IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. E/954/2009

(Arising out of Order-in-Appeal No. PI/VSK/128/2009 dated 22.5.2009 passed by Commissioner of Central Excise (Appeals), Pune-I)

Chaphekar Engineering (P) Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Pune-I **Respondent**

Appearance:

Shri S. Narayanan, Advocate, for appellant
Shri N.N. Prabhudesai, Superintendent (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 26.9.2018
Date of Decision: 26.9.2018

ORDER No. **A/88094/2018**

Per: Sanjiv Srivastava

This appeal is directed against the order dated 22.05.2009 of Commissioner (Appeal) Central Excise Pune-I, holding as follows:

"11 In this case also the automobile cess which is paid on the raw material is not modvatable and therefore in terms of the judgment of the Hon'ble Supreme Court, the same is includible in the cost of production of the final product.

12. The appellants have also raised the issue of invoking extended period. I am of the view that in a situation of self assessment the statute casts a greater responsibility on the appellant to furnish all the facts. The decision of the Supreme Court was clearly available to the appellants and cognizance could have been taken of the same. The full facts about the exclusion of automobile cess in the input cost was not brought to the notice of the Department. Therefore, in view of this I hold that appellants have suppressed the facts by an act of omission and commission. I am therefore inclined to agree with the findings of the original adjudicating authority and pass the following order.

13. I uphold the order of the original adjudicating authority and set aside the appeal."

2.1 The appellants are engaged in the manufacture of load bodies in their factory and these load bodies are mounted on the duty paid chassis received free of cost from chassis manufacturer viz M/s Tata Motors Ltd.

2.2 Appellants were availing the CENVAT credit of the in respect of the duty paid chassis received free of cost from M/s Tata Motors and were adding the cost of chassis in the value of load bodies as declared by the chassis manufacturer.

2.3 The appellants did not include the element of automobile cess in their input value and thereby short paid the duty to that extent.

2.4 A show cause notice dated 11.08.2008 was issued to them demanding the duty short paid by invoking extended period of limitation as provided for under proviso to Section 11A(1) of the Central Excise Act, 1944. Interest was also demanded under Section 11AB and penalty under Section 11AC read with Rule 25 of Central Excise Rules, 2002 also proposed.

2.5 Show Cause notice was adjudicated by the Assistant Commissioner vide his order in original dated 27.02.2009, holding as follows:

"(i) In exercise of the powers conferred on me under section 11A(2) of the Central Excise Act, 1944, I determine and demand differential duty amounting to Rs 2,86,977/- (Cenvat duty Rs 280412/- + Education Cess Rs 5608/- + S&HSED Cess Rs 956/-)(Rupees Two Lakhs Eighty Six Thousand Nine Hundred Seventy Seven only)

(ii) I demand interest on the above said amount @ 13% pa under Section 11AB of the Central Excise Act, 194.

(iii) I impose penalty of Rs 2,86,977/- (Rupees Two Lakhs Eighty Six Thousand Nine Hundred Seventy Seven only), on the assessee under the provisions of Section 11AC of the Central Excise Act, 1944 red with Rule 25 of the Central Excise Rules, 2002.

Provided that where such duty as determined under sub-section 2) of section 1A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty five percent of the duty so determined.

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of *penalty so determined has also been paid within the period of thirty days referred to in that proviso."*

2.6 Against the order of adjudicating authority appellants preferred the appeal before the Commissioner (Appeal). Commissioner (Appeal) rejected appeal filed by the appellant holding as stated in para 1, supra.

2.7 Aggrieved appellants have filed this appeal.

3.1 In their appeal appellants have challenged the order of Commissioner (Appeal) on following grounds:-

i. Inclusion of price of free issue chassis while clearing the goods is as per the requirement of Valuation Rules and the CENVAT credit availed is not as a input. They are manufacturing load body for which free issue is not a input. The finding that appellants are availing credit of the chassis as input is not factually correct.

ii. Appellants are adopting value as per Section 4(1). The value of chassis arrived as per section 4(1) is taken as shown in the invoice of M/s TML and in the transaction value it is included all the expenses including the transport charges, insurance charges, handling charges etc. The value do not include the duty of excise, sales tax and other taxes. The 0.125% Automobile Cess on Motor Vehicle is being a Excise Duty is not includible in the assessable value. Thus the charge of non inclusion of 0.125% CESS in the assessable value is not legally tenable.

iii. The decision of Supreme Court in the case of Dai Ichi Kakaria is not relevant in the present situation.

iv. Demand is time barred on the ground of limitation.

v. No interest and penalty are impossible on them as they have valued the goods as per the Section 4(1() read with Valuation Rules, 2000. and under bonafide belief. As they had no intention to evade payment of duty they are not guilty of any kind of misstatement, suppression or fraud etc., Thus the demand of interest and penalty is not tenable.

