CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>CHANDIGARH</u>

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REGIONAL BENCH – COURT NO. 1

Excise Appeal No.1785 Of 2011

[Arising out of OIO No.05/CE/Commissioner/J&K/2011 dated 25.02.2011 passed by the Commissioner of Central Excise, Jammu & Kashmir]

The Commissioner of Central Excise,
Jammu & Kashmir : **Appellant (s)**
OB-32, Rail Head Complex,
Jammu & Kashmir- 180012

Vs

M/s Komal Enterprises : **Respondent (s)**
Block-A, 2nd Floor, Industrial Flats,
E.P.I.P., SIDCO Industrial Area Complex,
Bari Brahmana, Jammu-181133

<u>APPEARANCE:</u>
Shri Nikhil Kumar Singh and Shri Aneesh Dewan, Authorised Representatives for the Appellant
None for the Respondent

CORAM:
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60007/2024

Date of Hearing: 18.10.2023

Date of Decision: 09.01.2024

Per: P. ANJANI KUMAR

Scrutiny of ER-I Returns and refund claims filed by the appellants M/s Komal Enterprises revealed that the appellants have discharged the duty liability in respect of clearance effected by them, during the period August 2007 to January 2008, by availing credit in respect of National Calamity Contingent Duty (Rs.1,40,90,078/-), Additional Duty of Excise on Pan Masala (Rs.36,75,672/-), Education Cess (Rs.5,50,812/-) and Higher Education Cess (Rs.2,75,507/-); it was further observed that the appellants have further utilized
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Rs.41,89,505/- of the above duties and cesses towards payment of duty. Department was of the opinion that these duties and cesses are not notified for grant of exemption under the said Notification and as such, the utilization of the same for the payment of duty and refund of the same is not correct. Accordingly, a show-cause notice dated 28.08.2008 was issued to the appellants; Commissioner of Central Excise, Jammu & Kashmir vide Order dated 25.02.2011 confirmed the recovery of the amounts demanded along with interest; however, Commissioner has refrained from imposing penalty under Section 11AC of the Central Excise Act, 1944, Rule 25 & Rule 27 of the Central Excise Rules, 2002. Revenue is in appeal against the non-imposition of penalty.

2. Shri Nikhil Kumar Singh, assisted by Shri Aneesh Dewan, learned Authorized Representatives for the Department, reiterates the grounds of appeal and submits that the appellants have taken self-credit and refund in a fraudulent manner and therefore, are liable to pay back the refund amount along with interest and also are liable to penal action. They rely in the case of Dilip Kumar – 2018 (361) ELT 577 (SC) and submits that exemption notifications should be construed strictly. Relying on Zunjarrao Bhikaji Nagarkar – 1999 (112) ELT 772 (SC), they submit that offence being established, imposition of penalty is mandatory and only quantum is discretionary. They also rely on judgment of the Tribunal in the case of Amex Alloys – 2013 (296) ELT 229 (Tri. Chennai) to submit the reason that the goods were not available to confiscation should not be a reason to avoid penalty.

3. None appeared for the respondents. Notices sent to the respondents were returned by Postal Authorities with the remarks that "Addressee not traced". Therefore, we are constrained to decide the case on the basis of the submissions of learned Authorized Representatives and records of the case.

4. The contention of the Revenue in the instant appeal is that having confirmed the demand, learned Commissioner ought to have imposed penalty under Section 11AC of Central Excise Act or Rule 25/27 of the Central Excise Rules, 2002. Coming to the imposition of penalty under Section 11AC, we find that the terms of the Section are very clear that penalty under the Section can only be imposed when duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty. We find that to attract penalty under Section 11AC, the five ingredients should be present and intent to evade payment of duty should be established; Tribunal and Courts have been consistent in holding this opinion. We find that Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills – 2009 (238) ELT 3 (SC) observed that:

> "**17.** The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision of this Court in *Dharamendra Textile* (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in *Dharamendra Textile* and we see no reason to understand or read that decision in that manner. In *Dharamendra Textile* the court framed the issues before it, in paragraph 2 of the decision, as follows :

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in *Dilip*

N. Shroff v. *Joint Commissioner of Income Tax, Mumbai &Anr.* [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the "Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain *mens rea* as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and a decision of this Court in *Chairman, SEBI* v. *Shriram Mutual Fund &Anr.* [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in *Chairman, SEBI's* case (supra) and not in *Dilip Shroff's* case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. *Dilip Shroff's* case (supra) was not correctly decided but *Chairman*, *SEBI's* case (supra) has analysed the legal position in the correct perspectives. The reference is answered.........".

