goods removed on payment of duty and the duty paid on such quantity. Rule 173-1 provides for assessment of duty by the proper Officer on the basis of information contained in the return filed by the assessee under Rule 173-G and after such further inquiry as he considers necessary. Rule 10 & 11 of the Rules which provide for recovery of duty short levied and for refund of duty paid in excess respectively are made applicable for Chapter VII-A by Rule 173-J with the modification of the period of limitation. The period of limitation as mentioned in Rules 10 and 11 is three months, but for purposes of Chapter VII-A Rule 173-J makes the period of limitation in these rules read one year. Rule 173-Q provides for confiscation and penalty. It is under this rule that the impugned orders were made by the Collector. This rule as in force at the relevant time is as under ;--

173-Q Confiscation and penalty.--If any manufacturer, producer or licensee of a warehouse,--.

- (a) removes any excisable goods in contravention of the provisions of any rules; or
- (b) does not account for all such goods manufactured, produced or stored by him; or
- (c) engages in the manufacture, production or storage of such goods without having applied for the licence required u/s 6 of the Act, or
- (d) contravenes the provisions of any rule with intent to evade payment of duty, then :--
 - (i) any land, building, plant, machinery, materials, conveyance, animal or any other thing used in connection with the manufacture, production, storage, removal or disposal of such goods, and
 - (ii) all excisable goods on such land or in such building or produced or manufactured with such plant, machinery, materials or thing,

belonging to such manufacturer, producer or licensee shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clauses (a), (b), (c) or (d) has been committed or five thousand rupees, whichever is greater and in every case where there has been such a contravention the proper Officer may assess the duty due to the best of his judgment and the assessee shall there upon pay

the duty so assessed.

5. On 27th April 1970 the petitioner filed before the Superintendent, Central Excise, Satna, a list of goods under Rule 173-B and a list of prices under Rule 173-C. In the price list filed under Rule 173 C, the exfactory price was show as Rs. 5,005/- per (sic) and Rs 4,600/- per m.t. for properzi rods manufactured from Hindalco and Indal ingots respectively. The basis for showing these prices was explained by the petitioner in its letter dated 30 April 1970, addressed to the Superintendent, Central Excise. The petitioner clarified that it had valued the properzi rods manufactured out of the respective aluminium ingots of the two manufacturers at the respective control prices of the said manufacturers. The petitioner further explained that it was only charging Rs. 400/- per m.t. for conversion of aluminium ingots into properzi rods from its clients who send ingots for conversion purposes. The list of goods and the price list submitted by the petitioner were approved on 6th May 1970 by the Superintendent, Central Excise, who was the proper Officer for the purposes of Chapter VII-A of the Rules. The approval was made by making endorsements in the respective lists under Rules 173-B and 173-C. On 22nd July 1970, the petitioner filed a revised list of classification of goods and a revised list of prices under Rules 173-B and 173-C. In the revised price list, the price of properzi rods manufactured from Indalco ingots was shown at Rs. 4.500/- per m.t. instead of Rs. 4.600/-. It was explained that in the earlier price list Rs 4,600/- per m.t. was shown as the price under a mistake. Copies of correspondence which showed that the mistake was bona fide were also submitted. The revised lists of classification of goods and prices were also approved by the proper Officer on 6th August 1970. From time to time between May 1970 and May 1971, the petitioner cleared and removed from its factory at Satna various quantities of properzi rods after payment of duty which was calculated on the basis of the list of prices approved by the proper Officer. Monthly returns in the proscribed form under Rule 173-G (3) were filed before the proper Officer from time to time. The proper Officer after making such inquiry as he considered necessary assessed the duty on the goods and completed the assessment memorandum as required under rule, 173-I. By a letter dated 3rd April 1971, the proper Officer informed the petitioner that all properzi rods manufactured by the petitioner would be assessed on the value of Rs. 5,005/- per m.t. On the petitioner's protest, the Deputy Collector, by an order made on 28th April 1971, permitted the petitioner to pay the duty by valuing properzi rods from Hindalco ingots at Rs. 5,005/- and from Indal ingots at Rs. 4,500/- per m.t. under rule 9-B. Some proceedings were taken by the Superintendent, Central Excise, and the Assistant Collector, Central Excise, for recovery of short levy for the earlier period on the basis that the duty was payable on the value determined at the rate of Rs. 5,005/- per m.t. in respect of all properzi rods. It is not necessary to go into these proceedings because they became abortive by an order passed in appeal by the Appellate Collector, New Delhi, on 18th May 1974. In the meantime, representations were made by the petitioner and other manufacturers to the Government of India for laying down

the basis for valuing the properzi rods manufactured by job workers for cable manufacturers. By an order passed on 15th May 1972, the Government of India communicated the recommendation of the Central Board of Excise that the properzi rods manufactured by job-workers for cable manufacturers should be valued by adding a sum of Rs. 510/- per m.t. to the prices of the ingots used in the manufacture of properzi rods. The said recommendation related to the period from 1st March 1970 to 23rd May 1971. On 12th July 1970, the Superintendent, Central Excise informed the petitioner that all cases would be finalised in the light of the said order of the Government of India. The petitioner was directed to furnish particulars of all past clearances. On 28th August 1972, the petitioner claimed a refund of Rs. 2,82,599/- in view of the order of the Government of India. By an order passed on 9th April 1973, the Assistant Collector allowed a refund of Rs. 2,09,254/- to the petitioner. This refund was presumably ordered under rule 11 read with rule 173-J. The petitioner preferred an appeal for claiming the refund to the extent it was disallowed by the Assistant Collector. This appeal was partly allowed by the Appellate Collector and by an order passed on 30th July 1974 some further relief was granted to the petitioner.

6. In exercise of its powers conferred by section 3 of the Essential Commodities Act, 1955, the Central Government on 20th March 1970 promulgated the Aluminium (Control) Order, 1970. On the same date, the Central Government issued a Notification under Clause 4 of the Control Order fixing sale prices of aluminium of the different producers, manufacturers or dealers at the ex-factory prices of the different items of the said producers, manufacturers or dealers prevailing on 28th February 1970. This notification had the effect of fixing the maximum selling price of aluminium goods including properzi rods at the price prevailing on 28th February 1970. The price so fixed was not uniform because different manufacturers sold their products at different rates on 28th February 1970. By another notification issued on 24th May 1971, uniform selling price for properzi rods was fixed at Rs. 5,815 per m.t. inclusive of excise duty.