4.1 We have heard Shri S Narayanan Learned Advocate and Shri N Prabhudesai, Superintendent Authorized Representative for the revenue.

4.2 Arguing for the appellant learned advocate submitted-

i. The thrust of the case of revenue is that as per the decision of Apex Court in case of Daichi Karkaria, the duties on the raw materials which are not Cenvated are to be included in the cost of final product. Since automobile cess is not modvatable and hence the same is to be included in the value of final product.

ii. It is settled position that automobile cess is regarded as “duties of excise” and since duties of excise are cenvatable as per Rule 3(1) of Cenvat Credit Rules, 2004, the question of the said automobile cess being considered as part of value of final product do not arise.

iii. The decision of Daichi Karkaria is not applicable in the present case.

iv. They rely on the following decision in their case-

a. TVS Motor Co Ltd vs UOI [2015 (323) ELT 57 (Kar)];

b. Mahindra & Mahindra Ltd [2007 (211) ELT 481 (T-Mum)];

c. Shree Renuka Sugars Limited [2007 (218) ELT 388 (T-Bang)];

d. Shree Renuka Sugars Ltd. [2014 (302) ELT (Kar)].

4.3 Arguing on the behalf of revenue, learned Authorized Representative submitted-

i. The issue involved in the matter is squarely covered by the decision of the Apex Court in the case of Daichi Karkaria.

ii. The appellant have by not including the quantum of 0.125% automobile cess have suppressed the value of the final products to that extent and have short paid the duty.

iii. In the scheme of self assessment, great emphasis and thrust is put on the appellants to determine the assessable value and declare the facts to the department in the returns filed. Since the appellants have failed to do so, they are guilty of suppression with intention to evade payment of duty. Thus extended period of limitation as provided by the proviso to Section 11A(1) has been rightly invoked for demanding the duty.

iv. Interest is justified as it is in relation to the short payment of duty by the due date.

v. Since appellants are guilty of suppression with intention to evade payment of duty, penalty under section 11AC read with rule 25 of Central excise Rules, 2002 is justified.

5.1 We have considered the submissions made by the appellant's in the appeal and also during the course of arguments on the appeal. In our view the issue is squarely covered by the decision of Apex Court in case of Daichi Karkaria [1999 (112) ELT 353 (SC)]. Following was held by the Apex Court:-

*"**24.**We think it is appropriate that the cost of the excisable product for the purposes of assessment of excise duty under Section 4(1)(b) of the Act read with*

Rule 6 of the Valuation Rules should be reckoned as it would be reckoned by a man of commerce. We think that such realism must inform the meaning that the Courts give to words of a commercial nature, like cost, which are not defined in the statutes which use them. A man of commerce would, in our view, look at the matter thus : "I paid Rs. 100/- to the seller of the raw material as the price thereof. The seller of the raw material had paid Rs. 10/- as the excise duty thereon. Consequent upon purchasing the raw material and by virtue of the Modvat scheme, I have become entitled to the credit of Rs. 10/- with the excise authorities and can utilise this credit when I pay excise duty on my finished product. The real cost of the raw material (exclusive of freight, insurance and the like) to me is, therefore, Rs. 90/-. In reckoning the cost of the final product I would include Rs. 90/- on this account." This, in real terms, is the cost of the raw material (exclusive of freight, insurance and the like) and it is this, in our view, which should properly be included in computing the cost of the excisable product.

