Before Adarsh Kumar Goel and Ajay Kumar Mittal, JJ.

M/S BANSAL ALLOYS AND METALS PVT. LTD.,—*Petitioner*

versus

UNION OF INDIA AND ANOTHER,—*Respondents*

CWP No. 18099 of 2009

8th November, 2010

Constitution of India, 1950-Art. 14, 19, 21 and 226—Central Excise Act, 1944—Ss.35G and 37—Central Excise Rules, 1944—Rls. 96 (ZO), (ZP) and (ZQ)—Provisions in Rules 96(ZO), (ZP) and (ZQ) providing for mandatory minimum penalty equal to amount of duty even for slightest bonafide delay, without any mens rea and without any element of discretion—Excessive, unreasonable restriction on fundamental rights and arbitrary—Exercise of such power by way of subordinate legislation—Only if default is "with intent to evade payment of duty"—Petition of assesses allowed, provisions in Rls. 96(ZO), (ZP) and (ZQ) held to be ultra-vires 1944 Act and the Constitution.

Held, that the provision for minimum mandatory penalty equal to the amount of duty even for slightest bonafide delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without mens rea, and can be punished or a penalty could be imposed is not a blanket power without providing for any justification. In the Indian Constitutional scheme, power of legislature is circumscribed by fundamental rights. Judicial review of legislation is permissible on the ground of excessive restriction as against reasonable restriction which is also described as proportionality test.

(Para 15)

Further held, that the impugned provisions in Rules 96 (ZO), (ZP) and (ZQ) to the extent of providing for mandatory minimum penalty without any mens rea and without any element of discretion is excessive and

unreasonable restriction on fundamental rights and is arbitrary. Moreover, exercise of such power by way of subordinate legislation is not permissible when rule making authority for levying penalty is limited to default "with intent to evade duty".

(Para 16)

Jagmohan Bansal, Advocate and Vishav Bharti Gupta, Advocate.

Gurpreet Singh, Standing Counsel for Union of India.

H.P.S. Ghuman, Standing Counsel for Union of India.

ADARSH KUMAR GOEL, J

(1) This order will dispose of CWP Nos. 18099, 19513 of 2009, 780, 943, 8555, 9412, 11752 of 2010, CEA Nos. 46 of 2004, 80, 81, 161, 164, 184 of 2005, 6, 16, 84, 172 of 2006 and 88 of 2007.

(2) The appeals have been preferred by the revenue under section 35G of the Central Excise Act, 1944 (for short, 'the Act') against judgments of the Tribunal holding that penalty equal to the amount of duty was not mandatory under Rule 96ZO (3) of the Central Excise Rules, 1944 (in short, 'the Rules'). The writ petitions seek declaration of Rules 96ZO, 96ZP, 96ZQ of the rules being ultra vires the rule making power under the Act and also being arbitrary, discriminatory and confiscatory.

(3) The appeals were earlier dismissed in the light of main judgment dated 3rd August, 2006 in **Commissioner of C. Ex. Ludhiana** *versus* **K.C. Alloys and Steels Castings. (1).** It was held that penalty under rule 96ZO was different from penalty under section 11AC. Under Section 11AC, *mens rea* was the requirement for levy of minimum mandatory penalty and in absence thereof, under Rule 96ZO, either the requirement of *mens rea* had to be read therein or extent of penalty under the said rule should be held to be in the discretion of the concerned authority depending upon the period of delay in deposit and other circumstances. Such discretion had to be exercised judicially having regard to the principle of proportionality. Conclusions were summed up as under :—

"23. (i) Scheme of levy of penalty under rule 96ZO of the Rules is different from scheme of penalty under section 11AC of the

(1) 2006 (206) ELT 1183 (P&H)

Act, inasmuch as there is no requirement of proving fraud, collusion, willful misstatement or suppression of facts or intention to evade payment of duty. The object of penalty under rule 96ZO appears to be to emphasis loss of revenue on account of delay in deposit.

(ii) Since element of *mens rea* is not required to be provided for exercise of jurisdiction under rule 96ZO, quantum of penalty prescribed therein has to be read to be maximum and discretionary.

(iii) Where element of *mens rea* of the nature specified in Section 11AC is shown to exist, the quantum of penalty will be read as minimum.

(iv) Discretion to levy penalty under rule 96ZO has to be exercised judiciously having regard to fact situation of a given case. Amount of duty involved, extent of delay, reasons for delay and other relevant circumstances may have to be kept in view for exercising discretion for determining the quantum of penalty.