7. On 17th October 1974, the Assistant Collector, Central Excise, issued the 13 impugned notices to the petitioner in respect of clearances of properzi rods made from May 1970 to May 1971. It was alleged in the notices that the petitioner contravened the provisions of rules 173-C, 173-F and 173-G in that the petitioner did not file correct price list, did not determine correct assessable value and did not pay proper duty as required by the rules. It was also alleged in the notices that the scrutiny of the records of the petitioner showed that the petitioner had been selling the properzi rods manufactured by it in wholesale to other cable manufacturers under open market conditions prior to 28th February 1970. In support of this allegation, it was stated in the notices that the petitioner sold two lots of 9 260 m.t. and 9.951 m.t. at the ex-factory price of Rs. 7.400/- per m.t. on 2nd January 1970 and 10th January 1970 respectively to Messrs Deora P.V. Cabcon Manufacturing Co. Pvt. Limited. Pologround, Indore and that one further consignment of 10,108 m.t. was sold to the same party on 16th February 1970 at Rs. 1,325/- per m.t. It was further alleged that the price at

which the last consignment was sold represented the price prevailing on 28th February 1970 and the ex-factory price of properzi rods manufactured by the petitioner was, therefore, Rs. 325/- in terms of the Aluminium (Control) Order and this price should have formed the basis for valuation of the petitioner's goods u/s 4 (a) of the Central Excise Act, 1944; and that the petitioner evaded payment of duty by not declaring this price as correct price in the price list filed under rule 13-C. The petitioner was required to show cause to the Collector, Central Excise, Nagpur, as to why penalty should not be imposed under rule 173-Q. The petitioner was also required to show cause why the land, buildings; plants etc. and the excisable goods on such land or in such buildings with plant machinery be not confiscated and differential duty be not charged and recovered under rule 173-Q. In reply to the notices to show cause, the petitioner submitted that it was not a seller of properzi rods. It was explained that the petitioner manufactured properzi rods either for the use in its factory or for supplying to other manufacturers of cables and conductors who supplied aluminium ingots to the petitioner. The petitioner only charged from these other manufacturers conversion charges and not the price. It was further explained that as aluminium ingots that were used in the manufacture of properzi rods were either Hindalco or Indal Brand, the petitioner adopted the control prices of properzi rods of these two manufacturers for purposes of payment of excise duty. As regards the sales to the Indore party, the petitioner submitted that the sales to that party were of an insignificant quantity of non-dutiable defective properzi rods and that the stray sales of such rods could not form the basis for determination of the wholesale price of properzi rods manufactured by the petitioner. It was also submitted that the sale price of defective stuff could not be accepted as wholesale price of the quality goods. The petitioner further submitted that isolated sales of defective and unusable properzi rods did not mean or prove the existence of a potential wholesale market for the articles for being sold on wholesale basis at the place of manufacture because the petitioner never sold any quality properzi rods to any customer at any time. On 10th/11th September 1975 the Collector, Central Excise passed the thirteen impugned orders. The Collector did not decide whether the three sales of properzi rods to the Indore party referred to in the show cause notices related to the defective rods or whether the sales were of quality rods. The Collector also took into account certain despatches of properzi rods to Bombay and Ahmedabad between 12th March 1970 and 29th May 1970 under consignment of self. It may here be mentioned that these despatches were not referred to in the show cause notice and the petitioner was not given any opportunity to give its explanation in respect of these despatches. The Collector held that it was imperative for the petitioner to have mentioned that price in the price list under rule 173-C at which its properzi rods sent to Bombay and Ahmedabad under consignment to self were eventually sold. It was observed that the price list did not contain this material information and, therefore, there was contravention of rule 173-C. It was further held by the Collector that the properzi rods sent to Bombay Ahmedabad etc. were capable of being sold at a rate not below the control price, i.e. at the rate of

Rs. 7.325/- per m.t. The control price of Rs. 7,325/- was derived by the Collector on the basis of sales made to the Indore party prior to 28th February 1970 which were referred to in the show cause notices. On these findings, the Collector held that there was contravention of rules 173B, 173-C, 173-F, 173-G and 173-I and the petitioner was liable to penalty under rule 173-Q. As earlier stated, the Collector imposed in all the thirteen cases penalty totalling nearly to Rs. 2-1/2 crores.

8. The impugned orders of the Collector proceed on the basis that the petitioner contravened rules 173-B, 173-C, 173-F, 173-G and 173-I. The show cause notices issued preceding these orders also alleged breaches of rules 173-C, 173-F and 173-G. It is, however clear that the contravention, on the findings of the Collector, was in essence of rule 173-C and not of other rules. The petitioner did file list of goods for approval in proper form as required by rule 173-B. It is not disclosed in what manner this rule was contravened by the petitioner. The contravention found in respect of rule 173-G is that the prices mentioned in the price list filed by the petitioner were not correct and did not disclose the true prices at which the petitioner's goods were sold or were capable of being sold. The list of prices submitted by the petitioner was approved by the proper Officer and the petitioner valued the goods in accordance with prices so approved as required by rule 173-F. There was, therefore no contravention of rule 173-F. The petitioner opened a current account as required by rule 173-G and the duty was paid by debit to this account before removal. The petitioner also submitted returns as required by clause (3) of rule 173-G in the proper form. Thus there was also no contravention of rule 173-G. As regards rule 173-1, it is for the proper Officer to make an assessment on the basis of the returns and after such further inquiry as he may consider necessary. The assessments were duly made by the proper Officer from time to time. It is difficult to understand as to how could the petitioner be made liable for any breach of rule 173-I. Indeed, learned counsel appearing for the respondents has accepted before us that the contravention in the real sense was of rule 173-C alone and it is for the contravention of this rule which resulted in evasion of duty that the petitioner has been punished by imposition of penalty under rule 173-Q by the impugned orders passed by the Collector.

9. The arguments addressed at the bar in this petition can be divided under the following heads :--(1) Denial of natural justice; (2) Wrong valuation of properzi rods, (3) No contravention of rule 173-C; (4) Bar of limitation u/s 40 (2) (5) Bar of finality u/s 35 (2); (6) Unreasonable exercise of statutory powers; and (7) Alternative remedy.

(1) Denial of natural justice :

10. The first contention that has been raised before us is that the Collector in holding the petitioner liable for contravention of rule 173-C took into account certain despatches to Ahmedabad and Bombay which were not referred to in the show cause notices nor was the petitioner's attention drawn to them at any

stage during the proceedings before the Collector and, therefore, principles of natural justice were not followed and the finding is vitiated for that reason.