25.*The view we take about the cost of the raw material is borne out by the Guidance Note of the Indian Institute of Chartered Accountants, and there can be no doubt that this Institute is an authoritative body in the matter of laying down accountancy standards.*

26.*To answer the Question involved in these appeals, in determining the cost of an excisable product covered by the Modvat scheme under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules the excise duty paid on raw material also covered by the Modvat scheme is not to be included."*

5.2 Appellants have relied upon various decisions to argue that automobile cess is duty of excise and hence Cenvatable. The said decisions as relied upon by the appellant do not help the case of the appellant. The issue in the present case is not in respect of manner of collection of automobile cess but is in respect of the admissibility of Cenvat Credit on the said automobile cess. Automobile cess is a cess collected by the department of labour in the Ministry of Industries and is levied under Industries (development and Regulation), Act, 1951 read with Automobile Cess Rules, 1984. Rule 3 of these rules provide-

*"**Rule 3. Application of Central Excise Act and the rules made thereunder.** - Save as otherwise provided in these rules, the provisions of Central Excise Act, 1944 (1 of 1944), and the rules made thereunder including those relating to refund of duty, shall, so far as may be, apply in relation to the levy and collection of the cess as they apply in relation to the levy and collection of the duty of excise on manufacture of automobiles under the Act and the Rules."*

5.3 Now, in terms of Rule 3 of the Credit Rules, a manufacturer is entitled to avail Cenvat credit only of excise duty as mentioned under the Excise Act, specified additional duties and also of education cess, national calamity contingency duty, etc. Cenvat credit is also available on all of the above duties paid during the time of import. However, the cess levied under various other acts, though collected as in manner similar to excise duty in the respective acts, is not in the list of duties eligible for Cenvat credit.

5.3 None of the authorities cited by the appellant have stated in respect of admissibility of CENVAT Credit in respect of the automobile cess. Thus the submission of the appellant in this respect is not tenable.

5.4 Since automobile is not Cenvatable, in view of the decision of the Apex Court in case of Dai Ichi Karkaria, supra, same needs to be added for determining the assessable value of the finished goods cleared by the appellant.

6.1 On the issue of limitation also we do not find much merits in the submissions of the appellant. The issue of inclusion of the taxes and fees which were not Cenvatable has been decided by the Apex Court in case of Dai Ichi Karkaria in the year 1999. After the said decision, there can be no justification for non inclusion of the same in assessable value. Appellant cannot claim that they were under bonafide belief that the said automobile cess was not includable after the decision of the Apex Court. Further all these details were not made available to the department while filling the returns. Hence there was suppression of material facts from the revenue with the intention to evade, accordingly demand of duty short paid by invoking extended period of limitation cannot be faulted in the present case. In similar circumstances, tribunal has in case of Air Cell Digi link India Ltd [2006 (3) STR 386 (T)] held-

"***4.*** *Another argument, which has been vehemently put forth by the Counsel, is of the limitation. According to the Counsel, the demand is time-barred as the show cause notice was issued only on 2-8-2000 whereas the period of demand is March, 1997 to Jan., 2000. But from the record, we find that there had been suppression of the material facts by the appellants from the department. They never disclosed that they were not paying the tax on the service on the sale of the SIM cards by them, to their subscribers. In their Return ST-3 forms, no details and mode of computation of the service tax being paid by them during the period in dispute had also been disclosed. This evasion of the service tax by the appellants was detected by the department ultimately. The contention of the Counsel that the appellants had been working under the bona fide belief that such service i.e. sale of SIM cards to the subscribers, was not taxable, cannot be accepted. There was nothing on the record to suggest if the appellants ever approached the office of the service tax authorities to ascertain the details of their liability to pay the service tax. The ratio of law laid down in Pushpam Pharmaceuticals Co. v. CCE, Bombay [1995 (78) E.L.T. 401 (S.C.)] and M/s. Ultra Flax (P) Ltd., v. CCE, Faridabad [2004 (167) E.L.T. 354 (Tribunal-Delhi)], referred by the Counsel, is not attracted to the facts of the present case. Those cases were under the Central Excise Act and there was material on the record to suggest therein that there was no suppression of the true facts by the assessee from the department. But such is not the position in this case."*

6.2 In case of Continental Drugs Company Pvt Ltd. Vs Commissioner Service Tax Mumbai [2015 (39) STR 154 (T-MUM)], tribunal held-

