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

APPEAL No. E/1971/2010

(Arising out of Order-in-Original No. 08/Commr(KAP)/LTU/2010 dated 18.8.2010 passed by Commissioner of Central Excise & Service Tax, LTU, Mumbai)

Technova Imaging Systems Pvt. Ltd. **Appellant**

Vs.

Commissioner of Cen. Excise & ST (LTU), Mumbai Respondent

Appearance:

Shri Rajesh Ostwal, Advocate, for appellant
Shri Ajay Kumar, Additional Commissioner (AR), for respondent

CORAM:

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

Date of Hearing: 26.11.2018
Date of Decision: 26.11.2018

ORDER No. **A/88306/2018**

Per: Sanjiv Srivastava

The appeal is directed against the Order in Original No 08/Commr (KAP)/ LTU/ 2010 dated 19.08.2010 passed by the Commissioner (C Ex & S Tax) LTU, Mumbai. By the said order Commissioner has held as follows:

i. *I confirm the demand of Rs.54,99,975.00 (Rs. Fifty Four Lakhs Ninety Nine Thousand Nine Hundred and Seventy Five) for the period April 2003 to*

March 2004 under Section 11A(2) of the Central Excise Act, 1944.

ii. *I appropriate the amount of Rs.54,99,975.00 (Rs. Fifty Four Lakhs Ninety Nine Thousand Nine Hundred and Seventy Five) paid by the assessee, against the amount confirmed in (i) above.*

iii. *I also confirm and appropriate the amount of Rs.15,46,320.00 (Rs Fifteen Lakhs Forty Six Thousand Three Hundred and Twenty only) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.*

iv. *I also impose a penalty of Rs.54,99,975.00 (Rs. Fifty Four Lakhs Ninety Nine Thousand Nine Hundred and Seventy Five) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.*

v. *I confirm the demand of Rs.1,04,44,742.00 (Rs. One Crore Four Lakhs Forty Four Thousand Seven Hundred and Forty Two) and Cess amounting to Rs.2,09,000.00 (Rs. Two Lakhs Nine Thousand) for the period April 2004 to March under Section 11A(2) of the Central Excise Act, 1944.*

vi. *I appropriate the amount of Rs.1,04,44,742.00 (Rs. One Crore Four Lakhs Forty Four Thousand Seven Hundred and Forty Two) and Cess amounting to Rs.2,09,000.00 (Rs. Two Lakhs Nine Thousand) paid by the assessee, against the amount confirmed in (v) above.*

vii. *I also confirm and appropriate the amount of Rs.24,53,150.00 (Rs. Twenty Four Lakhs Fifty Three Thousand One Hundred and Fifty only) separately paid by the assessee against interest* *payable under Section 11AB of the Central Excise Act, 1944.*

viii. *I also impose a penalty of Rs.1,06,53,742.00 (Rs. One Crore Six Lakhs Fifty Three Thousand Seven Hundred and Forty Two) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.*

ix. *I confirm the demand of Rs.18,67,353.00 (Rs. Eighteen Lakhs Sixty Seven Thousand Three Hundred and Fifty Three) for the period March 2003 to March 2004 under Section 11A(2) of the Central Excise Ac t, 1944.*

x. *I appropriate the amount of Rs.18,67,353.00 (Rs. Eighteen Lakhs Sixty Seven Thousand Three Hundred and Fifty Three) paid by the assessee, against the amount confirmed in (ix) above.*

xi. *I also confirm and appropriate the amount of Rs.9,95,941.00 (Rs. Nine Lakhs Ninety Five Thousand Nine Hundred and Forty One) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.*

xii. *I also impose a penalty of Rs.18,67,353.00 (Rs. Eighteen Lakhs Sixty Seven Thousand Three Hundred and Fifty Three) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.*

xiii. *I confirm the demand of Rs.49,76,844.00 (Rs. Forty Nine Lakhs Seventy Six Thousand Eight Hundred and Forty Four) and Cess amounting to Rs.63,329.00 (Rs. Sixty Three Thousand Three Hundred and Twenty Nine) for the period April 2004 to March 2005 (clearances of semi-finished* *goods from Unit 1 to 2) under Section 11A (2) of the Central Excise Act, 1944.*

