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

APPEAL Nos. E/1143/2009,90,91/2010,89384,89746/2013

(Arising out of Orders-in-Appeal No. YDB/47,48/MII/2009 dated 31.8.2009 passed by Commissioner of Central Excise (Appeals), Mumbai-III, Order-in-Original No.04/ANS/09-10 dated 27.10.2009 passed by Commissioner of Central Excise, Mumbai-III, Order-in-Appeal Nos. 02/R/M-II/2013 dated 30.9.2013 and SK/269/M-II/2013-14 dated 14.10.2013 passed by Commissioner of Central Excise (Appeals), Mumbai-II)

PLA Components **Appellants**
PLA Relays
Shrenik Narendra Shah
PLA Components
Commissioner of Central Excise, Mumbai-II

Vs.

Commissioner of Central Excise, Mumbai-II/III **Respondent**
PLA Components

Appearance:

Shri Nirav Mainkar, Advocate, for appellant assessees
Shri A.B. Kulgod, Assistant Commissioner (AR), and Shri N.N. Prabhudesai, Superintendent, for Revenue

CORAM:

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

Date of Hearing: 27.11.2018
Date of Decision: 27.11.2018

ORDER No. A/**88272-88276/2018**

Per: Sanjiv Srivastava

The appeals under consideration are directed against the order as detailed in table below-

SN	Appeal No	Order Appealed Against	Appellant	Amount 'Rs	
				Duty	Penalty
1	E/1143/2009	YDB/47,48/M II/2009	PLA Components	34084	34084
2	E/90/2010	04/ANS/09-10 dtd 27.10.09	PLA Relays	7868217	7868217
3	E/91/2010	04/ANS/09-10 dtd 27.10.09	Shrenik Shah	0	7868217
4	E/89384/13	SK/269/M II/2013-14 dtd 14.10.13	PLA Components	4885627	0
5	E/89476/13	SK/269/M II/2013-14 dtd 14.10.13	Revenue	0	0

2.1 The appeal at Sl No 1, is directed against the order of Commissioner (Appeals), upholding the demand of duty as indicated on the ground that the Relays cleared by them were to be assessed in terms of Section 4A of The Central Excise Act, 1944 and not under Section 4. Penalty and demand of interest has also been upheld.

2.2 The Appeal at Sl No 2 & 3 is directed against the order of Commissioner. By the said order demand of duty has been made by invoking the extended period of limitation as provided by proviso to Section 11A (1). Demand has been made on the ground that appellants have been using the brand name 'PLA Relays' which was not owned by them and not registered in their name. Demand was has been confirmed holding that the Relays cleared by them are liable for assessment under Section 4A and not under Section 4. Penalty has also been imposed on the partner who is also in appeal.

2.3 Appeal at Sl No 4 & 5 are directed against order of Commissioner (Appeal). Appeal at Sl No 4 is filed by the appellants (assessee) and the one at Sl No 5 is filed by revenue. Appeal of party is directed against the order of Commissioner (Appeal), upholding the demand of duty as indicated on the ground that the Relays cleared by them were to be assessed in terms of Section 4A of The Central Excise Act, 1944 and not under Section 4. The appeal of department is for imposition of penalty under Section 11AC.

3.1 The common issue in the threes appeals is whether the relays manufactured and cleared by the appellant are to be assessed under Section 4 of the Central Excise Act, 1944 as claimed by the appellants or under Section 4A as claimed by the revenue.

3.2 Appellants manufacture “relay” classifiable under 85364100 and 85364900. These relays have been notified under Notification No 13/2002-CE (NT) dated 01.03.2002 as amended and Notification No 2/2006-CE(NT) dated 1.03.2006 as amended, for the purpose of assessment under section 4A of the Central Excise Act, 1994.

3.3 Appellants have cleared these goods by determining the value in terms of Section 4. They claimed that since the goods being supplied by them are not packed in retail pack, and such relays will not attract the provisions of the provisions of Standard Weight & Measures (Packaged Commodity) Rules, 1977[SWMR]. Since these goods do not attract the provisions of SWMR they are not required to be assessed under Section 4A of the Central Excise Act, 1944.