11. In paragraph 5 of the orders the Collector formulated six issues as requiring his decision. Issue No. 4 formulated by him reads as follows :--

Whether the information mentioned in the price list submitted on 30-4-70 was correct and complete for determination of value in terms of section 4 of the Act in respect of the properzi rods manufactured and cleared from their factory during the relevant period ? If not, whether the party furnished misleading information and or suppressed material particulars in their said price list by not determining such value on the basis of their sales under open market condition and thereby wilfully undervaluing their excisable goods.

In giving his finding on the above issue, the Collector observed that a scrutiny of the petitioner's despatch account showed that in several cases properzi rods consigned to self were sent to different places like Bombay and Ahmedabad which indicated that these self consigned goods on reaching the destination were sold from those places to other customers. The Collector referred in this connection to nineteen despatches which were made between 12th March 1970 and 29th May 1970. The Collector observed that under rule 173-C it was imperative for the petitioner to have mentioned that price in the price list at which the properzi rods sent to Bombay and Ahmedabad under consignment to self were eventually sold to other customers as that would be the nearest place from Satna at the relevant time. The Collector also observed that as it was undisputed fact that the price list in question did not contain the material information, he came to the irresistible conclusion that the information furnished by the petitioner was incorrect and incomplete and the petitioner had wilfully suppressed material information and gave misleading information so as to undervalue the excisable goods.

12. It is quite clear by reading the impugned orders that the conclusion as to the contravention of rule 173-C was solely based on the despatches of goods made by the petitioner to Bombay and Ahmedabad which were referred to by the Collector in his finding on issue No. 4. These despatches were not referred to in the show cause notices and the attention of the petitioner was not drawn to them at any stage during the pendency of proceedings before the Collector. The petitioner, therefore, had no opportunity to meet the inference drawn from the aforesaid despatches by the Collector. Learned counsel for the respondents submitted that as these despatches were recorded in the petitioner's despatch register, this was a fact within the knowledge of the petitioner and no grievance can be made if facts within the knowledge of the petitioner were not brought to its notice during the inquiry. In my opinion, there is no substance in this argument. Natural justice requires that a quasi-judicial authority must inform the person proceeded against the material which it proposes to use against him so that he may meet the inferences that are likely to be raised from that material. Even when the material used is within the knowledge of the person proceeded

against, he must be told that it would be used against him, for, unless he is so informed he would have no opportunity of offering his explanation for meeting the inference that the authority seeks to draw from it. In *Collector of Central Excise and Land Customs. Shilong v. Sansawarmal Purohit* 1969 Ass LR (SC) 11 the Supreme Court observed that "a quasi-judicial authority would be acting contrary to the rule of natural justice if it acts upon information collected by it which has not been disclosed to the party concerned and in respect of which full opportunity of meeting the inferences which arise out of it has not been given." (See further *Prakash Cotton Mills Private Ltd. and Others Vs. B.N. Rangwani and Others*, . It is true that the fact that certain despatches were made to Bombay and Ahmedabad between 12th March 1970 and 29th May 1970, on dates referred to in the orders of the Collector, was known to the petitioner. But the petitioner was never told that these despatches will be taken into account in holding it liable for contravention of rule 173-C. The petitioner, therefore, had no opportunity of meeting the inference which the Collector drew from these despatches. The petitioner's case is that these stray despatches were not of good quality properzi rods but of defectives and the prices at which these rods were sold at Bombay & Ahmedabad were irrelevant for finding out the wholesale price of good quality rods at Satna and, therefore, the petitioner was not obliged to enter these prices in the price list filed under rule 173-C. The petitioner had no opportunity of offering this explanation before the Collector as the petitioner was not told that the said despatches to Bombay and Ahmedabad would be taken into account against it. The non-disclosure to the petitioner that the despatches to Bombay and Ahmedabad would be used against it lands a serious infirmity to the finding that the petitioner did not enter correct prices in the price list and thereby contravened rule 173-C.

(2) Wrong valuation of properzi rods :

13. It was next contended that the Collector acted against the principles of valuation contained in section 4 (a) of the Central Excise and Salt Act, 1944, in finding that the assessable value of the properzi rods clearly by the petitioner during the relevant period was Rs. 7,325/- per m.t.

14. The Collector's reasoning in adopting Rs. 7,325/- per m.t. as the assessable value is something like this. The assessable value ought to be determined on the basis of the wholesale cash price charged by the petitioner from its customers in the course of transactions at arms length at the places of production, i.e. Satna, or at any place nearest to it. The petitioner sold the properzi rods consigned to self at Ahmedabad and Bombay between March and May 1970 and the price at which these sales were made should form the basis for finding out the assessable value u/s 4 (a). The petitioner did not produce any evidence that these sales were at a rate below the maximum control price and, therefore, it must be assumed that the sales were made at the control price. The control price was Rs. 7,325/- per m.t. because it was at this price that the petitioner sold a consignment of properzi rods on 16th February 1970 to M/s P.V. Cabcon

Manufacturing Co. Pvt. Ltd., Indore, and this sale was nearest to the date 28th February 1970 with reference to which the Central Government fixed the control price under clause 4 of the Aluminium (Control) Order.

15. The reasoning of the Collector suffers from many infirmities. The Collector fixed the wholesale price on the basis of the despatches made to Ahamedabad and Bombay. As earlier stated, the attention of the petitioner was never drawn to those despatches either in the show cause notices or at any other stage during the proceedings and the Collector was therefore not entitled to take into account these despatches. The Collector wrongly blamed the petitioner that no evidence was produced to show the rate at which the goods despatched to Ahamedabad and Bombay were sold there. When the petitioner's attention was not drawn to these despatches, how could it know that it was required to lead evidence of the price at which these goods were sold. As regards the consignments sold to the Indore party, including the consignment that was sold on 16th February 1970, the petitioner's reply was that these consignments were of defective rods and not of good quality rods and, therefore, these sales could not furnish any basis for determining the value of good quality rods. The Collector did not decide the pertinent question raised by the petitioner that the consignments sold to the Indore party were of defective rods and not of good quality rods and without deciding it the Collector adopted the rate at which the consignment dated 16th February 1970 was sold as the control rate applicable for all the properzi rods removed by the petitioner during the relevant period.

