

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

APPEAL No. ST/87367/2015

(Arising out of Order-in-Appeal No. SR/42/ST-I/2015 dated 14.8.2015 passed by Commissioner of Service Tax (Appeals), Mumbai-I)

State Bank of India

Appellant

Vs.

Commissioner of Service Tax-I, Mumbai

Respondent

Appearance:

Shri B. Rajchandani, Advocate, for appellant

Shri Dilip Shinde, Assistant (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 07.01.2019

Date of Decision: 30.01.2019

ORDER No. A/85250/2019

Per: Sanjiv Srivastava

The appeal is directed against the Order in Appeal No SR/42/ST-1/2015 dated 14.08.2015 passed by the Commissioner of Service Tax (Appeal) Mumbai -1. By the said order Commissioner has held as follows:

- i. I set aside the penalty imposed in respect of Show Cause Notice SCN No V/(9)70/BFN/SCN/ST/BLS/2010 dated 16.08.2010 listed at S No 15 of the table annexed to the impugned order.*

- ii. *I set aside the demand confirmed and penalty imposed at S No 40 of the said table in respect of C No V(BFN)4/133/ST/Adju/ST2-101771 dated 19.04.2010 as the same is already covered against S No 36 of the aforesaid table.*
- iii. *I uphold the impugned order in respect of all other show cause notices”*

2.1 Appellants are nationalized bank having branches across the country. Earlier they were having Service Tax registration branch wise and were discharging the service tax liability branch wise. The returns were also filed branch wise.

2.2 During course of Audit of their branches in Hyderabad it was observed that branches were wrongly computing the service tax payable and thereby short paying the service tax. Similar discrepancies were observed in other branches during audit conducted by Bhubaneswar I Commissionerate. On the basis of audit undertaken Show Cause Notices were issued to each branch, demanding the service tax short paid by invoking the proviso to Section 73 (1) of Finance Act, 1994. Along with demand interest and penalty under section 76, 77 & 78 were also proposed. These SCN's covered period from 1st April 2004 to 31st March 2010.

2.3 Subsequently Appellants obtained centralized registration in Mumbai and accordingly 171 of said

show cause notices have been taken up for adjudication by the jurisdictional authorities in Mumbai.

2.4 After considering the submissions made by the appellant Deputy Commissioner Division II Service Tax –1 Mumbai, upheld the demands made by the show cause notice along with interest a under Section 75. He also imposed penalty under Section 76, 77 & 78 as proposed in the show cause notice. In his order adjudicating authority held as follows:

“ORDER

1. *I confirm the demand raised against all the above mentioned SCNs totally amounting to Rs.91,38,569/- (Rupees Ninety-One Lakh Thirty Eight Thousand Five Hundred Only) for services rendered under the category of Banking and other financial services for the period from April 2005 to March 2020 under the proviso to Section 73 of the Finance Act, 1944 and appropriate the amounts paid by the notice.*

2. *I order the payment of interest at the appropriate rate under provisions of Section 75 of Finance Act, 1994 for the delay in payment of service tax and appropriate the amounts against relevant SCNs whereby interest is paid by the notice.*

3. *I impose penalty of Rs.100/- for everyday during which failure to pay service tax and interest on that tax in accordance with the provision of Section 75 of the Finance Act, 1994 continues, under Section 76 of the Finance Act, 1994 till 17.04.2006. The penalty shall not be less than Rs.200/- for everyday during which such failure continues or at the rate of 2% of such tax per month, whichever is higher starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax w.e.f. 18.04.2006 under the Section 76 of the Finance Act, 1994. However the*

said penalty under Section 76 shall not exceed the amount of Service Tax as confirmed above.

4. I impose penalty of Rs.5000/- on the notice under Section 77 of the Finance Act, 1994, against each of those SCNs where the same has been invoked.

5. I impose penalty on the notice equivalent to the amounts confirmed against each SCN mentioned above wherein penalty under Section 78 of the Finance Act, 1994 has been invoked for deliberately suppressing the value of taxable service with an intent to evade payment of service tax. However if the assessee discharges the remaining interest and 25% of the penalty imposed in these cases within 30 days of the receipt of this order then, their liability will stand discharged thereunder. Consequently, I refrain from imposing penalty under Section 76 of the Finance Act, 1994 on the notice against these SCNs where penalties under Section 76 & 77 have been imposed.”