3.4 The relays cleared by the appellant were affixed with the brand name *"PLA RELAYS"* which neither belonged to them nor was registered in their name. One Jayantilal Dharsey Vikamsey was the owner of the brand name "PLA RELAYS" who was in no way connected to the appellant. Thus appellants were not eligible for exemption under Notification No 9/2002-CE dated 1/3/2002 and 8/2003-CE dated 1/3/2003.

3.5 On basis of intelligence investigations were conducted and it was found that these relays were being displayed and sold in retail by dealers/ retailers and were sold in numbers. On the outer packing of the box containing the relays it was inscribed "*INDUSTRIAL PRODUCT EXCLUSIVE USE OF INDUSTRIES AS INTERMEDIATE / FOR SERVICING INDUSTRIES NOT INTENDED TO BE DISPLAYED FOR SALE AT RETAIL OUTLET"*.

3.6 Clarification was also sought from Controller of Legal Metrology, Mumbai, who had vide his letter letter F No IM-14/C.E./Enq/05/8534 dated 14.02.2005 clarified that since the relays were sold in the retail market, there was no exemption from declaring MRP on such packages. It was also clarified that packages of Relay should confirm to the Rule 6, 17 & 29 of SWMR.

3.7 Appellants sold the relays to M/s Planet Electronics Pvt Ltd, who in turn sold them in retail through their network of dealers. The sub dealers sold the relays either in retail from their shops or to the retailers in the market.

3.8 In their statement recorded under Section 14, M/s Planet Electronics, to bring on record the manner of marketing network, it was admitted that the goods were sold through the network of dealers in retail.

3.9 On the basis of then investigations proceedings were initiated against the appellants by issuance of Show Cause Notice dated 04.04.2007. Subsequently two more show cause notices dated 14.01.2008, & 01.04.2008 have been issued to the appellants.

3.10 Appellants contested all the three show cause notice. The Notice dated 04.04.2007 was adjudicated by the Commissioner and the other two were adjudicated by the officers below in rank to the Commissioner.

Accordingly first appeal against these order went to Commissioner (Appeal).

3.11 Aggrieved by the orders of Commissioner and Commissioner (Appeal) appellants are now in appeal before us.

4.1 We have heard Shri Nivan Mainker Learned Advocate for the appellant and Shri A B Kulgod Assistant Commissioner and Shri N N Prabhudesai Superintendent, Authorized Representative for the Revenue.

4.2 Arguing for the Appellants learned advocate submitted that-

i. The relays in dispute were meant for industrial use and hence were exempted from the provisions of SWMR. Since these were exempt from SWMR, even though notified under Section 4A, they were required to be assessed under 4 of the Central Excise Act, 1944.

ii. They had sought clarification from Dy Controller of Legal Metrology Maharastra State, Mumbai with regards to applicability of the provisions of SWMR, and he has vide his letter dated 23.11.2005, clarified stating “As per your letter “Relays” are not sold in pre-packed or packed condition in market, if so then the provisions made under Chapter II of the Packaged Commodity Rules, 1977 are not applicable to the unpacked Relays.

iii. They had also sought clarification from the Dy Secretary TRU, who also vide his e-mail clarified in their favour.

iv. They rely on the decision as follows in their support:

   a. American Home Products/ Mac Labs Pvt Ltd [1986 (1) Sec 465]
   b. Swan Sweets [2006 (198) ELT 565]
   c. Control & switchgear Contractors Ltd [2006 (201) ELT 574 (T-Del)]
   d. Control & switchgear Contractors Ltd [2005 (183) ELT 95 (T-Del)]

v. Some of the dealers whose statement was recorded have retracted from their statement. During the course of adjudication of the show cause notice under appeal No E/90, 91/2010 , they had asked for cross examination of the dealers, which was not allowed.

vi. Even at the time of search on 2/12/2005 of their premises all relays in their BSR were unpacked/ except two corrugated container. However in panchnama it was recorded otherwise. Panchas have retracted vide their letter dated 9/12/2005.