16. The petitioner's contention before the Collector was that there was no wholesale market of properzi rods at Satna, that the petitioner's business was not of selling properzi rods, and that the stray sales made to the Indore party were of defective rods, i.e. rods which were not in conformity with the prescribed standard. u/s 4 (a) of the Act, as in force at the relevant time, the assessable value of an article is deemed to be "the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place, where such market exists". This section was construed by the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, in which it was held that a wholesale market does not mean that there should be an actual place where articles are sold and bought on a wholesale basis and that these words can also mean the potentiality of the articles being sold on a wholesale basis. The first question to be examined by the Collector, therefore, was whether there was any wholesale market in the sense as explained by the Supreme Court for the properzi rods manufactured by the petitioner at Satna. In other words, it ought to have been found whether there was potentiality of the articles being sold on a wholesale basis at Satna. As earlier stated, the petitioner's case throughout was that there was no such wholesale market at Satna because the properzi rods manufactured by it were either used in the factory or returned

to its customers. This cast of the petitioner was not found to be untrue. The stray sales of properzi rods made on 16th February 1970 and in January 1970 to the Indore party could not furnish any basis for wholesale market at Satna during the period from May 1970 to May 1971, with which we are concerned in this case. Moreover, these sales, according to the petitioner, were of defective rods and not of the goods of "like kind and quality" within the meaning of section 4 (a). The Collector first ought to have decided whether the contention of the petitioner that these sales related to defective rods was true. In the absence of any finding by the Collector overruling the petitioner's stand that the sales to Indore party were of defective rods, the learned counsel for the respondent had no option but to invite us to proceed on the assumption that the petitioner's stand was true and that the sales were of defective rods. Now, if the sales to Indore party were of defective rods, they could not form any basis for finding out wholesale cash price of good quality rods because these sales were not of the goods of the same quality. Learned counsel for the respondents submitted that good quality rods and defective rods were both properzi rods taxable under Item 27 of the First Schedule to the Act which made no distinction between good quality rods and defectives. There is no merit in this argument. It is true that good quality properzi rods and defectives are both taxable under Entry 27 of the First Schedule, but their assessable value has to be determined u/s 4, In determining the assessable value of the goods removed, what has to be seen is the wholesale cash price of the article of "like kind and quality", good quality rods and defective rods may be goods of the same kind, but certainly they are not of the same quality. Therefore, the price obtained for defective rods cannot in law form the basis for finding out the wholesale cash price for good quality rods. There was no evidence whatsoever before the Collector of sales of good quality properzi rods at Satna. It could not, therefore, be held that there was any wholesale market or any potentiality of the good quality rods being sold on a wholesale basis at Satna. The Collector then ought to have considered, in accordance with section 4 (a), the wholesale price prevailing in a wholesale market at a place nearest to Satna. The nearest wholesale market, according to the petitioner, is Renukoot where Hindalco has its factory and sells goods of like kind and quality. The Collector could not have taken into account the sales made at Ahmedabad and Bombay firstly, because, these sales were not brought to the notice of the petitioner in the show cause notice or at any stage during the inquiry, and secondly, because Renukoot being nearer to Satna as compared to Ahmedabad and Bombay, the wholesale price prevailing at Renukoot had to be adopted u/s 4 (a) as against the wholesale price, if any, prevailing at Ahmedabad or Bombay. In my opinion, therefore, the entire basis on which the Collector proceeded in fixing Rs. 7, 325/-- per m.t. as the assessable value of the properzi rods cleared by the petitioner during the relevant period is apparently erroneous being in contravention of section 4 (a) of the Act as also being against the principles of natural justice.

17. It was argued by the learned counsel for the respondent that when the

petitioner sold rods of defective quality at Rs. 7, 325/- per m.t., it must be held that the petitioner must have sold good quality rods at a higher price. The argument assumes that there were sales of good quality rods by the petitioner for which there is no finding or foundation. The sale of properzi rods was controlled by the Aluminium (Control) Order. Under clause 5 of that Order, aluminium rods could be sold to only such person or persons as may be specified by the authorities under the Order, It is quite possible that because of scarcity of good quality properzi rods available in the market, the Indore Party paid a somewhat high price for the defective rods which the petitioner sold. But from these stray sales it could not be assumed that the good quality rods were capable of being sold at Satana at the same or higher price. As earlier stated, there was no finding that there was any wholesale market of good quality rods at Satna in the sense explained by the Supreme Court in Voltas' case. Admittedly, there was a whole sale market at Renukoot where Hindalco was selling goods of like kind and quality. Therefore, in the absence of a finding of any wholesale market at Satna or any place nearer to it than Renukoot, the price prevailing at Renukoot could alone furnish the basis for valuation of the petitioner's goods.

(3) No. Contravention of Rule 173 (c)

18. It was then contended by the learned counsel for the petitioner that even on the assumption that the price list submitted by the petitioner did not disclose correct prices, it cannot be held that the petitioner contravened Rule 173-C and thereby made itself liable to penalty under Rule 173. Q.

19. As earlier stated, the penalty has been imposed on the petitioner under Rule 173-Q essentially on the ground of contravention of Rule 173-C. The clauses of Rule 173-Q (1) that are relevant in this connection are clauses (a) and (d). For applicability of either of these clauses, it was necessary to be proved that the petitioner contravened the provisions of Rule 173-C. The obligation laid on a manufacturer by Rule 173-C is that he shall file with the proper officer for his approval a price list, in such form and in such manner and at such intervals as the Collector may require, showing the price of goods chargeable with duty and the trade discount, if any, allowed in respect thereof to the buyer. The rule further requires that if in the list approved by the proper Officer any alteration becomes necessary for any reason, the assessee shall likewise file a fresh list or an amendment of the list already filed for the approval of such Officer. It is not disputed that the petitioner did not file a price list as also an amended list in the form and in the manner prescribed by the Collector, showing the prices of the properzi rods manufactured by it. The prices mentioned in both these lists were approved by the proper Officer. The gravamen of the charge against the petitioner is that the prices in these lists were not correctly shown. The question, therefore, to be determined is whether if a manufacturer files a list in the form and in the manner prescribed by Rule 173-C showing the price of excisable goods but the price shown is not correct, can it be said that he contravenes the provisions of Rule 173-C within the meaning of clauses (a) and (d) of Rule 173-Q