xiv. *I appropriate the amount of Rs.49,76,844.00 (Rs. Forty Nine Lakhs Seventy Six Thousand Eight Hundred and Forty Four) and Cess amounting to Rs.63,329.00 (Rs. Sixty Three Thousand Three Hundred and Twenty Nine) paid by the assessee, against the amount confirmed in (xiii) above.*

xv. *I also confirm and appropriate the amount of Rs.8,24,936.00 (Rs. Eight Lakhs Twenty Four Thousand Nine Hundred and Thirty Six only) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.*

xvi. *I also impose a penalty of Rs.50,40,173.00 (Rs., Fifty Lakhs Fifty Forty Thousand One Hundred and Seventy Three) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.*

xvii. *I confirm the demand of Rs.32,37,059.00 (Rs., Thirty Two Lakhs Thirty Seven Thousand and Fifty Nine) and Cess amounting to Rs.64,741.00 (Rs. Sixty Four Thousand Seven Hundred and Forty One) for the period April 2005 to November 2005 (clearances) of semi-finished goods from Unit 1 to 2) under Section 11a(2) of the Central Excise Act, 1944.*

xviii. *I appropriate the amount of Rs.32,37,059.00 (Rs., Thirty Two Lakhs Thirty Seven Thousand and Fifty Nine) and Cess amounting to Rs.64,741.00 (Rs. Sixty Four Thousand Seven Hundred and Forty One) paid by the assessee, against the amount confirmed in (xvii) above.*

xix. *I also confirm and appropriate the amount of Rs.1,75,669.00 (Rs. One Lakh Seventy Five Thousand Six Hundred and Sixty Nine only) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.*

xx. *I also impose a penalty of Rs.33,01,800.00 (Rs. Thirty Three Lakhs One Thousand and Eight Hundred only) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.*

xxi. *I confirm the demand of Rs.9,02,463.00 (Rs. Nine Lakhs Two Thousand Four Hundred and Sixty Three only) for the period April 2003 to March 2004 (clearances of goods from Unit No.2) under Section 11A(2) of the Central Excise Act, 1944.*

xxii. *I appropriate the amount of Rs.9,02,463.00 (Rs. Nine Lakhs Two Thousand Four Hundred and Sixty Three only) paid by the assessee, against the amount confirmed in (xxv) above.*

xxiii. *I also confirm and appropriate the amount of Rs.2,53,728.00 (Rs. Two Lakhs Fifty Three Thousand Seven Hundred and Twenty Eight only) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.*

xxiv. *I also impose a penalty of Rs.9,02,463.00 (Rs. Nine Lakhs Two Thousand Four Hundred and Sixty Three only) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.*

xxv. *I confirm the demand of Rs.1,79,64,520.00 (Rs. One Crore Seventy Nine Lakhs Sixty Four Thousand Five Hundred and Twenty only) and*

Cess amounting to Rs.3,33,592.00 (Rs. Three Lakhs Thirty Three Thousand Five Hundred and Ninety Two only) for the period April 2004 to March 2005 (clearances of goods from Unit No.2) under Section 11A(2) of the Central Excise Act, 1944.

xxvi. I appropriate the amount of Rs.1,79,64,520.00 (Rs. One Crore Seventy Nine Lakhs Sixty Four Thousand Five Hundred and Twenty only) and Cess amounting to Rs.3,33,592.00 (Rs. Three Lakhs Thirty Three Thousand Five Hundred and Ninety Two only) paid by the assessee, against the amount confirmed in (xxix) above.

xxvii. I also confirm and appropriate the amount of Rs.39,48,615.00 (Rs. Thirty Nine Lakhs forty Eight Thousand Six Hundred and Fifteen only) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.

xxviii. I also impose a penalty of Rs.1,82,98,112.00 (Rs. One Crore Eighty Two Lakhs Ninety Eight Thousand One Hundred and Twelve only) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.