vii. By not allowing the cross examination of the persons/ dealers the principles of natural justice have been denied in their case.

viii. In appeal No E/89384/13, adjudicating authority has dropped the demand. In appeal filed by the department against the order of the adjudicating authority, Commissioner (Appeal) has allowed the appeal setting aside the order of the adjudicating authority. None of the authorities have rendered any finding in respect of applicability of extended period as per proviso to section 11A(1) of the Central Excise Act, 1944. Hence even if the matter is decided against them on merits it needs to be remanded back to adjudicating authority to consider the applicability of extended period of limitation.

4.2 Arguing for the revenue learned Authorized representative submitted-

i. Appellant cleared the goods in retail market by mentioning on the package "*INDUSTRIAL PRODUCT EXCLUSIVE USE OF INDUSTRIES AS INTERMEDIATE / FOR SERVICING INDUSTRIES NOT INTENDED TO BE DISPLAYED FOR SALE AT RETAIL OUTLET*". These goods were actually sold by number in the retail market through dealer network.

ii. Appellants were using the brand “PLA Relays” on the goods cleared by them during the period September 2002 to September 2007. The words “RELAYS” used on the label was to create a subterfuge in order to fraudulently claim the benefit of the said concessional rate under notifications. The brand “PLA” was also used by M/s PLA Components and they were paying duty at full rate.

iii. Registrar of Patents and Trade Marks have vide their letter TMR/ Central Excise/05/07-08 dated 13,09.2007 informed that “PLA is applied and registered in the name of M/s PLA Electro Appliances Pvt Ltd upto 22.07.2013.

iv. The goods in the present case are the goods which are notified for the purpose of assessment under Section 4A. Also as per SWMR, these goods have actually been sold in retail numbers through retail outlet. The fact that these relays in the form which they are cleared and sold are covered by the provisions SWMR has been clarified by the Department of legal Metrology vide their letter dated 14.02.2005. Hence he submitted that of Commissioner/ Commissioner (Appeal) holding that these relay need to be assessed under Section 4A cannot be faulted with.

v. He relies on the decision of Bombay High Court in the case Larsen & Tubro Limited [2012 (275) ELT 153 (Bom)]

vi. The Appeal No E/89476/13 has been filed by the department against the order of Commissioner (Appeal) dated 14.10.2013, for the reason that by the said order Commissioner (Appeal) has set aside the order of adjudicating authority dropping the demand, but has failed to impose penalty under Section 11AC of the Central Excise Act, 1944. Since the demand has been made invoking the proviso to Section 11A(1) penalty under Section 11AC should follow.

vii. Referring to para 76 of the order of Commissioner dated 27.10.2009 (Appeal No E/90,91/2009) he submitted that Commissioner has considered and denied the request of cross examination. Since Commissioner did not found it relevant he was justified in denying the request for cross examination.

5.1 Issues for consideration in these appeals can be listed as follows:

i. Whether the assessment of “Relays” manufactured and sold by the appellants are to be assessed under Section 4 or Section 4A of the Central Excise Act, 1944?

ii. Whether the benefit of exemption under Notification No 9/2002-CE dated 1/3/2002 and 8/2003-CE dated 1/3/2003, was available to the appellants?

iii. Whether Commissioner was correct in denying the request of cross examination in his order No 04/ANS/09-10 dtd 27.10.09 subject matter in Appeal No E/90, 91/2010?

iv. Whether extended period of limitation of limitation as provided by proviso to section 11A(1) invokable in respect of order No SK/269/M II/2013-14 dtd 14.10.13, subject matter of appeal No E/89384/13?

v. Whether penalty under Section 11AC is required to be imposed in respect of order No SK/269/M II/2013-14 dtd 14.10.13, subject matter of appeal No E/89476/13?