(v) Interference by this Court in appeal which is provided only on a substantial question of law, will be only where exercise of jurisdiction by the authorities is shown to be perverse or arbitrary, which has not been shown in the present case."

(4) After the judgment of this Court, the issue came up before the Hon'ble the Supreme Court in **Union of India** *versus* **Dharamendra Textile Processors, (2).** The said judgment was delivered by larger bench of three Judges on a reference made to it on account of conflict of opinions. In **Dalip N. Shroff** *versus* **Joint Commissioner of Income Tax, (3),** the view taken was that *mens rea* should be held to be an essential ingredient for levy of minimum penalty under section 11AC of the Act. On the other hand, in **SEBI** *versus* **Shriram Mutual Fund and another (4),** in the context of Sections 15D(b) and 15E of the Securities and Exchange Board of India Act, 1992 (SEBI Act), it was held that it was not necessary to

(2) 2008 (231) E.L.T. 3
(3) (2007) 6 S.C.C. 329
(4) (2006) 5 S.C.C. 361

read requirement of *mens rea* in a provision laying down minimum penalty. After referring to judgments in **Director of Enforcement** *versus* **MCTM Corpn. (P) Ltd. (5) J. K. Industries Ltd.** *versus* **Chief Inspector of Factories and Boilers, (6) R.S. Joshi** *versus* **Ajit Mills Ltd. (7), Gujarat Travancore Agency** *versus* **CIT (8) Swedish Match AB** *versus* **SEBI, (9), SEBI** *versus* **Cabot International Capital Corpn, (10)** it was held that plea of concept of inbuilt discretion in Rules 96ZO and 96ZQ could not be accepted. The observations in the judgments relied upon included that provision of penalty was neither criminal nor quasi criminal but for failure or default of statutory civil obligation. In such situation, *mens rea* was not an essential elements. Absolute or strict liability without proof of *mens rea* could also be created in a special beneficial social defence legislation such as statutes relating to economic crimes as well as in laws concerning industry, food adulteration, prevention of pollution etc. Absolute offences were not criminal offences in real sense but acts prohibited in the interest of welfare of public. Classical view "no *mens rea* no crime" stood eroded regarding economic crimes or departmental penalties.

(5) In **Union of India** *versus* **Krishna Processors (11)** after noticing the view taken in **Dharmendra Textile,** it was observed that challenge to vires of the rules will stand revived as by reading the requirement of *mens rea,* the rule was upheld by Gujarat High Court in **Ambuja Synthetics Mills** *versus* **Union of India (12).** Accordingly, the batch of appeals before the Hon'ble Supreme Court was remanded to respective High Courts. View taken in **Ambuja Synthetics** was identical to the view by this Court in **K. C. Alloys.**

(6) Thus, the question which now arises for consideration is whether provision levying minimum penalty equal to the amount of duty involved without any requirement of mens rea and without any discretion in the

(5) (1996) 2 S.C.C. 471
(6) (1996) 6 S.C.C. 665
(7) (1977) 4 S.C.C. 98
(8) (1989) 3 S.C.C. 52
(9) (2004) 11 S.C.C. 641
(10) (2005) 123 Comp. Cases 841 (Bomb.)
(11) (2009) 237 E.L.T. 641
(12) (2004) 175 E.L.T. 85 (Guj.)

concerned authority on the issue of quantum of penalty is permissible, is consistent with Articles 14, 19 and 21 of the Constitution, particularly when such provision has been incorporated by a subordinate legislation.

(7) Before considering the said question, a brief reference may be made to the facts in the lead petition i.e. CWP No. 18099 of 2009.

Facts

(8) The petitioner is manufacturer of non alloy steel ingots falling under Chapter Heading 72 of the First Schedule to the Central Excise Tariff Act, 1985. By Section 3A of the Act, compounded levy scheme was introduced providing for payment of lump sum amount of duty on the basis of capacity instead of actual production of goods. Rule 96ZO provided for discharge of duty liability by 15th and last day of each month. The petitioner could not fully discharge its duty of first fortnight of the month of April 1999 and instead deposited the same after one week i.e. on 22nd April, 1999 alongwith interest i.e. Rs. 3531. For the said default, it was required to pay penalty equal to the outstanding amount of duty i.e. Rs. 6,66,500 under third proviso to Rule 96ZO (3) vide order dated 15th February, 2005. On appeal, it was held that since duty had already been deposited and there was delay only of seven days, there was no justification for imposing minimum penalty. Accordingly, quantum of penalty was reduced to Rs. 5000 with the following observations :—

> "In the present case the differential duty was delayed only for 7 days and the appellant deposits the same alongwith interest as such the penalty of Rs. 5000 is imposed on them."