***"5.2** ……. As regards the claim of the appellant that they had not suppressed any facts and therefore, extended period time cannot be invoked, the appellant has not brought on record any evidence to prove their bona fides. Bona fide belief is not blind belief but has to be based on reasonable measures taken to entertain such belief. There is nothing in the records to show that the appellant consulted either the department or obtained any legal opinion as their liability towards service tax. In the absence of any such evidence, it is difficult to accept this contention. Inasmuch as the appellant did not obtain any registration nor did they follow any of the statutory procedures, the appellant had clearly suppressed the facts from the department with an intent to evade service tax. In these circumstances, the confirmation of duty demand invoking the extended period of time along with interest thereon cannot be faulted. Consequently, the appellant is also liable to penalty under the provisions of the Finance Act, 1994."*

6.3 Thus in our view extended period of limitation has been correctly invoked for demanding the duty short paid.

7.1 Demand for interest is natural consequence of the delay in payment of the duty from the due date. Since the duty as determined under Section 11A(2) has been short paid on the due date, demand for interest under Section 11AB cannot be faulted with.

8.1 Since we have held that necessary ingredients to invoke extended period of limitation are present in the case, penalty under Section 11AC read with rule 25 of the Central Excise Rules, 2002 justified. Hon'ble Apex Court has in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] held as follows:

"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."*

8.2 Hence we uphold the penalty imposed on the appellant under the provisions of Section 11AC read with Rule 25 of Central Excise Rules, 2002. Hon'ble Gujarat High Court has in case of Gopal Fibres [] held as follows:

"9. We have considered the submissions made by Mr. Oza and also perused very minutely the order passed by the authorities below. As a matter of fact, all these questions refrained by Mr. Oza are different facets of the main question as to whether the Tribunal is justified in reducing the penalty to 25% of the duty leviable on the respondent. All these aspects of the main question are already considered by this Court in its order dated 18-11-2009 in the case of Messers Exotic Associates v. Commissioner of Central Excise (Tax Appeal No. 572 of 2007 with Tax Appeal No. 869 of 2007 [2010 (252) E.L.T. 49 (Guj.)] and Tax Appeal No. 1942 of 2008, in the case of Commissioner of Central Excise & Customs v. Rama Synsilk Mills P. Ltd., decided on 21-1-2010 [2010 (254) E.L.T. 277 (Guj.)]. This Court after considering the decision of Commissioner of Central Excise v. Malbro Appliances, 2007 (79) RLT 109 (Delhi), Union of India v. Dharamendra Textiles, 2008 (231) E.L.T. 3 (S.C.), Union of India v. Rajasthan Spinning & Weaving Mills, 2009 (238) E.L.T. 3 (S.C.), K. P. Pouches (P) Ltd. v. Union of

India, 2008 (228) E.L.T. 31 (Delhi), Commissioner of Central Excise, Rohtak v. J.R. Fabrics Pvt. Ltd., 2009 (238) E.L.T. 209, has taken the view that the order passed by the Tribunal retaining the penalty of 25% of the duty amount seems to be quite justified. For the reasons recorded in the said two judgments, we do not feel it necessary to take any different view in this appeal.

10. However, Mr. Oza has made two more submissions in this Tax Appeal. He has emphatically stated that the respondent has not complied with pre-condition for availment of benefit of reduced penalty under proviso to Section 11AC of the Central Excise Act, 1944. As per the first proviso, the duty amount was not paid with interest and even the reduced penalty of 25% is not deposited by the respondent within 30 days from the date of such determination, as required under second proviso to Section 11AC of the Act. So far as second issue is concerned, Mr. Oza submitted that the adjudicating authority is not under any statutory obligation to set out in its order the availability of benefit of reduced penalty prescribed under proviso to Section 11AC of the Central Excise Act and to give an option to such person liable for penalty under that Section. Both these issues were dealt with by this Court in Tax Appeal No. 572 of 2007 with tax Appeal No. 869 of 2007 decided on 18-11-2009 [2010 (252) E.L.T. 49 (Guj.)]. It is also important to note that the adjudicating authority has not calculated the interest neither in the order-in-original nor even thereafter. It is, therefore, too much to expect from the respondent-assessee to pay the interest along with the duty amount in absence of such calculation of interest. As far as statutory obligation of the adjudicating authority is concerned, the Central Excise Department itself has issued Circular on 22-5-2008 wherein it is clarified that in all cases wherein penalty under Section 11AC of the