5.2 The issue in respect of manner of assessment of "Relays" sold in the manner as have been cleared by the Appellants is no longer res-integra. Tribunal has in case of Schneider Electrical India (P) Ltd vs Commissioner Central Excise Nashik [2014 (311) ELT 113 (T-Mum) held as follows:

"15. Issue No. A : *The said issue came up before the Hon'ble High Court of Bombay in the case of Larsen & Toubro Ltd. (supra) as that whether the valuation of* *goods for the levy of excise duty, whether the provisions of Section 4 or 4A of the Central Excise Act, 1944 are applicable.*

16. *The contention of the appellant is that as per the explanation to Rule 2A of Standards of Weights and Measures (Packaged Commodities) Rules, 1977 that as the package commodities are meant for industrial or institutional consumers therefore they are not liable to affix MRP on their products accordingly they are out of the purview of Section 4A in that case. But the Hon'ble High Court of Bombay has held that appellants are required to affix MRP on the impugned goods. Further, the contention of the appellant is that the decision of Hon'ble High Court in the case of Larsen & Toubro Ltd. (supra) has been challenged before the Hon'ble Apex Court and appeal against the said order has been admitted and it is also contended that the decision of Larsen & Toubro Ltd. is based on the decision of Whirlpool India Ltd. v. Union of India (supra) and said decision of the Hon'ble Apex Court is in jeopardy as the Hon'ble Apex Court in the case of Subhash Arjundas Kataria (supra) has doubted the same.*

17. *We are not convinced with the argument advanced by the ld. Counsel for the appellant. In the light of decision of this Tribunal in the case of M/s. Access Textiles & Another vide Order No. A/569-572/13/CSTB/C-I, dated 23-4-2013 this Tribunal has observed as under :-*

"It is seen that the judgment in the case of West Coast (supra) is not a precedent for the ratio that a judgment losses its precedent value if stayed by a Superior Court, the said judgment was on the issue of commencement of the period of limitation for filing suit, whether from the date of passing of original decree or from the date of

passing of appellate decree by a Superior Court. While deciding this question, while holding the period from which writ petition was pending before the Superior Court was excludable for computing period of limitation, in that context, it was observed by the Hon'ble Apex Court that on admission of appeal correctness or otherwise of judgment impugned becomes wide open and is in jeopardy. In the case of B.S. Refrigerators Ltd. (supra), neither the judgment of the Hon'ble Apex Court in the case of Shri Chamundi Mopeds Ltd. (supra) nor the judgment of Hon'ble Bombay High Court in the case of Pramod K. Shah dated 18-12-2006 were considered. Both these cited judgments are directly on the point, wherein the Hon'ble High Court of Bombay has observed as under :-

"5. To say the least, the learned Additional Sessions Judge has committed a grave error in not following the binding precedent. The precedent does not cease to be binding merely because in the opinion of the learned Judge, the same is challenged in the Supreme Court and its operation stayed by the Supreme Court. In the decision, reported in AIR 1992 Supreme Court 1439 in the case of M/s. Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, Madras, the Hon'ble Supreme Court has very succinctly pointed out the difference between a judgment being quashed and set aside and its operation stayed by the Higher Court. The judgment being stayed does not wipe it out unless and until it is so wiped out, it continues to be binding on the lower and subordinate Courts."

The said decisions were not brought in the knowledge of this Tribunal. Therefore, the judgment of this Tribunal in the case of Tex Age (supra) will not cease to be binding precedent".

As the decision of the Hon'ble High Court of Bombay in the case of Larsen & Toubro Ltd. (supra) has not been set aside by the Hon'ble Apex Court. Therefore in the light of the judgment in the case of Shri Chamundi Mopeds Ltd. the judgment of the Hon'ble High Court of Bombay in the case of Larsen & Toubro Ltd. (supra) is a law of land as on today. Therefore, we hold that the appellants are required to affix MRP on the impugned goods."

In view of the above decision we are of the view that assessment of the goods manufactured and cleared by the appellants is required to be done in terms of Section 4A of the Central Excise Act, 1944.