xxix. I confirm the demand of Rs.20,34,435.00 (Rs. Twenty Lakhs Thirty Four Thousand Four Hundred and Thirty Five only) and Cess amounting to Rs.40,689.00 (Rs. Three Lakhs Thirty Three Thousand Five Hundred and Ninety Two only) for the period April 2005 to November 2005 (clearances of goods from Unit No.2) under Section 11A(2) of the Central Excise Act, 1944.

xxx. I appropriate the amount of Rs.20,34,435.00 (Rs. Twenty Lakhs Thirty Four Thousand Four Hundred and Thirty Five only) and Cess amounting to Rs.40,689.00 (Rs. Three Lakhs Thirty Three Thousand Five Hundred and Ninety Two only) paid by the assessee, against the amount confirmed in (xxxiii) above.

xxxi. xxxi.I also confirm and appropriate the amount of Rs.1,57,097.00 (Rs. One Lakh Fifty Seven Thousand and Ninety Seven only) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.

xxxii. I also impose a penalty of Rs.20,75,124.00 (Rs. Twenty Lakhs Seventy Five Thousand One Hundred and Twenty Four only) on the assessee, under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.

xxxiii. I confirm the demand of Rs.1,59,391.00 (Rs. One Lakh Fifty Nine Thousand Three Hundred and Ninety One only) and Cess amounting to Rs.1013.00 (Rs. One Thousand and Thirteen only) for the period April 2003 to March 2004; April 2004 to March 2005 and April 2005 to November 2005 (clearances of semi finished goods from Unit No.2 to Unit No.1) under Section 11A(2) of the Central Excise Act, 1944.

xxxiv. I appropriate the amount of Rs.1,59,391.00 (Rs. One Lakh Fifty Nine Thousand Three Hundred and Ninety One only) and Cess amounting to Rs.1013.00 (Rs. One Thousand and Thirteen only) paid by the assessee, against the amount confirmed in (xxxvii) above.

xxxv. I also confirm and appropriate the amount of Rs. 62,194.00 (Rs. Sixty Two Thousand One Hundred and Ninety Four only) separately paid by the assessee against interest payable under Section 11AB of the Central Excise Act, 1944.

xxxvi. I drop further proceedings with reference to recovery of a sum of Rs.33,27,780.00 (Rs. Thirty Three Lakhs Twenty Seven Thousand Seven Hundred Eighty only) and cess amounting to Rs.57,209.00 (Rs. Fifty Seven Thousand Two Hundred and Nine only) for the period 2003-04, 2004-05 and 2005-06 (towards CENVAT credit wrongly availed by Unit No.1) as referred to in Para 28 to the Show Cause Notice and the consequential demands with reference to Para 28(F) of the Notice. Consequently invoking Rule 13 and Rule 3(4) of the CENVAT Credit Rules, 2002 will not apply.

xxxvii. Penal proceedings against Shri C.G. Ramkrishnan, Director & COO are dropped."

2.1 Appellants are having two units designated as Unit 1 (Plot No E-1/2/3, MIDC Taloja) and Unit 2 (Plot No C-2, MIDC Taloja) wherein they are undertaking the manufacture of pre sensitized aluminum litho plates, offset printing chemicals and sensitized/ lacquered films falling under Chapter 84, 37, 38 and 39 of the Central Excise Tariff Act, 1985.

2.2 One of the final products manufactured by the appellants is lacquered polyester films, for which the input is plain polyester film in jumbo rolls. In Unit 1 plain polyester film is pre-treated. Some part of pre-treated film is consumed within Unit-1 and rest sent to Unit-2 for lacquering.

2.3 CENVAT credit of duty paid on the input plain polyester film is taken in Unit-1. While clearing the pre-treated film to Unit 2, Unit 1 instead of reversing the credit availed, paid the duty on after determining the assessable value as purchase cost of polyester film + cost of pre-treatment. Unit 2 took the credit of the duty paid on pre-treated film received by them.

2.4 Unit-2 cleared lacquered polyester films in jumbo rolls for the purpose of slitting to Unit-1, by paying the duty on same. The value of the lacquered polyester film was determined by taking the value of slit lacquered polyester film – cost of slitting. Unit -1 took the credit of duty paid on lacquered polyester film in jumbo rolls received by them.

2.5 Both the units of Appellant had cleared certain goods without accounting them in SAP-ERP system and without payment of duty.