21. From the above, we fail to see how the decision in *Dharamendra Textile* can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that *Dharamendra Textile* could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any *mens rea* as in section 11AC where *mens rea* is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues *mens rea* is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no *mens rea* was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in *Dharamendra Textile* must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a

> case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what *Dharamendra Textile* decides.
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> **24.** It must, however, be made clear that what is stated above in regard to the decision in *Dharamendra Textile* is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision.
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> **25.** In light of the discussion made above it is evident that in both the appeals, orders were passed by the Tribunal on a wrong premise. In both the appeals, therefore, the impugned orders passed by the Tribunal are set aside and the matters are remitted to the respective Tribunals for fresh consideration, in accordance with law, and in light of this judgment. As the matters are quite old it is hoped and expected that the Tribunal would pass the final order within four months from the date of the receipt of this order.

5. On going through the records of the case, though we find that the demand is issued under Section 11A of Central Excise Act, 1944, the proviso is not invoked. No elements of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, have been alleged leave alone discussion and establishment of the same. Learned Commissioner also did not discuss the same in the impugned order. Learned Commissioner finds as the issue relating to the credit and refund of Secondary and Higher Education Cess in respect of units availing the exemption Notification No.56/2002 dated 14.11.2002 was subject to litigation and Tribunals and Courts had different opinions during the relevant period and therefore, the appellant had reasons to entertain the belief that the same are eligible for credit and refund. The ingredients for invocation

of extended period being not even alleged, we are of the considered opinion that the Commissioner was right in his finding. To that extent, we find no infirmity in not imposing penalty under Section 11A of the Central Excise Act, 1944.

6. Coming to the non-imposition of penalty under Rule 25 of Central Excise Act, 2002, we find that among the four sub-clauses which enumerate the contraventions, under Rule 25 (1), which would render the goods liable for confiscation and the persons liable for penalty, only sub-clause (d) of Rule 25 is closest to the facts of the instant case.It is not the case of the Department also that sub-clauses (a) (b) & (c) are applicable; the same are not even alleged in the show-cause notice; there is not even a whisper in the show-cause notice about manufacture, production, storage, removal of goods in contravention of the provisions of the Act or the Rules made thereunder. Therefore, imposition of penalty for contraventions listed in sub-clauses (a) (b) & (c) of Rule 25(1) of Central Excise Rules, 2002 is beyond the scope of the show-cause notice. As we observed earlier in this para, the closest could be Rule 25(1) (d) of Central Excise Rules, 2002 which reads as follows:

> **"(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty"**

7. It is clear from the above that the provision under Rule 25 (1) (d) also makes intent to evade payment of duty the foremost condition to invoke this Section. As discussed above, though the intent to evade payment of duty is cursorily alleged, it is not established with evidence. Therefore, we are of the considered opinion that the

conditions for imposing penalty under Rule 25 are also not satisfied and that learned Commissioner was correct in concluding that no case for imposition of penalty has been made by the Revenue. Coming to the penalty under Rule 27 of Central Excise Rules, 2002, we find that though the learned Commissioner mentions that he refrains from imposing penalty under that Section, the same is not invoked in the show-cause notice. When the same is not invoked in the show-cause notice, there is no way that the Adjudicating Authority could have imposed penalty under Rule 27 of Central Excise Rules, 2002.

8. In view of our discussion as above, we are of the considered opinion that there is no infirmity in the impugned order and the order does not require any intervention. Thus, we do not find any merit in the appeal and the same is, accordingly, dismissed.

(Pronounced on 09/01/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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