5.3 It is an admitted fact the appellants were using the brand name on their goods which did not belonged to them but was owned by someone else. Commissioner has in his order recorded as follows:

"73. Para 4 stipulates that the exemption contained in this notification shall not apply to specified goods bearing a brand name or trade name whether registered or not, of another person. In this regard it is also observed from the case records that Shri Shrenik Narendra Shah, partner of the assessee firm, in his deposition under section 14 of the C E Act, 1944 recorded on 20.08.2007, ha accepted the fact that the brand name "PLA Relays" belong to one Shri Jayantilal Dharsey Vikamsay; that the said Shri Jayantilal Dharsey Vikamsay was in no way connected with the assessee firm; that after the death of the said Shri Jayantilal Dharsey Vikamsay on 10.08.1997, he had applied for the proprietorship of the brand name "PLA Relays" in the name of assessee firm but he has not received any certificate/ confirmation to that effect till

date. The said Shri Shrenik Narendra Shah has further accepted the fact that the brand "PLA" is being used by M/s PLA Component, and the said firm is paying Central Excise duty at full rate from the beginning. The depositions under Section 14 do have an evidential value in the eyes of law and as such department's stand that the assessee was using a brand name of another person is proved substantially."

In Kohinoor Elastics (P) Ltd. v. Commissioner of Central Excise, Indore [2005 (188) E.L.T. 3 (S.C.)], interpreting an identical Notification No. 1/1993-C.E.)dated 28th February 1993, Hon'ble Apex Court held :

"Clause 4 of the notification is unambiguous and clear. It specifically states that the exemption contained in the notification shall not apply to specific goods which bear a brand name or trade name (registered or not) of another person. It is settled law that to claim exemption under a notification one must strictly comply with the terms of the notification. It is not permissible to imply words into the notification which the legislature has purposely not used. The framers were aware that use of a brand/trade name is generally to show to a consumer a connection between the goods and a person. The framers were aware that goods may be manufactured on order for captive consumption by that customer and bear the brand/trade name of that customer. The framers were aware that such goods may not reach the market in the form in which they were supplied to the customer. The framers were aware that the customer may merely use such goods as an input for the goods manufactured by him. Yet clause 4 provides in categoric terms that the exemption is lost if the goods bear the brand/trade name of another. Clause 4 does not state that the exemption is

lost only in respect of such goods as reach the market. It does not carve out an exception for goods manufactured for captive consumption. The framers meant what they provided. The exemption was to be available only to goods which did not bear a brand/trade name of another. The reason for this is obvious. If use of brand/trade names were to be permitted on goods manufactured as per the orders of customers or which are to be captively consumed then manufacturers, who are otherwise not entitled to exemption, would get their goods or some inputs manufactured on job-work basis or through some small party, freely use their brand/trade name on the goods and avail of the exemption. It is to foreclose such a thing that clause 4 provides, in unambiguous terms, that the exemption is lost if the "goods" bear a brand/trade name of another."

Hon'ble Supreme Court has in case of Parle Bisleri Ltd

[2011 (263) ELT 15 (SC)] held as follows:

"14. *The second issue concerns the question whether the 'code names' used to denote soft drink flavours manufactured by the appellant could in fact be termed as 'brand names' and if so, whether they belonged to another entity. The yardstick in this regard is Explanation VIII which is pari materia in both Notifications No. 175/86 and No. 1/93 and reads as :*

Explanation VIII — "Brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and *some person using such name or mark with or without any indication of the identity of that person.*

We are not convinced by the argument of the appellant that this Explanation refers only to 'brand names' and cannot be used to determine whether code names, as used by the appellant in the present case, fall within the said category. The mere difference in nomenclature cannot take away the import of the Explanation from its applicability to the present case. The appellant herein manufactures flavours which fall within the ambit of the 'code names' and it is a fact on record that these codes are key to identifying the flavours which are commercially transferable.