(1). In this connection it is relevant to note that section 9 of the Central Excise and Salt Act, which provides for offences and penalty, makes a person liable to a criminal offence not only when he removes an excisable goods in (sic) of the provisions of the Act or any rule made (sic) any information which he is required by Rules made under this Act to supply but also when he supplies false information, Rule 173-Q on the other hand does not say that a person shall be liable to penalty when the information supplied by him is false. The omission in this respect in Rule 173-Q is pertinent and it shows that the rule does not intend to penalise a person for giving false information. Further, under sub-rule (2) of Rule 173-C the proper Officer while approving the price list can modify the value shown in the list so as to bring it to the correct value. Now if the rule requires the manufacturer to enter the correct price, he would become liable to penalty under Rule 173-Q on every occasion the proper officer modifies the list. Such a consequence could not have been intended, which supports the view that omission to enter correct price is not a contravention of Rule 173-C within the meaning of Rule 173-Q. So when the petitioner filed a 1st in the form and in the manner prescribed under Rule 173-C showing the prices of the goods, it cannot be said that the petitioner contravened the provisions of that rule even on the assumption that the information supplied by it under that rule was false in relation to the prices

20. In *Union of India v. Shree Ram Durgaprasad* AIR 1970 SC 197 the Supreme Court considered section 12 (1) of the Foreign Exchange Regulation Act, 1947, which, as it then stood, prohibited the exportation of any notified goods from India until a declaration supported by such evidence, as may be prescribed or specified, was furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will, within the prescribed period, be paid in the prescribed manner. The exportation of goods contrary to the prohibition or restriction contained in section 12(1) was made punishable u/s 167(8) of the Sea Customs Act, 1878, by recourse to section 23-A of the Foreign Exchange Regulation Act. *M/s Shree Ram Durgaprasad*, who were respondents before the Supreme Court, had furnished declarations in the prescribed form before exporting the goods mentioning therein the full export value of goods, they had also furnished to the proper authorities the prescribed evidence. The case against them was that they had under-invoiced the goods & had given incorrect information in the declarations. Even accepting that the goods were under-invoiced and the information supplied in the declarations was incorrect, the Supreme Court held that there was no contravention of section 12 (1) as the declarations given satisfied the requirement of that section. It was also held that the declarations could not be considered as nonest, although they did not correctly furnish all the information asked for. It was further held that supplying of wrong information was punishable u/s 23 read with section 22 of the Foreign Exchange Regulation Act, which provides that no person, when making an application or declaration to any authority or person for any purpose under the Act, shall give any information or

make any statement which he knows or has reasonable cause to believe to be false or not true, in any material particular. The reasoning of the Supreme Court in Shri Ram Durgaprasad's case supports our view that if a manufacturer files a price list in the form and in the manner prescribed by rule 173-C stating the price of excisable goods, he cannot be said to have contravened the provisions of that rule within the meaning of rule 173-Q, even if the price stated by him is not correct, although he can be made liable for an offence u/s 9. This conclusion is further supported by the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., . In Sanjana's case, the goods were removed after filing the required applications and forms under rules 9 and 52 of the Central Excise Rules and showing that the goods were exempted and after there was a nil assessment made by the proper Officer. Later on, the excise authorities entertained doubt about the fact that the goods were exempted. A notice was issued demanding duty, but it was beyond time under rule 10. The notice was sought to be supported under rule 9 (2). But this was negated by the Supreme Court on the ground that there was no contravention of rule 9 (1) as necessary applications were made and goods were removed after nil assessment. It will be seen that if the goods were really not exempted, the information supplied in the application or form under rule 9 (1) that the goods were exempted was not true, still it was held that there was no contravention of rule 9 (1) as the goods were removed after making applications as required by that rule.

21. Learned counsel for the respondents argued that the petitioner did not disclose its own prices but disclosed the prices of Hindalco and Indal and, therefore, it cannot be said that any prices were disclosed as required by rule 173-C in my opinion there is no merit in this argument, The petitioner adopted the prices at which Hindalco and Indal were selling their properzi rods, because the petitioner's case was that it was not selling any properzi rods and it was only manufacturing for use in its own factory or for use of its customers properzi rods from ingots manufactured by Hindalco or Indal. The petitioner explained this position in the letter which it sent along with the price list. The petitioner adopted the prices of Hindalco and Indal as the price of its own properzi rods. Even if the petitioner's goods were sold or to be capable of being sold at higher prices, all that can be said is that the petitioner did not disclose correct prices in the price list. But this error did not invalidate the price list to render it nonest.

22. I am therefore, of opinion that even on the assumption that the petitioner did not show the prices correctly in the price lists submitted by it, it did not contravene rule 173-C and, therefore, there was no basis whatsoever for levy of penalty under rule 173-Q. The proceedings against the petitioner for levy of penalty were, therefore, entirely misconceived,

(4) Bar of Limitation u/s 40 (2):

23. It was then contended by the learned counsel for the petitioner that the penalty proceedings were barred by limitation u/s 40 (2) of the Central Excise

and Salt Act. This section, as in force at the relevant time, reads as follows :--

No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

The argument of the learned counsel is that the expression "other legal proceeding" in this section should be interpreted in its natural sense to mean any proceeding taken in a manner prescribed by law or in pursuance of law irrespective of whether it is taken in a Court of law or before any authority or tribunal. Reference in this connection was made to AIR 1946 16 (Federal Court) , where it was held that a proceeding u/s 46(2) of the income tax Act, 1922, before the revenue authorities for recovery of income tax dues was a legal proceeding within the meaning of section 171 of the Companies Act, 1913. Reference was also made to Abdul Aziz Ansari Vs. The State of Bombay, and Jagmohandas v. Jamnadas AIR 1965 Guj. 181. In the Bombay case, it was held that assessment proceedings were "any legal proceeding" within the meaning of section 48 of the Bombay Sales Tax Act, 1933, and in the Gujarat case it was held that a proceeding before the District Court for appointment of a member of the Managing Committee of a trust was "any legal proceeding" within section 56-B of the Bombay Public Trusts Act.