The above view has been upheld by the Tribunal following judgment of this Court in **K. C. Alloys.**

Rival contentions

(9) Learned counsel for the petitioner submits that even though it may be permissible to provide for penalty for breach of civil obligation without *mens rea* or even for absolute offences in strict liability without *mens rea* in certain cases, legislature could not act arbitrarily and provide for minimum heavy penalty for slightest default. Principle of proportionality was part of reasonableness and even a legislative measure has to pass the test

of reasonableness. If a legislative measure is held to be arbitrary, the same can be struck down to enforce fundamental rights under Articles 14, 19 and 21. The rules are beyond the scope of delegated legislation permitted under the Act.

(10) Stand of the respondents on the other hand is that under Section 37(4) of the Act, the Central Government could make a rule providing for levy of penalty on contravention of rule with an intent to evade duty regarding removal of excisable goods, accounting for such goods, engaging in manufacture, production or storage of goods without registration. There being no compulsion to imply *mens rea*, minimum penalty was permissible and was neither arbitrary nor unreasonable and thus, there was no violation of fundamental rights nor the provision was beyond the scope of delegated legislation.

Statutory provisions

(11) We may now refer to the statutory provisions :—

Section 37 : **Power of Central Government of make rules—**

(1) to (3) xx xx xx xx xx

(4) Notwithstanding anything contained in sub section (3) and without prejudice to the provisions of section 9, in making rules under this section, the Central Government may provide that if any manufacturer, producer or licensee of a warehouse—

(a) removes any excisable goods in contravention of the provisions of any such rule, or

(b) does not account for all such good manufactured, produced or stored by him, or

(c) engaged in the manufacture, production or storage of such goods without having applied for the registration as required under section 6, or

(d) contravenes the provisions of any such rule **with intent to evade payment of duty,**

then all such goods shall be liable to confiscation and the manufacturer, producer or licensee, shall be liable to a penalty not exceeding the duty leviable on such goods or two thousand rupees, whichever is greater."

Rule 96ZO : **Procedure to be followed by the manufacturer of ingots and billets.**—(1) A manufacturer of non-alloy steel ingots and billets falling under Sub-Headings 7206.90 and 7207.90 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), shall debit an amount calculated at the rate of Rs. 750 per metric tonne at the time of clearance of ingots and billets of non-alloy steel from his factory in the account current maintained by him under sub-rule (1) of Rule 173-G of the Central Excise Rules, 1944, subject to the condition that the total amount of duty liability shall be calculated and paid in the following manner—

I. Total amount of duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998

(a) a manufacturer shall pay a total amount calculated at the rate of Rs. 750 per metric tonne on capacity of production of his factory for the period from the 1st day of September, 1997 to the 31st day of March, 1998, as determined under the Induction Furnace Annual Capacity Determination Rules, 1997. This amount shall be paid by the 31st day of March, 1998 ;

(b) the amount of duty already paid, together with on account amount paid by the manufacturer, if any, during the period from the 1st day of September, 1997 to the 31st day of March, 1998, shall be adjusted towards the total amount of duty liability payable under clause (a) ;

(c) if a manufacturer fails to pay the total amount of duty payable under clause (a) by the 31st day of March, 1998, he shall be liable to pay the outstanding amount (that is the amount of duty which has not been paid by the 31st day of March, 1998) alongwith interest at the rate of eighteen per cent

per annum of such outstanding amount calculated for the period from the 1st day of April, 1998 till the date of actual payment of the outstanding amount :

Provided that if the manufacturer fails to pay the total amount of duty payable under clause (a) by the 30th day of April, 1998, he shall be liable to pay a penalty equal to the outstanding amount of duty as on the 30th day of April, 1998 or five thousand rupees, whichever is greater.

II. Total amount of duty liability for a financial year subsequent to 1997-1998.

(a) a manufacturer shall pay a total amount calculated at the rate of Rs. 750 per metric tonne on the annual capacity of production of his factory as determined under the Induction Furnace Annual Capacity Determination Rules, 1997. This amount shall be paid by the 31st day of March of the financial year :

(b) the amount of duty already paid, together with on account amount paid by the manufacturer, if any, during the financial year shall be adjusted towards the total amount of duty liability ;

(c) if a manufacturer fails to pay the total amount of duty payable under clause (a) by the 31st day of March, of the relevant financial year, he shall be liable to,—

(i) pay the outstanding amount of duty (that is the amount of duty which has not been paid by the 31st day of March of the relevant financial year) along with interest at the rate of eighteen per cent per annum on such outstanding amount, calculated for the period from the 1st day of April of the immediately succeeding financial year till the date of actual payment of the whole of outstanding amount ; and

(ii) a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater.