2.6 The details of demand in respect of the units is as follows:

Period		Duty Demand	Reason for Demand
From	To		
Unit 1			
April 03	March 04	5499975	Demand on Finished Goods cleared without accounting
April 04	March 05	10653742	

March 03	November 05	10209319	Intermediate Products Cleared to Unit 2
Total		26363036	
Unit 2			
April 03	March 04	902463	Demand on Finished Goods cleared without accounting
April 04	March 05	18298112	
April 05	November 05	2075124	
April 03	March 06	160404	Intermediate Products cleared to Unit 1
Total		21436103	

2.7 Appellants paid the entire amount of duty demanded along with interest.

2.8 The proceedings have been initiated against the appellant by way of issuance of Show Cause Notice dated 26.02.2008 for

- confirmation of the demand of duty short paid by invoking proviso to Section 11A(1) of the Central Excise Act, 1944,
- demand interest on the duty short paid under Section 11AB of the Central Excise Act, 1944,
- Impose penalty under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944.
- Impose penalty under rule 13 of the CENVAT Credit Rules, 2002.

2.9 The show cause notice was adjudicated by the Commissioner as per the order referred in para 1, supra.

2.10 Aggrieved by imposition of penalty appellants are in appeal before us.

3.1 We have heard Shri Rajesh Ostwal Advocate on the behalf of Appellant and Shri Ajay Kumar additional Commissioner (Authorized Representative0 on behalf of revenue.

3.2 Arguing on behalf of appellants learned advocate submitted-

i. In case of transactions between Unit 1 and Unit 2, the issue was totally revenue neutral as to what so ever was the duty paid in one unit was available as CENVAT credit to the other unit. In case of SRF Ltd [2007 (220) ELT 201 (T)], it has been held by the tribunal that when the transactions are revenue neutral, the demand of duty, interest and penalty is not maintainable. Thus no penalty should be imposed on them under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central excise Act,1944.

ii. There was no malafide intention on the their part to evade the payment of duty and the short payment occurred duty to system glitch in SAP-ERP system of the company. The short payment thus occurred due to reason beyond their control. However when they identified the short payment they came forward and made goods the duty short paid by themselves even before the issue of show cause notice.

iii. The goods in respect of which duty has not been paid were duly accounted by them in their production records and were cleared from their premises only after making the invoices as required under Rule 11 of Central Excise Rules, 2002.

iv. Section 11AC is not applicable in their case as they have paid the entire duty along with interest even prior to issuance of show cause notice. Section 11AC comes into picture only when there is determination of duty by the proper officer under Section 11A(2) of Central excise Act, 1944. Since the duty was paid prior to issuance of show cause notice there cannot be any determination under Section 11A(2) hence section 11AC cannot be invoked for imposition of penalty

v. They rely on decisions of Tribunal in following cases:

   a. Jhagadia Coper Ltd [2009 (248) ELT 373 (T)]

   b. Wearwell tyre & Tubes Industries Pvt Ltd [2004 (165) ELT 409 (T)]

3.3 Arguing for the revenue learned Authorized Representative justified the order of adjudicating authority and submitted that in case of short payment of duty on account of various reasons justifying invocation of extended period of limitation as per proviso to Section 11A(1), penalty under Section 11Ac is mandatory. He relied on the decision of Apex Court in case o Prudential Spinners Ltd [2011 (267) ELT 291 (SC)], Delhi High Court in case of Shiva Alloys Pvt Ltd [2018 TIOL 988 HC DEL CX] in his support.

4.1 We have considered the submissions made in appeal and during the course of argument by both the sides-

4.2 There appears to be no dispute that Appellants have not paid the duty demanded at the relevant time and hence short paid the duty to that extent. In case of non/ short payment of duty, Section 11A of the Central Excise Act, 1944 automatically comes into picture and demand is made in terms of that section, to recover the duty so short paid. In case the duty is paid after the relevant date the same gets adjusted by application of the section.