24. Section 40 (2) of the Act came up for construction before the Supreme Court in Public Prosecutor, Madras Vs. R. Raju and Another, etc., . In that case it was held that section 40 (2) was not confined in operation to Government servants and that the section was applicable to any person including an assessee. It was further held that non-compliance with the provisions of the Act or rules by omitting to do what they enjoin will be anything done or ordered to be done under the Act within the meaning of section 40 (2). The limitation for taking penalty proceedings under Rule 173-Q for contravention of Rule 173-C with a view to evade duty, therefore, will be governed by section 40 (2) in case it is held that such proceedings are "other legal proceeding" within the meaning of that section. So the question that falls for our consideration is the ambit and scope of the expression "other legal proceeding" as it occurs in section 40 (2). It may be at once conceded that the expression "other legal proceeding" is ordinarily wide enough to include any proceeding taken in accordance with law, whether so taken in a Court of law or before any authority or tribunal. The question, however, is whether in the context of section 40 (2) this wide meaning should be given to the said expression. Now the language of section 40 (2) is: "no suit, prosecution or other legal proceeding shall be instituted", "suit" and "prosecution" which precede the expression "other legal proceeding" can be taken only in a Court of law. "suit" and "prosecution" belong to a class or category of legal proceeding which can be described as judicial proceedings or proceedings taken in a Court of law. This class or category is not exhausted by "suit" and "prosecution", for "suit" is not comprehensive enough to include civil

proceedings which are instituted by filing petitions or applications. In this situation, the rule of ejusdem generis persuades us to hold that the general words "other legal proceeding" are limited to the same category of legal proceeding of which "suit" and "prosecution" are examples. In other words, the expression "other legal proceeding" in the context of section 40 (2) bears a restrictive meaning conveying the idea of judicial proceedings or proceedings taken in a Court of law. The rule of ejusdem generis is founded on the reasoning that had the Legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the specific words as they, in such a case, would be superfluous. The rule applies when the following conditions exist: (i) the statute contains an enumeration of specific words; (ii) the subjects of enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent. See *Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others*, Sutherland, Vol 2, pp. 399, 400; All these conditions for applicability of the rule are here satisfied. There is no indication in section 40 (2) or elsewhere in the Act that the general words "other legal proceeding" should be given their wide meaning and should not be construed in a limited sense by applying the rule of ejusdem generis. Indeed, the word "instituted" in section 40 (2) is a pointer in the direction that the expression "other legal proceeding" is limited to proceedings taken in a Court of law and does not cover proceedings before departmental authorities. A departmental proceeding like a penalty proceeding is commenced by issue of a notice to the assessee by the adjudicating authority. It would be inappropriate to say that by issuing a notice the authority concerned institutes a proceeding before itself. The word "institute" is commonly used in the context of proceedings instituted in a Court of law like suits or prosecutions. There are also other indications that the wide meaning of the expression "other legal proceeding" was not intended by the Legislature. Now, if the words "other legal proceedings" are construed in a wide sense, recovery proceedings for realising duty and penalty u/s 11 of the Act before the authorised officer and the Collector, on the assessee failing to pay the same, will be governed by the rule of six month's limitation provided in section 40 (2). Similarly, the proceedings for re-assessment under Rule 173 J read with Rule 10 will be governed by section 40 (2) and the period of limitation of one year prescribed by Rule 173-J would become invalid. These consequences are somewhat startling and could not have been intended by the Legislature.

25. It was suggested that no judicial proceeding other than a suit or persecution can be thought of "for anything done or ordered to be done under the Act" and, therefore, if the expression "legal proceeding" in section 40 (2) is construed in a limited sense as restricted to judicial proceedings, it will have no practical application and will become redundant. In my opinion, it is not correct to say that no judicial proceeding other than a suit or prosecution can be contemplated in the context of "anything done or ordered to be done under the Act." An

application to sue as a pauper, which is not a suit until permission to sue is granted, will be a judicial proceeding which a person may institute against the Central Government or a Government servant for any thing done or ordered to be done under the Act. Further, the Government may institute a petition for winding up against a Company which has omitted to pay excise duty or penalty which it is ordered to pay under the Provisions of the Act. There is authority in support of the view that the Government can make use of the machinery of winding up of a Company in the High Court for enforcing a debt in the nature of revenue from the Company. (See *Mh. Amin Bros v. Dominion of India* AIR 1952 Cal 325. So a winding up petition may furnish another example of a judicial proceeding which, though not a suit or prosecution, may be taken for anything done or ordered to be done under the Act. An example of the same nature may be an insolvency petition under the Insolvency Acts. These examples are not exhaustive but they go to show that it is not a valid argument that the expression "other legal proceeding" in section 40 (2) will become redundant in case it is construed in a limited sense to mean judicial proceedings.

26. The cases relied upon on behalf of the petitioner are distinguishable as they relate to construction of enactments where the language used was different. In S. 171 of the Companies Act, 1931, which was construed by the Federal Court in *Shiromani Sugar Mills* case, the words used were "no suitor other legal proceeding shall be proceeded with or commenced". The mention of only one specific word "suit" could not obviously give rise to the application of ejusdem generis rule for construing the general words "other legal proceeding" in section 171. We may here mention that in construing S. 446 of the Companies Act, 1956, which corresponds to S. 171 of the Companies Act, 1931, the Supreme Court held that the expression "other legal proceeding" will not include re-assessment proceeding u/s 147 of the Income tax Act, 1961. See *S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay* and Another, . In the Gujarat case of *Jegmohandas v. Jamunadas* (supra) the material words were "any suit or legal proceeding" and *Bhagwati. J.*, as he then was, specifically held that there being only one species, namely, suit, it was not possible to find the genus and the rule of ejusdem generis could not be applied. In the Bombay case of *Abdul Aziz v. State of Bombay* (supra), the words used were only "any legal proceeding" and thus the general words were not used in association with any word of specific import, Reference was also made to the case of *Secretary to the Government of India and others v. A. Loganathan* Writ Appeal No. 134 of 1974, decided on 16th July 1975, where a Division Bench of the Madras High Court held that assessment proceedings are not taken for anything done or ordered to be done under the Central Excise Act therefore, the period of limitation prescribed by section 40(2) is not applicable to such proceedings. The case is not very helpful in determining the meaning of the expression "other legal proceeding" as used in the section.