Act is imposed the provisions contained in the first and second proviso of Section 11AC should be mandatorily mentioned in the order-in-original itself by the adjudicating authority. It is, therefore, not open for the revenue to agitate this issue before the Court in contradiction of the Circular issued by the Central Excise Department. This Court in Messers Exotic Associates (supra) has directed the adjudicating authority to pass a fresh order giving option to the assessee to pay the duty amount within 30 days by making it explicitly clear in the order itself that if the assessee wants to avail such option he is permitted to do so. In the case on hand since the duty amount has already been paid by the respondent-assessee and if the interest and/or reduced penalty of 25% were not paid by the respondent-assessee, the adjudicating authority may send a communication to the respondent-assessee indicating therein that the particular amount of interest and/or 25% of the penalty of the duty amount is not paid by the respondent assessee and hence if the assessee wants to avail the benefit of the reduced penalty of 25%, such amount of interest and/or penalty of 25% should be paid within 30 days from the date of receipt of such communication, failing which they would be liable to pay penalty under Section 11AC equivalent to the amount of duty."

8.3 Hon'ble Madras High Court has in case of A P Steels [2017 (355) ELT 6 (Mad)] held as follows:

"5.5*The way, we look at the issue raised before us, has, in our view, got nothing to do with Section 2(b), or Section 12E of the 1944 Act. What is required to be considered, in our opinion, is whether the appellate proceedings can be considered as a continuation of the original proceedings? And therefore, would the Appellate Authority have the* *same powers, as the Original Authority? In our view, the answer has to be that, if, the original proceedings are challenged in appeal, the order of the Original Authority is in jeopardy, till such time, it attains finality, upon conclusion of the appellate proceedings. (See Santoshi Tel Utpadak Kendra v. Deputy Commissioner of Sales Tax and Another, (1981) 3 SCC 466 Paragraph 11; Commissioner of Wealth Tax, Gujarat v. Vimlabeen Vadilal Mehta, AIR 1984 SC 302; Union of India and Others v. West Coast Paper Mills Ltd., (2004) 2 SCC 747 [2004 (164) E.L.T. 375 (S.C.)] Paragraph 41; and the Full Bench Judgment of this Court in : State of Tamil Nadu v. Arumugham & Co., Jayalakshmi Sago Factory, Salem and Another, 1982 (51) STC 381). In other words, duty, as determined under Section 11A(2) of the 1944 Act, will attain finality, only, if, it is sustained by the Appellate Authority. In this case, the Appellate Authority was the Commissioner (Appeals). Therefore, in the instant case, when, the Commissioner (Appeals) gave the option to pay penalty, albeit, for a reduced amount equivalent to 25% of the duty so determined, in our opinion, no fault could be found with such a direction.*

5.6*To illustrate the validity of this proposition, we may assume, in a given case, the show cause notice proposes to impose duty in the sum of Rs. 12,00,000/- on an Assessee. The Assessee challenges the imposition of duty and the Adjudicating Authority, after hearing the Assessee and the representative of the Revenue, comes to the conclusion that the demand should be confirmed only to the extent of Rs. 10,00,000/-, as against what was proposed in the show cause notice. If, the Revenue were to carry the matter in appeal, and the Appellate Authority held that the original proposal ought to be sustained, which is that, the demand ought to be confirmed at Rs. 12,00,000/-, would then, the Revenue* *contend that the penalty should be imposed keeping in mind, the order of the Adjudicating Authority and not that of the Appellate Authority. In our understanding, the answer, would, necessarily, be that, the Revenue would press for penalty equivalent to the demand as confirmed by the Appellate Authority. The rationale for this stand can only be that the Order-in-Original, if, challenged, can only attain finality on the conclusion of the appellate proceedings. Quite logically then, the time frame for the option given in proviso to Section 11AC will also commence from the date of the Appellate Order.*