4.3 In the present case the period of demand is from April 2003 to November 2005 (Unit-1) and April 2003 to March 2006 (Unit-2). The argument about system glitch in SAP-ERP system of the Appellants for such a long period do not appear to be justified. The appellants were issuing the invoices and collecting the duty from their customers but not depositing the same with the revenue by the due date. This itself shows the malafide intention of the appellants. Further it should also be taken note of that against the duty shown on the invoice, the buyers of appellant were entitled to CENVAT credit. In this manner Appellants were passing on the CENVAT credit to their buyers without actually depositing the duty.

4.4 The argument of the Appellants to the effect that they had paid the duty prior to issuance of Show Cause Notice do not hold goods in view of the decision of Bombay High Court in case of Shri Ram Aluminium Pvt Ltd [2009 (242) ELT 202 (BOM)], Hon'ble High Court held as follows:

"3. The Respondents aggrieved preferred an Appeal before the CESTAT. The learned Tribunal [2006 (199) E.L.T. 331 (Tri. - Mum.)] was of the view that the offence is clearly established as the act of clandestine removal of goods has come to the public gaze and referred to the observations in the case of M/s. Saheli Synthetics Pvt. Ltd. v. C.C. Kandla (Appeal Nos. C/414 to 416/03), dated 19th July, 2005 [2006 (197) E.L.T. 337 (Tri. Mum.)]. The learned Tribunal, however, observed that considering the findings of the larger Bench in the case of Machino Montell (I) Ltd., 2006 (202) E.L.T. 398 (P & H) = 2006 (4) S.T.R. 177 (P & H) which had held that if the duty is payable by the assessee before issuance of show cause notice no penalty can be impugned under Section 11AC and no interest can be demanded under Section 11AB and accordingly set aside the order of penalty and interest. They however, upheld the demand of duty and penalty and interest demanded under the Rules. It is this order which is the subject matter of the present appeal.

4. At the hearing of this appeal on behalf of the Revenue learned Counsel has drawn our attention to the judgment of the Supreme Court in Union of India v. Dharamendra Textile Processors - 2008 (231) E.L.T. 3 (S.C.). and the judgment in Union of India v. M/s. Rajasthan Spinning & Weaving Mills, 2009 (239) E.L.T. 3 (S.C.) and submitted that the Tribunal has no jurisdiction to impose lesser penalty than the duty adjudicated to be payable. It is further submitted that mere payment of duty before issuance of show cause notice is also of no consequence.

5. At the bar it was mentioned that the issue is of vital importance in large number of matters. Considering that Shri Sreedharan, Advocate of this Court was appointed as Amicus Curiae to assist this Court.

6. The learned Amicus Curiae considering Section 11A and 11AC has submitted that in order to impose penalty two predicates are to be satisfied, firstly the duty has to be determined under sub-section (2) of Section 11A and secondly, that the duty was not paid with an intent to evade payment. It is only on satisfaction of these to predicates can penalty be imposed under Section 11AC. Referring to the judgment in Rajasthan Spinning & Weaving Mills (supra) it is submitted that the judgment can be said to have been passed sub-silentio in so far as the first requirement is concerned and consequently the judgment of the Supreme Court cannot be held to have concluded the issue on there being a need for determination of duty under Section 11A(2).

7. We have heard learned Counsel. In so far as mandatory penalty is concerned, the law stands now concluded in Dharamendra Textile Processors (supra). The law as now settled is that there is no jurisdiction in the authority to impose penalty lesser than the mandatory penalty which has to be co-extensive with the *duty which is payable. The Supreme Court has further held that there is no requirement of existence of mens rea. Mens rea as understood in criminal law is not an essential ingredient for holding a delinquent liable to pay penalty for a tax delinquency which is a Civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.*

8. Having so said we may now consider the first limb of argument as raised by the learned Amicus Curiae. The relevant portion of Section 11A of Central Excise Act, 1944 reads as under :-

"11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason 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, by such person or his agent, the provisions of this sub-section shall have effect, (as if) for the words "six months", the words "five years" were substituted.

Explanation :- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person or whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined."

(3)..........."

9. The controversy requires consideration of Section 11AC also, which reads as under :-

"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 or 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 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 purposes of this section, the duty has reduced or increased, as the case may be, shall be taken into account."