2.5 Against the order of adjudicating authority appellants filed appeal before Commissioner (Appeal) who decided the matter as per the order referred in para 1, supra.

2.6 Aggrieved by imposition of penalty appellants are in appeal before us. They have deposited the entire amount of Service Tax demanded i.e. Rs 91,22,577/- along with interest of Rs 3.17,799/-

3.1 We have heard Shri Bharat Raichandani Advocate on the behalf of Appellant and Shri Dilip Shinde Assistant Commissioner (Authorized Representative) on behalf of revenue.

3.2 Arguing on behalf of appellants learned advocate submitted-

- i. There was no malafide intention on the their part to evade the payment of duty and the short payment occurred duty to erroneous practices being followed at the branch level. The short payment thus occurred due to reason beyond their control. However when they identified the short payment they came forward and paid the Service Tax short paid, even when certain demand would have been time barred.
- ii. Section 78 is not applicable in their case as they had no malafide intention to evade tax, further in case the total demand of service tax was nothing in comparison to the tax actually paid by them.
- iii. Though various other ground have been taken in the appeal memo, appellants did not pressed the same except that they had no malafide intention to evade payment of tax hence penalty imposed on them is not justifiable.

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 73(1), penalty under Section 78 is

mandatory. He relied on the decision of Apex Court in case of 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. He also submitted that that adjudicating authority has in para 16 of his order has discussed with regards to invocation of extended period.

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 73(1) of the Finance Act, 1994 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 para 16, of the order in original adjudicating authority has held as follows:

“16. In many cases they have only paid the service tax involved and not paid interest. In certain cases they have submitted that they paid interest along with service tax dues. It is a fact that it was binding on assessee being a public sector undertaking/Govt. body to assess the correct taxable value and discharge the service tax on due dates prescribed

and file a return in time to the concerned authority. In all 171 cases assessee failed to arrive at proper taxable value (assessable value) by applying faulty method of calculation of taxable value thereby suppressing the cum-value of taxable services to the extent of provision made towards payment of service tax. This has resulted in short payment of service tax as demanded in these SCNs totally to the tune of Rs.91,38,569/-. The assessee paid the service tax involved only after issuance of Show Cause cum Demand Notices. In certain cases they have also paid the interest. This short payment would have gone unnoticed if it were not for the department who pointed out the same. The details of taxable values representing Branch income was forwarded to the branches by Belapur branch, which was not a registered premises and therefore the local service tax official in-charge of branches would be unable to detect this from the scrutiny of the ST-3 returns. M/s. SBI had willfully mis-stated the value of taxable services in the statutory ST-3 returns, because it is on record that the first SCN issued to the branches were somewhere in April 2010 and last the last one sometime in September 2010. Which indicates that in April 2010 the bank was aware of the fact that they were short paying service tax & chose to ignore the same, which leads to the conclusion that they were under the presumption that payments would be made only as and when a branch receives SCN which clearly indicates that they, instead of coming clean and disclosing all facts to the department instead suppressed the same with clear intent to evade payment of service tax. Therefore the judgments relied upon by them do not come to their aid and therefore they are liable to consequential penalties. The proviso to Sub Section 1 of Section 73 of the Act invoked in all Show Cause cum Demand Notices for extended period of five years is properly invoked by concerned authorities in all these SCNs."

4.4 Commissioner (Appeal) has in his order para 10 to 12 held as follows in respect of invocation of extended period.

“10. The appellant has contended that no allegation has been made against the appellant to attract proviso to Section 73(1) in 162 show cause notices. Copy of a Show Cause Notice C.No.V(BFS)4/150/100/ST/ADJN/STC/2010/1810-11 dated 20.4.2010 was submitted as an example in support of their contention. I find that the said show cause notice specifically states that the records of the appellant were scrutinized pursuant to the intelligence received and it was found that the appellant was deflating the taxable value by debiting the service tax paid towards the tax liability of the previous month from the assessable value of services provided in the current month before computing the tax liability of the current month. Thus charge of deflating the assessable value through the above modus operandi has been made explicitly in the show cause notice and penalty under Section 78 for suppressing the value have been proposed in the show cause notice. I further find from the para B3 of their grounds of appeal that the appellant have themselves admitted that 114 SCNs make allegation about suppression/misstatement. This is contrary to their averment that 162 SCNs out of 171 SCNs make no such allegation. I find that adjudicating authority has elaborately tabulated the amount involved, period covered and the penal provisions invoked in the individual show cause notices in the table annexed to impugned order and penal provisions under Section 78 were invoked in all the show cause notices except in the case of show cause No. V(9)70/BFN/SCN/ST/BLS/2010 dated 16.8.2010 listed at S.No.15 and show cause No. V(BFS)4/133/ST/Adju/STC/20101771 dated 19.04.2010 listed at S.No.40 of the table. The appellant has also contended that in 46 SCNs, no penalty was proposed under Section 76. I find that in all these SCNs, penalty was proposed under Section 78, except in SCN dated 16.8.2010