15. *Furthermore, it is expressly clear that the code names on the flavours indicate a connection in the course of trade between the specified goods and such person using such name or mark. The flavours in question, which were earlier manufactured by M/s. PEL Ltd. and supplied to the franchise holders, were subsequently allowed to be made by the appellant. The franchise holders were in effect buying the very same flavours from the appellant and were placing orders by referring to the same code name, as is evident from the respective purchase orders. The users of the flavours, i.e. M/s. PEL Ltd., M/s. PIL Ltd. and specified bottlers are all interconnected since the latter group comprises franchisees of PEL and thus there is more than an iota of evidence to prove the connection in the course of trade between the flavours and the entity using the flavours through code names. Furthermore, the ownership of the code names by M/s. PEL Ltd. is clearly evidenced from the fact that these flavours were developed, researched and concocted by M/s. PEL Ltd. in its research labs. That M/s. PEL Ltd. have given the brand names to the* *flavours and allowed them to be manufactured by the appellant, their holding company cannot hide the fact that M/s. PEL Ltd. were in fact, the owner of the code/brand names. This conclusion is fortified by the fact that it was M/s. PEL Ltd. who transferred the right of the codes when they were sold to M/s. Coca Cola Company in November, 1993. Since the appellant was not the owner of the said brand names in question, the Tribunal was justified in holding that the appellant will not be entitled to the benefit of Notification No. 175/86 and 1/93 for the products with code names G-44T, L-33A, T-IIPC, T-IIP, R-66M and K-55T which belonged to M/s. PEL Ltd."*

In Grasim Industries Ltd [2005 (183) ELT 123 (SC)], Hon'ble Apex Court held

"15...... In our view, the Tribunal has completely misdirected itself. The term "brand name or trade name" is qualified by the words "that is to say". Thus, even though under normal circumstances a brand name or a trade name may have the meaning as suggested by the Tribunal, for the purposes of such a Notification the terms "brand name or trade name" get qualified by the words which follow. The words which follow are "a name or a mark". Thus even an ordinary name or an ordinary mark is sufficient. It is then elaborated that the "name or mark" such as a "symbol" or a "monogram" or a "label" or even a "signature of invented word" is a brand name or trade name. However, the contention is that they must be used in relation to the product and for the purposes of indicating a connection with the other person. This is further made clear by the words "any writing". These words are wide enough to include the name of a company. The reasoning given by the Tribunal based on

a dictionary meaning of the words "write" and "Writing" is clearly erroneous. Even the name of some other company, if it is used for the purposes of indicating a connection between the product and that company, would be sufficient. It is not necessary that the name or the writing must always be a brand name or a trade name in the sense that it is normally understood. The exemption is only to such parties who do not associate their products with some other person. Of course this being a Notification under the Excise Act, the connection must be of such a nature that it reflects on the aspect of manufacture and deal with quality of the products. No hard and fast rule can be laid down however it is possible that words which merely indicate the party who is marketing the product may not be sufficient. As we are not dealing with such a case we do not express any opinion on this aspect."

In case of Ace Auto Comp Ltd. [2011 (263) ELT 3 (SC)],

Hon'ble Apex Court held

"14. *Therefore, in order to avail of the benefit of the exemption notification, the assessee must establish that his product is not associated with some other person. To put it differently, if it is shown that the assessee has affixed the brand name of another person on his goods with the intention of indicating a connection between the assessee's goods and the goods of another person, using such name or mark, then the assessee would not be entitled to the benefit of exemption notification. We may hasten to clarify that if the assessee is able to satisfy the Adjudicating Authority that there was no such intention, or that the user of the brand name was entirely fortuitous, it would be entitled to the benefit of the exemption.*

15. *In the instant case, admittedly, the brand name "TATA" did not belong to the assessee. It is also evident that by using the said brand name, the assessee had not only intended to indicate a connection between the goods manufactured by them and Tata Company; but also the quality of their product as that of a product of Tata Company, as they were supplying their goods to the said company. Thus, the bar created in Clause 4 read with Explanation IX of the Notification is clearly attracted in the present case, disentitling the assessee from the benefit of the exemption notifications under consideration. We are of the opinion that the decision of the Tribunal is clearly erroneous and deserves to be set aside."*

Thus in view of the facts as determined by the Commisssioner in his order and the decisions of the Apex Court referred above we are of the view that the benefit of exemption under Notification No 9/2002-CE dated 1/3/2002 and 8/2003-CE dated 1/3/2003 has been correctly denied to the appellants.