10. The Judgment in Dharamendra Textile Processors (supra) came up for consideration before the Supreme Court in Rajasthan Spinning & Weaving Mills Ltd.

(supra). It is necessary to reproduce paragraphs 2 and 15, which read as under :-

“2. What are the conditions and the circumstances that would attract the imposition of penalty under Section 11AC of the Central Excise Act (“The Act” hereinafter)? In the two cases before us the Tribunal has taken the view that there was no warrant for levy of penalty since the assessees had deposited the balance amount of excise duty (that was short paid at the first instance) even before the show cause notice was issued. On the other hand, on behalf of the Revenue, the appellants in the two appeals, it was contended, relying upon a recent decision of this Court in Union of India v. Dharamendra Textile Processors, 2008 (231) E.L.T. 3 (S.C.) that mere non payment or short payment of duty (without anything else) would inevitably lead to imposition of penalty equal to the amount by which duty was short paid. In our view the reason assigned by the Tribunal to strike down the levy of penalty against the assessees is as misconceived as the interpretation of Dharamendra Textiles is misconstrued by the Revenue. We completely fail to see how payment of the differential duty, whether before or after the show cause notice is issued, can alter the liability for penalty, the conditions for which are clearly spelled out in Section 11 AC of the Act.”

11. Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of duty before the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it *clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub-section 2B will have to application.*

The learned Counsel points out that therefore, the issue that before imposing penalty under Section 11AC there must be an adjudication process was neither raised nor was it decided by the learned Supreme Court and, therefore, it is sub silentio. As to what would constitute sub silentio we would gainfully refer from Solmond on Jurisprudence, Twelfth Edition, by P.J. Fitzgerald, M.A., Indian Economy Reprint, 2002, which reads as follows :-

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favor; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

12. Can it be said that this issue was sub-silentio and not under consideration in Rajasthan Spinning & Weaving Mills. In our opinion it is not possible to accept the said submission considering the last sentence of para.2 of the judgment which we again reproduce and which reads as under :-

"We completely fail to see how payment of the differential duty, whether before or after the show cause notice is issued, can after the liability for penalty, the conditions for which are clearly spelled out in Section 11AC of the Act."

13. It is, therefore, clear that though the Supreme Court has not expressly referred to the argument now advanced by the learned Amicus Curiae, nevertheless the Supreme Court was clear that to impose penalty the conditions in Section 11AC of the Act must be complied with. Under Section 11AC as already set out the requirements are firstly, that there must be intent to evade payment of duty and secondly the duty ought to be as determined under sub-section (2) of Section 11A. It is, therefore, clear that it is only on these two requirements being followed that penalty is imposable. The determination of duty admittedly is under Section 11A. The other limb of argument is that once the duty is paid even before the show cause notice, the question of the A.O. in a case where duty demanded has been paid there will be no determination of liability. In our opinion, the argument is fallacious. Under Section 11A there must be a determination of duty irrespective of as to whether duty demanded is paid before issuance of show cause notice or before order is passed. Any amounts paid as aforesaid are to be adjusted against the final order of adjudication. In other words the monies paid will be adjusted against the duty ascertained and consequently if the full amount has been paid there will be no requirement of further deposit and/or invocation of the provisions for recovery. All that Section 11AC requires is the duty as determined. Once the A.O., passes the order under Section 11A. the duty is determined. The question, therefore, of having paid the amount before issuance of *the show cause notice or after issuing the show cause notice cannot result in holding that there is no requirement of determination. That argument, therefore, must be rejected."*

4.5 Further in case of Prudential Spinner Ltd [2011 (267) ELT 291 (SC)], Hon'ble Apex Court held-

"2. A show cause notice was issued by the appellant herein in which it was stated that the assessee had cleared the finished goods either on less payment of duty or without payment of duty for certain invoices and thus violated the provisions of the Central Excise Rules read with Section 11A of the Central Excise Act. In the show cause notice, it was specifically stated that in view of the aforesaid short payment or non-payment, penalty equal to the duty payable should be paid by the assessee as provided under Section 11AC of the Central Excise Act. The extended period of limitation was also invoked by the department. By referring to proviso to Section 11A of Central Excise Act, a reply to the show cause notice was filed. The Commissioner considered the allegation against the respondent as also the reply submitted by him and on appreciation thereof, came to a finding that the charge of evasion of duty through mis-statement, suppression and fraud was proved justifying the application of extended period of five years as provided in Section 11A of the Central Excise Act, 1944. It was also held that in equal quantity of excisable goods were removed by the assessee without payment of duty. Finally, by exercising the powers under Section 11AC, penalty was also imposed to the extent of equal amount of the duty which is 100% penalty.