listed at S.No.15 of the table annexed to impugned order where penal provisions were not at all invoked under any section. I find the adjudicating authority has imposed the penalty under Section 78, only in respect of those SCNs where the provisions of the said section were invoked in the show cause notice and has refrained from imposition of penalty under Section 76 in the cases where penalty under Section 78 was imposed. Thus, I do not find any basis to entertain the appellant's argument except in respect of SCN dated 16.8.2010 referred above.

11. The appellant has also contended that they had no malafide intention in wrongly determining the assessable value. It has also been submitted that the mistake was committed by their employees who were not to gain anything by committing such a mistake. In this regard it is observed that the details of taxable value representing Branch income was regularly forwarded to the branches by Data Centre of SBI located at Belapur and the service tax was paid by the branches on this income till March 2009. This practice continued till March 2009 as indicated in para 5 of the impugned order. From April 2009 onwards, when the facts came to the light, branches were directed to add the amount of service tax payable by the branch for the last month and paid by the fifth of next month. The appellant has contended that even prior to April 2009, the branches were required to pay service tax on the total commission received as per their internal instructions issued to the branches and therefore, the mistake committed was non-intentional. I find that the commission statement was being prepared by their Data Centre at Belapur and forwarded to the branches indicating the amount of commission on which service tax was required to be paid. It was only in 2009 that the branches were first time instructed to add the amount of service tax paid for the previous month to the figure supplied by data centre. The appellant has argued that earlier also the branches were required to make adjustment in the figures of commission

supplied by the data centre for the following on which the service tax was being paid separately.

- a. commission received on Government business,*
- b. exchange income from FD Kolkata*
- c. commission received – Cross selling – MF/Insurance.*

It is clear that the appellant had instructed their branches to make deduction towards above commissions from the figure of total commission amount supplied by the data centre for determining the amount of service tax payable. The appellant had never instructed the branches prior to April 2009, to make addition of any amount to the figure of commission supplied by the data centre. The amount of commission shown in ST-3 returns was clearly less than the amount of commission actually received during the relevant period and to that extent, the value of service was misdeclared. The ST-3 return in its part K requires the appellant to make following declaration:

“Self Assessment Memorandum

(a) I/We declare that the above particulars are in accordance with the records and books maintained by me/us and are correctly stated.

(b) I/We have assessed and paid the Service Tax and/or availed and distributed CENVAT credit correctly as per the provisions of the Finance Act, 1994 and the Rules made thereunder.

xxxx

xxxx”

The appellant have debited service tax liability of the preceding month from the amount of commission received which resulted in lowering the taxable value to the extent of service tax paid. The appellant signed the declaration (a) above stating that the particulars declared were in accordance with the records and books maintained by them though the value of commission declared by them in the return was lower than the value of commission received in their books of account. It is therefore clear that the appellant had misdeclared the facts and had suppressed the correct value of

taxable service. As such, invoking the penal provision of Section 78 are fully justified.

12. Appellant have also contended that extended period cannot be invoked when records were not audited by the Department every year. I do not find any such statutory provision which requires the Department to conduct annual audit. Honourable Tribunal in case of Star India Pvt. Ltd. 2015(38)STR 884 (Tri-Mumbai) has held that invocation of extended period is justified when an assessee operating under self-assessment procedure failed to declare complete particulars of the service rendered. Ratio of this judgment is squarely applicable here.”

4.4 The argument of the Appellants to the effect that they had paid the service tax 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 two 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 assessee 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 assessee 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.

5.1 Thus appeal of the appellant is dismissed.

(Pronounced in court on 30.01.2019)

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

(Sanjiv Srivastava)
Member (Technical)