(1-A) If any manufacturer removes any of the non-alloy steel ingots and billets specified in sub-rule (1) without complying with the requirements of the provisions of that sub-rule, then all such goods shall be liable to confiscation and the manufacturer shall be liable to a penalty not exceeding three time the value of such goods, or five thousand rupees, whichever is greater.

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(3) Notwithstanding anything contained elsewhere in these Rules, if a manufacturer having a total furnace capacity of 3 MT installed in his factory so desires, he may, from the first day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, pay a sum of rupees five lakhs per month in two equal instalments, the first instalment latest by the 15th day of each month, and the second instalment latest by the last day of each month, and the amounts so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998, or any other financial year, as the case may be, subject to the condition that the manufacturer shall not avail of the benefit, if any, under sub-section (4) of Section 3-A of the Central Excise Act, 1994 (1 if 1944) :"

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Provided also that where a manufacturer fails to pay the whole of the amount payable for any month by the 15th day or the last day of such month, as the case may be, he shall be liable to

(i) Pay the outstanding amount of duty alongwith interest thereon at the rate of eighteen per cent per annum calculated for the period from the 16th day

of such month or the 1st day of next month, as the case may be, till the date of actual payment of the outstanding amount and

(ii) a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater."

Rules 96(ZP) and 96 (ZQ) are identical.

Scope of Rule Making Power

(12) Reference to the above clearly shows that power to make rule for levying penalty equal to the outstanding amount of duty could be exercised only if the default was *with intent to evade payment of duty*. This was not under consideration before the Hon'ble Supreme Court in the said pronouncement. The rule making authority could not go beyond the Act and when the Act provides for requirements of *mens rea*, the rule could not dispense with the said requirement. For this settled position of law, reference may be made to judgments of the Hon'ble Supreme Court in **State of TN and another** *versus* **P.Krishnamurthy and others, (13),** and **Bombay Dyeing & Manufacturing Company Limited (3)** *versus* **Bombay Environmental Action Group (14).**

Reasonableness and Proportionality

(13) Apart from above, only similarly circumstanced persons could be treated alike. Un-equals cannot be treated as equals. Reasonableness is omnipresent part of right to equality as held in **Smt. Maneka Gandhi** *versus* **Union of India and another (15).** Every enactment which lays down minimum sentence has to be tested on the touchstone of reasonableness. Doctrine of proportionality can be invoked where punishment provided is in outrageous defiance of logic and perverse or irrational. If a statute provides for disproportionate or excessive restriction on a fundamental right, the Court can go into the question whether there is proper balance in fundamental right and the restriction imposed. This aspect was discussed in **Union of India versus G. Ganayutham, (16),** wherein it was observed :—

"22. State of A.P. v. McDowell & Co., (1996) 3 SCC 709 however makes it clear that so far as the validity of a *statute* is concerned,

(13) (2006) 4 S.C.C. 517
(14) AIR 2006 S.C. 1489
(15) AIR 1978 S.C. 597
(16) AIR 1997 S.C. 3387

the same can be judged by applying the principle of proportionality for finding out whether the restrictions imposed by the statute are permissible within the bounds prescribed by our Constitution. McDowell referred to this exception as follows : (SCC pp. 738-39, para 43)

"43....It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted." (emphasis supplied)

That a statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the *statute* and that the Court can go into the question whether there is a proper *balancing* of the fundamental right and the restriction imposed, is well settled. [See *Chintaman Rao versus State of M.P. AIR 1951 SC 118 State of Madras versus V.G. Row, AIR 1952 SC 196; Indian Express Newspapers Bombay (P) Ltd. versus Union of India, (1985) 1 SCC 641.*] (The principle of "proportionality" is applied in Australia and Canada also, Cunliffe *versus* Commonwealth, (1994) 68 Aust LJ 791 to test the validity of statutes.)'