3. Being aggrieved by the aforesaid order passed by the Commissioner of Customs and Central Excise, an appeal was filed before the Tribunal. Before the Tribunal, only one issue was raised by the respondent, which was with regard to the quantum of penalty under Section 11AC of the Central Excise Rules. No other issue was raised and, therefore, we are not required to go into any other aspect of the matter except for deciding as to whether or not the quantum of penalty imposed by the Tribunal is justified or not in the facts and circumstances of the present case. In this connection, we may appropriately refer to the decision of the Division Bench of this Court in Union of India v. Rajasthan Spinning and Weaving Mills and Commissioner of Customs and Central Excise v. Lanco Industries Ltd. reported in 2009 (13) SCC 448 = 2009 (238) E.L.T. 3 (S.C.). In the said judgment, scope and ambit of Section 11-AC was considered and decided by this Court.

4. The learned counsel appearing for the appellant relies on the said judgment in order of substantiate his

submission that the Tribunal was not justified in reducing the quantum of penalty to only Rs. 1 lakh in view of the mandatory provisions of Section 11AC of the Central Excise Act. Learned counsel appearing for the respondent, however, submits that there was only a delay of one or two days in making payment of duty with reference to the clearance of goods and that duty was paid even prior to issuance of the show cause notice and, therefore, the Tribunal was justified in reducing the quantum of penalty to Rs. 1 lakh. We have taken notice of the aforesaid submission also. However, reference is made to the decision of Rajasthan Spinning and Weaving Mills (Supra). We find in the said case also, a similar submission was made contending, inter alia, that there was no warrant for levy of penalty since the assessee had deposited balance amount of excise duty that was short paid at the first instance and that too even before the show cause notice was issued. Tribunal upheld the said contention in the said case which was set aside by this Court in the decision of Rajasthan Spinning and Weaving Mills (Supra). Since the submission here is of identical nature, the aforesaid submission is only to be rejected in view of the findings recorded by this Court that once the section is held to be applicable in a case, the authority concerned 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. On consideration of the factual position, we also hold that, in the present case, the Tribunal was not justified in reducing the quantum of penalty as penalty under the provision of the Act must be imposed equal to the duty determined under sub-section (2) of Section 11A. We also make it clear that in the present case applicability of any other provision except for substantive provision of sub-section (2) of Section 11A and substantive provision of Section 11AC was pleaded. Nor any effort was made to substantiate or prove a case of applicability of any of the provisos therein and not even such a case was pleaded."

4.6 In view of the above decisions of Apex Court and jurisdictional High Court we do not find merits in the submissions of the appellants.

4.7 Appellant have in their appeal at Sl No 9 and submissions in para 5.3 stated that they have paid 25% of the penalty amount. In terms of Section 11AC as it existed during the relevant period read as follows:

*"**Section 11AC as amended by the Finance Act, 2000 with effect from 12th May, 2000.***

Section 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 intention 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 purposes 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.

(2) 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.""

4.8 Since in the present case the order is dated 18.08. 2010 and has been received by the Appellants on 27.08.2010 and appellants have deposited the 25% of penalty before filing of the appeal on 18.08.2010. Adjudicating authority should have extended the benefit of payment of penalty of 25% of duty demanded in his order as per the first proviso to section 11AC. Since the appellant has made payments as per the proviso to the section 11AC the benefit of proviso should have been allowed to them. Thus we modify the order of Commissioner to the extent of extending the benefit of proviso to section 11AC.

5.1 Thus appeal of the appellant is partially allowed by extending the benefit proviso to Section 11AC of Central Excise Act, 1944 to them.

(Pronounced in court)

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

(Sanjiv Srivastava)
Member (Technical)

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