27. It was also argued by the learned counsel for the petitioner that a narrow

construction of section 40 (2) will open it to challenge on the ground of discrimination that when the limitation of six months is prescribed for a criminal offence u/s 9, there is no reasonable basis why there should be no limitation for penalty proceedings under Rule 173-Q. In my opinion, there is no merit in this argument. All persons liable to prosecution u/s 9 would be governed by the same rule of limitation of six months without any discrimination. Similarly, all persons against whom penalty proceedings can be taken under Rule 173-Q would not be governed by any period of limitation without any discrimination. Moreover, there is a basic distinction between a prosecution u/s 9 and a penalty proceeding under Rule 173-Q. A prosecution may deprive a person of his personal liberty in that he may be sentenced to a term of imprisonment. On the other hand, a penalty proceeding under Rule 173-Q can only deprive a person of his property. In our opinion, no reasonable doubt can be raised as to the validity of section 40 (2) or Rule 173-Q on the ground that no period of limitation is prescribed for proceedings under that Rule, although a period of six months is prescribed for a prosecution u/s 9 of the Act. The plea for a wide construction of section 40 (2) of the Act on this, ground must, therefore, fail

28. In my opinion, the penalty proceeding taken by the Collector against the petitioner under Rule 173-Q read with section 33 of the Act were not governed by the period of limitation prescribed by section 40(2) of the Act.

(5) Bar of Finality u/s 35 (2):

29. It was next contended by the learned counsel for the petitioner that by the order dated 30th July 1974 the Appellate Collector in appeal confirmed the order of the Assistant Collector dated 9th April 1973 granting refund and allowed further refund to the petitioner, and, as this order became final u/s 35 (2) it was not open to the Collector, in penalty proceedings under Rule 173 Q, to hold that the assessable value on the basis of which refund was ordered was wrong, In other words, it was contended that penalty proceedings, if at all, could be taken only on the basis that the assessable value accepted in proceedings for refund was the correct value It was argued that as the order of the Appellate Collector became final u/s 35 (2), subject to the power of revision u/s 36, it was binding in all proceedings taken under other provisions between the parties.

30. In my opinion, there is no merit in this argument. The question before the Collector in the penalty proceedings under Rule 173 Q was whether the petitioner mis-stated the price of properzi rods in the price list submitted by it with a view to evade payment of duty. The inquiry into this question which arose on the basis that the petitioner sold certain of its goods to the Indore party or at Ahmedabad or Bombay at a much higher price than what was disclosed in the price list was not undergone in the proceedings for assessment or refund. Probably, then the fact that the petitioner made sales of certain properzi rods to the Indore party or at Ahmedabad or Bombay was not even known to the authorities concerned. When the question whether the petitioner submitted wrong price list with a view to evade payment of duty was not enquired into in the refund proceedings, it is

difficult to accept the argument that by implication the assessable value on the basis of which the refund order proceeded became binding in penalty proceedings. The word "final" as it occurs in section 35 (2) only means that the order passed in appeal u/s 35 (1) would not be open to any further appeal or revision except as mentioned in the section. Section 35 (2), in my opinion, does not prohibit taking of original proceedings, such as proceedings for re-assessment under Rule 10 or proceedings for imposition of penalty under Rule 173-Q, on the ground that the assessee by contravening certain provisions or by making false statements evaded payment of duty. u/s 254 (4) of the income tax Act, 1961, orders passed in appeal by the Appellate Tribunal are final, save as provided in section 256, which deals with reference to High Court, In spite of this finality in section 254 (4), which in terms is not subject to section 147, it has never been doubted that reassessment proceedings can be taken u/s 147 for reopening an assessment which has been confirmed in appeal and attained finality u/s 254 (4). (See In re: Holder and sons 1942 ITR 79 a decision on the corresponding provision of the income tax Act, 1922). The Supreme Court in Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , in the context of reopening of assessment u/s 147 of the income tax Act, 1961, recently observed that "the provision of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings". In my opinion, similar observations can be made in relation to the Central Excise and Salt Act and the Rules made thereunder. The scheme of the Rules is to provide for proceedings at three stages. First is the stage of assessment under Rule 173-I. The second stage is of re-assessment under Rule 10 read with Rule 173-J. The third is the stage of the proceedings under Rule 173-Q, which proceedings are combination of penalty proceedings and proceedings for best judgment assessment. The original proceedings for re-assessment under Rule 10 and penalty proceedings and proceedings for best judgment assessment under Rule 173-Q can be taken even after the assessment under Rule 173-I has become final in appeal, Similarly, the finality of the refund order in appeal cannot affect the jurisdiction to initiate these original proceedings under Rule 10 and Rule 173Q.

31. In The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara, ; a case on which the learned counsel for the petitioner placed reliance it was held that the assessment of coal cess which became final under the rules became binding on the parties and could not be reopened because in the rules there was no provision for re-assessment. This case has therefore, no application here. The learned counsel also relied upon the cases of The Collector of Central Excise Vs. V.K. Palappa Nadar, and The Marsden Spg & Co. Ltd. v. Shri L.V. Pol and others ILR 1965 Guj 240. In the Madras case, penalty was imposed on the assessee by the Collector under rule 223 A of the Central Excise Rules. The Central Board of Revenue in appeal vacated the order of the Collector. The Collector then started denovo inquiry in the same matter and it was held by the High Court that as there was no order of remand passed by the Central Board of

Revenue while vacating the order of the Collector, the Collector had no jurisdiction to hold further inquiry in the same matter and the order of the Board being final was binding on the parties. In the Gujarat case, the Superintendent, Central Excise, imposed penalty under rule 226 and demanded duty under rule 9 (2) of the Central Excise Rules. The assessee went up in appeal and the Deputy Collector set aside the order of the Superintendent. Another notice was again issued for penalty under rule 226 and for duty under rule 9 (2). It was held by the High Court that as there was no remand order made by the appellate authority, the same matter could not be reopened by the Superintendent. The ratio of these two cases, which are similar, is that when a proceeding is terminated by an appellate order, the same proceeding cannot be restarted by the original authority in the absence of remand. These cases have no application before us, because, in the instant case the Collector did not reopen the refund proceedings which attained finality in appeal, but started entirely different proceedings under rule 173-Q.

32. The learned counsel for the petitioner also referred to the case of *Commr. of Sales Tax, MP v. Amarjeet Singh* 24 STC 501 (MP). It was held in this case that an order in appeal which became final u/s 22 (5) of the Central Provinces and Berar Sales Tax Act, 1947, could not be revised by the Commissioner u/s 223. Section 22 (5) of the Act provided that "every order passed in appeal shall, subject to the provisions of sections 22 A and 23, be final". On a construction of this section, it was held that power of revision u/s 22B could not be exercised against an appellate order. The position in the instant case, as already noticed, is entirely different. Here the appellate order relating to refund was not challenged in further appeal or revision contrary to the finality clause. What was done was that independent original proceedings under rule 173-Q were taken against the petitioner for levying penalty on the ground that it had contravened rule 173-C by mis-stating the prices of the properzi rods and by not showing the correct prices with a view to evade duty. This charge against the petitioner was levelled on the allegation that the petitioner had sold properzi rods at a much higher price than shown by it in the price lists. These matters were not enquired into either in the proceedings for assessment or in the proceedings for refund. The order of the Appellate Collector in the refund proceedings, therefore, had no bearing upon the penalty proceedings. The Collector was not bound in the penalty proceedings to accept the assessable value of the goods on the basis of which the refund was ordered. If the Collector rightly found that the price of the goods was mis-stated with a view to evade duty and if this legally constituted contravention of rule 173-C, the petitioner could be made liable to pay penalty. It is another matter that on merits I have come to the conclusion that there was no contravention of rule 173-C and, therefore, the Collector was not entitled to commence penalty proceedings against the petitioner for the period in question.