(14) In **Om Kumar** *versus* **Union of India (17),** it was observed :—

"28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the *legislature* and the *administrative authority* "maintain a *proper balance* between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they

(17) AIR 2000 S.C. 3689

were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

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(II) Proportionality and Legislation in UK and India

30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional *legislation* on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India—such as freedom of speech and expression freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India freedom to reside and settle in any part of India—this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. "Reasonable restrictions" under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which "reasonable restrictions" could be imposed was considered. In *Chintamanrao versus State of M.P. AIR 1951 SC 118* Mahajan, J. (as he then was) observed that "reasonable restrictions" which the State could impose on the fundamental rights "should not be arbitrary or of an excessive nature, *beyond what is required* in the interests of the public". "Reasonable"

implied intelligent care and deliberations, that is, the *choice* of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a *proper balance* between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in *State of Madras versus V.G. Row, AIR 1952 SC 196,* observed that the Court must keep in mind the "nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the *disproportion* of the imposition, the prevailing conditions at the time". This principle of proportionality vis-a-vis legislation was referred to by Jeevan Reddy, J. in *State of A.P. versus McDowell & Co. (1996) 3 SCC 709* recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of "proportionality". Provisions of the Criminal Procedure Code, 1974 and the Indian Penal Code came up for consideration in *Bachan Singh versus State of Punjab (1980) 2 SCC 684* the majority upholding the legislation. The dissenting judgement of Bhagwati, J. (see *Bachan Singh versus State of Punjab (1982) 3 SCC 24)* dealt elaborately with "proportionality" and held that the punishment provided by the statute was *disproportionate.*

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being

arbitrary in the sense of being unreasonable [see *Air India versus Nergesh Meerza, (1981) 4 SCC 335* (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in *State of A.P. versus McDowell and Co. (1996) 3 SCC 709.*

33. In Australia and Canada the principle of proportionality has been applied to test the validity of statues [see *Cunliffe versus Commonwealth (1995) 58* Aust LJ 791 (at 827, 839) (799, 810, 821)]. In *R. versus Oakes, (1986) 26 DLR 4th 200* Dickson, C.J. of the Canadian Supreme Court has observed that there are three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be "proportionality" between the effects of the measures and the objective. See also *Ross versus Brunswick School Dishut No. 15, (1996) 1 SCR 825* (SCR at p. 872) referring to proportionality. English Courts had no occasion to apply this principle to legislation. The aggrieved parties had to go to the European Court at Strasbourg for a declaration.

34. In U.S.A., in City of *Boerne versus Flores, (1997) 521 US 507* the principle of proportionality has been applied to legislation by stating that "there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end".

35. Thus, the principle that *legislation* relating to restrictions on fundamental freedoms could be tested on the anvil of "proportionality" has never been doubted in India. This is called "primary" review by the courts of the validity of legislation which offended fundamental freedoms.

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53. Now under Articles 19(2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the statute concerned permitted the administrative authorities to exercise power or discretion while imposing restrictions in Individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of "proportionality", just as it is done in the case of the main legislation. *This, in fact, is being done by our courts.*

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(a)(i) Classification test under Article 14

58. Initially, our courts while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification. It is not necessary to give citation of cases decided by this Court where administrative action was struck down as being discriminative. There are numerous.

(ii) Arbitrariness test under Article 14 :

59. But, in **E.P. Royappa** *versus* **State of T.N. (1974) 4 SCC 3** Bhagwati, J laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary", it could be struck down under Article 14. This principle is now uniformly followed in all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

(b) If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, Wednesbury applies and it is secondary review".

(15) Applying the above principles to the present situation, the provision for minimum mandatory penalty equal to the amount of duty even for slightest *bonafide* delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without *mens rea,* an can be punished or a penalty could be imposed is not a blanket power without providing for any justificastion. In the Indian Constitutional scheme, power of legislature is circumscribed by fundamental rights. Judicial review of legislation is permissible on the ground of excessive restriction as against reasonable restriction which is also described as proportionality test.

Conclusion

(16) For the above reasons, we hold that the impugned provision to the extent of providing for mandatory minimum penalty without any *mens rea* and without any element of discretion is excessive and unreasonable restriction on fundamental rights and is arbitrary. Moreover, exercise of such power by way of subordinate legislation is not permissible when rule making authority for levying penalty is limited to default "with intent to evade duty".

(17) The writ petitions of the assesses are allowed and impugned provisions in Rules 96(ZO), (ZP) and (ZQ) permitting minimum penalty for delay in payment, without any discretion and without having regard to extent and ciricumstances for delay are held to be *ulra vires* the Act and the Constitution. In CWP No. 8555 of 2010, penalty has been sustained by the Tribunal to the extent of 100% which will stand quashed without prejudice to any fresh order being passed in accordance with law. It is made clear that if penalty has attained finality as in CWP No. 18099 of 2009 upto this Court, this order will not affect the finality of such order. The appeals filed by the revenue against the orders of the Tribunal sustaining penalty proportionate to the default will stand dismissed.

(18) The appeals and writ petitions are disposed of accordingly.

R.N.R.