5.4 On the issue of cross examination Commissioner has in his order para 76, recorded as follows:

"76 The assessee has asked for the cross examination of five of the sub-dealers of M/s PLA Electronics as also of panchas in their written submissions. However no such cross examination of the panchas as well as the sub-dealers of the main dealer of M/s PLA Electronics, can be considered as they do not fall under the category of "witness". Their depositions were recorded during the course of investigations and the same are found to be supportive to the Deptt's view. Moreover the persons who

have deposed are "sub-dealers" of the Relays of the assessee firm and are familiar with the commodity and have the required expertise in their respective trading business and their deposition is therefore, acceptable."

The above para clearly shows the error in Commissioner's understanding of the purpose of cross examination and the law of evidence. The purpose of cross examination is to give opportunity to the person against whom the case has been made out to challenge the evidences produced against him by way of such depositions made and relied upon by the revenue. The purpose of cross examination is not for the acceptance of the evidence by the accusing department (revenue) but to provide opportunity to the accused to test the correctness of depositions made against him and bring out the truth. It is essentially to ensure fairness in the system of administration of justice. The view of Commissioner stating that because the depositions made by the sub dealers is acceptable to him, cannot be ground for denying the opportunity of cross examination to the appellants. The said part of the order is contrary to the principles of natural justice and against principles of fair administration of justice. In our view on this account matter needs to go back to the Commissioner to consider the request of cross examination afresh and pass a reasonable order thereafter. In case the person whose cross examination is sought is not available or cannot be made available, Commissioner should inform the appellant and also make a specific mention of the same in the order that he will issue.

5.5 Appeal No E/89384/13 has been filed by the Appellant against the Order in Appeal No SK/269/M II/2013-14 dtd 14.10.13, setting aside the order of the adjudicating authority. While accepting the appeal filed by the revenue, Commissioner (Appeal) has decided the issue on merits of the case in favour of revenue. Since the adjudicating authority has dropped the Show Cause Notice on merits he had not rendered any findings on the invocation of extended period as provided by the proviso to Section 11A(1) of the Central Excise Act, 1944. Commissioner (Appeal) has set aside the order of adjudicating authority, without rendering any finding on the issue of limitation. Since issue of limitation has not been adjudged by either the adjudicating authority or Commissioner (Appeal), the matter needs to be remanded back to the adjudicating authority for consideration of the issue on limitation.

5.6 Appeal No E/89476/13 has been filed by the revenue against the Order in Appeal No SK/269/M II/2013-14 dtd 14.10.13 for the reason that Commissioner (Appeal) has while setting aside the order of adjudicating authority not imposed any penalty under section 11AC of the Central Excise Act, 1944. Since the penalty under Section 11AC is directly linked to the decision on invocation of extended period of limitation, as has been held by the Apex Court in case of Rajasthan Spinning Mill [2009 (238) E.L.T. 3 (S.C.)]

"16. *The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :*

11AC. Penalty for short-levy or non-levy of duty in certain cases*.- where any 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, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

[Provided that where such duty as determined under sub-section (2) of section 11A, 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 per cent 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 :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

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."*

Since the matter in respect of determination of extended period of limitation is being remanded to the original authority the issue in respect of imposition of penalty under Section 11AC is also remanded to the same authority.

6.1 In view of discussions as above the appeals under consideration are disposed as follow:

i. Appeal No E/1143/2009 filed by the Appellants is rejected and dismissed.

ii. Appeal No E/90/2010 & E/91/2010 filed by the Appellants are allowed by way of remand for considering the request to cross examine the traders.

Appeal No E/89384/13 by the Appellant and Appeal No E/89476/13 filed by the Revenue is allowed by way of remand to the adjudicating authority determine issue of extended period/ penalty.

(Pronounced in court)

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

(Sanjiv Srivastava)
Member (Technical)

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