6.*In this context, we may say that the reliance placed by the Tribunal on the judgement of the Bombay High Court in : Commissioner of Central Excise and Customs, Aurangabad v. V.V. Patil S.S.K. Limited, 2007 (215) E.L.T. 23 (Bom.) was misdirected. According to us, the Tribunal has completely misunderstood the ratio of the judgement. This was a case, in which, the Bombay High Court held that there was no discretion vested in the Authorities to reduce the penalty below the minimum prescribed under the Act. The Court was not called upon to deal with the issue, that we have been called upon to decide. According to us, the judgement is completely distinguishable from the facts obtaining in the present case.*

6.1*An apposite judgement, in our view, would be the judgement of the Division Bench of the Delhi High Court in K.P. Pouchers (P) Ltd. v. Union of India, 2008 (228) E.L.T. 31 (Del). In this, none of the statutory authorities had given an option to the Assessee to pay duty at a scaled down amount in terms of the first proviso to Section 11AC. In the background of these broad facts, the Court made the observations :*

We are of the opinion that Section 11AC of the Act and its "..... 17. two provisions have to be given a meaningful *interpretation. The purpose of the Section and the provisos is to give a benefit to the Assessee if he pays the duty demanded within 30 days of the adjudication order. In that event, the Assessee would be liable to pay only 25% of the duty amount by way of penalty, otherwise he would be liable to pay 100% of the duty amount by way of penalty.*

18.In the present case, as we have already noticed, the Assessee deposited the entire duty amount well before the show cause notice was issued and, therefore, the Assessee would be liable to pay only 25% of the duty amount as penalty.

19. It is quite clear that under these circumstances, the Assistant Commissioner could not have demanded more than 25% of the duty amount by way of penalty, in view of the first proviso to Section 11AC of the Act. Unfortunately, for reasons that are not available on record, the Assistant Commissioner demanded 100% of the duty amount by way of penalty. This was incorrect and contrary to the benefit that the Assessee was statutorily entitled to under the first proviso to Section 11AC of the Act.

20.Since the Assistant Commissioner had wrongly demanded 100% of the duty by way of penalty and the Assessee was under no obligation to pay it, the Assessee preferred an appeal before the Commissioner (Appeals) as well as before the Tribunal. Neither of these authorities paid heed to the terms of the first proviso to Section 11AC of the Act.

21. As far as we are concerned, no one can say that if the Assistant Commissioner had in fact imposed only 25% of the duty amount by way of penalty (as he should have), the Assessee would not have paid the penalty amount within 30 days of the adjudication order.

However, the benefit of doubt in this regard must go to the Assessee considering the bona fides, which are obvious from the fact that the Assessee debited the duty amount on the date of the search, well before a show cause notice was issued to it. Under these circumstances, we can only inter that if the correct penalty had been imposed upon the Assessee, he could have paid it within the time prescribed.

The fact that the Assistant Commissioner levied an incorrect 22. penalty left the Assessee with no option but to challenge it otherwise he would have had to pay the full penalty amount, which is statutorily not leviable, and then claim a refund of 75% excess penalty paid. Having rightly challenged the imposition, it cannot be said that the Assessee had no intention of paying the penalty within time and saddle itself with an avoidable liability. On the contrary, it could easily be assumed (given the conduct of the Assessee) that if the correct penalty has been imposed, the Assessee would have paid it during the time prescribed.

Since the statutory authorities have themselves acted illegally 23. and contrary to the first proviso to Section 11AC, the Assessee cannot be faulted for challenging the order passed by the Assistant Commissioner. Unfortunately, the error committed by the Assistant Commissioner was repeated by the Commissioner (Appeals) as well as by the Tribunal.

Consequently, the failure of the Assessee to pay the penalty 24. amount within 30 days of the adjudication order cannot be held against the Assessee on the facts of the present case." (emphasis is ours)

6.2 *As would be evident from the observations extracted above from the judgement of the Delhi High Court in K.P. Pouchers case, the Court seems to have* *gone further, by observing that it is incumbent on the part of the statutory authorities to bring to the notice of the Assessee that it is entitled to a statutory "benefit" under the first proviso to Section 11AC."*

8.4 In view of the decisions of Gujarat high Court and Madras High Court referred above we extend the benefit of proviso to Section 11AC to Appellants for discharging the liabilities adjudged against them in respect of duties, interest and penalty.

9.0 In result appeal of the appellants is partly allowed, and the benefit of proviso to Section 11AC extended to them for discharging the liabilities adjudged against them in respect of duties, interest and penalty.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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