(6) Unreasonable exercise of statutory power :

33. It was then contended by the learned counsel for the petitioner that even if

there were technical breaches of rule 173-C, the Collector should not have, in the circumstances of the case, imposed penalty on the petitioner. In this connection, it was pointed out that there were no clear cut principles for valuing properzi rods manufactured by job workers for cable manufacturers and the Central Government on 16th May 1972 recommended that such properzi rods should be valued by adding a sum of Rs. 500/- per m.t. to the prices of the ingots used in the manufacture of rods. It was further pointed out that on this principle there was no evasion of duty by the petitioner; rather it had paid duty in excess which was refunded to it later. It was also submitted that as the petitioner throughout acted with the concurrence and approval of the excise authorities and in conformity with the decision of the Board and the Central Government, it was not reasonable for the Collector to exercise his statutory powers of imposing penalty. Reliance in this connection was placed on the case of Hindustan Steel Ltd. Vs. State of Orissa, in which it was laid down in the context of Orissa Sales Tax Act that 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. It was further observed that penalty will not also be imposed merely because it is lawful to do so, and that 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.

34. In the instant case, the Collector started penalty proceedings and imposed penalty on the ground that the petitioner concealed the sales made to the Indore party and the sales made by it at Ahmedabad and Bombay. In the opinion of the Collector, the properzi rods removed by the petitioner during the relevant period ought to have been valued at the price obtained by it from the Indore party. Now, if this finding of the Collector be correct, there can be no doubt that there was not merely technical breach of law but the true price of the properzi rods was suppressed with a view to evade duty. So on the findings reached by the Collector it cannot be said that he imposed penalty merely for technical breaches or acted unreasonably in the exercise of his discretion in imposing penalty.

35. The letter of the Central Government dated 16th May 1972 communicated to the excise authorities the decision taken by the Central Board of Excise that for assessments during the period from 1st March 1970 to 23rd May 1971 the assessable value of properzi rods should be determined by adding a sum of Rs. 510/- per m.t. to the price at which the particular lot of ingots used in the manufacture of rods was purchased. The argument of the learned counsel for the respondents is that this is not a letter under the authority of the Board; but this argument cannot be accepted. The Board is a respondent in this petition and it has not been denied that the letter was issued with its concurrence or authority. The learned counsel for the respondents has further argued that the directions in the said letter, even if they emanated from the Board, could not fetter the quasi

judicial powers of the excise authorities exercisable under the Central Excise Act and the Rules. In my opinion, this argument has to be accepted. The Board has a statutory power under Rule 233 to issue supplementary instructions; but these instructions cannot go against the statutory provisions and fetter the quasi-judicial powers of the excise authorities: (See *Orient Paper Mills Ltd. Vs. Union of India (UOI)*, . The method of valuation of excisable goods is laid down in section 4 of the Act. The Board cannot prescribe different method of valuation by issuing supplementary instructions. The excise authorities in assessing excise duty perform a quasi judicial function and have to follow the principles of valuation laid down in section 4 and the directions issued under the authority of the Board in that matter were not binding on them. Therefore, if the Collector was right in holding that there was contravention of Rule 173-C, because the price at which sales were made to the Indore party represented the correct wholesale price at Satna of the properzi rods removed by the petitioner which ought to have been entered in the price list, his order could not be challenged on the ground that he departed from the instructions contained in the Central Government's letter, or on the ground that he exercised his statutory power of imposing penalty unreasonably. It is a different matter that the findings on which the Collector proceeded cannot be sustained.

(7) Alternative remedy :

36. Learned counsel for the respondents raised a preliminary objection that in view of the remedy of appeal which was open to the petitioner under the Central Excise and Salt Act, it will not be a sound exercise of discretion on our part to interfere under Article 226. The petitioner has filed appeals against the impugned orders and those appeals are pending. The petitioner's stand is that it has done so as a matter of abundant caution. Existence of alternative remedy is no doubt taken into account in deciding whether interference should be made under Article 226; but it does not take away the jurisdiction of the High Court to interfere in appropriate cases. Indeed, interference has been made under Article 226 in proper cases even at the stage of notice when it was found that the notice for re-assessment or for imposition of penalty was clearly in excess of authority: (See for example *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, . In the instant case, on the facts admitted and found, there was no contravention of any rule within the meaning of rule 173-Q and the penalty proceedings were misconceived. There was denial of natural justice in taking into account the material which was not put to the petitioner. Further, the Collector in finding out the assessable value of properzi rods removed by the petitioner during the relevant period, proceeded on wrong principles contrary to those laid down in section 4. In the circumstances, it would not be a sound exercise of discretion on our part to dismiss the writ petition on the ground that the petitioner can get redress in the appeals filed by it.

37. I allow the petition and quash the impugned show cause notices issued by

the Assistant Collector and the orders passed by the Collector, Central Excise, Nagpur, in all the thirteen cases. The petitioner will recover costs of this petition from the Union of India. Counsel's fee Rs. 1,000/- if certified. The security deposit shall be refunded to the petitioner.

Raina, J.

38. I agree that this petition should be allowed for the reasons given by my learned brother, Singh, J.; but I would like to reserve my opinion on the question whether the imposition of such a heavy penalty was in any case justified in view of the decision of the Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, I am sure the Collector would keep in view the observations of their Lordships in that case whenever a question of imposition of penalty may arise.

39. We allow the petition and quash the impugned show cause notices issued by the Assistant Collector and the orders passed by the Collector, Central Excise, Nagpur, in all the thirteen cases. The petitioner will recover costs of this petition from the Union of India. Counsel's fee Rs. 1,000/-, if certified. The security deposit shall be refunded to the petitioner.