**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI**
**REGIONAL BENCH**

**Excise Appeal No. 85414 of 2013**

(Arising out of Order-in-Original No. Belapur/45/Taloja/R-III/Commr/KA/12-13 dated 30.10.2012 passed by the Commissioner of Central Excise, Belapur)

**M/s. Hindalco Industries Ltd.** **Appellant**
Plot No.2, MIDC, Taloja,
Tal-Panvel, Dist. Raigad

Vs.

**Commissioner of CGST & CE, Belapur** **Respondent**
1st Floor, CGO Complex, CBD Belapur,
Navi Mumbai 400 614.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri Deepak Bhilegaonkar, Additional Commissioner, Authorised Representative for the Respondent

**CORAM:**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**
**HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

Date of Hearing: 24.02.2023
Date of Decision: 24.02.2023

**FINAL ORDER NO. 85463/2023**

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original No. Belapur/45/Taloja/R-III/Commr/KA/12-13 dated 30.10.2012 passed by the Commissioner of Central Excise, Belapur. By the impugned order, Commissioner has held as follows:-

*"ORDER*

*1. I confirm the demand of wrongly availed credit of Rs.3,13,57,481/- (Rupees Three Crore Thirteen lakhs Fifty Seven Thousand Four Hundred Eighty One only) under Section 11A(1)/11A(1)(a) of the Central Excise Act, 1944. I appropriate the amount of Rs. 3,13,57,481/- paid by them vide debit in RG23A Part-II Entry No. 5672-5676 and GAR7 challan No. 50022 both dated 21.03.2011.*

*2. I hold that assessee is liable to pay interest of Rs. 1,26,11,353/- under Section 11AB Rule read with Rule 14 of Cenvat Credit Rules 2004 and appropriate the interest of Rs 1,26,11,353/- already paid by them.*

*3. I impose penalty of Rs. 3,13,57,481/- under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the CEA, 1944. However, the penalty is reduced to 25% of the above amount as the assesee has already paid the duty along with interest as per Section 11AC(3) applicable during the relevant period."*

2.1 Appellant is engaged in manufacture of aluminium products falling under Chapter 76 of the First Schedule to the Central Excise Tariff Act, 1985. Appellant had imported capital goods under the EPCG scheme and DEPB scheme. While taking Cenvat credit of additional duty on capital goods imported under DEPB scheme, appellant also took the credit of additional duty paid on capital goods under EPCG scheme against nine Bills of Entry. During the course of CERA audit it was observed that the appellant had availed the benefit of Notification No. 97/2004 dated 17.09.2004 and Notification No. 64/2008 dated 09.05.2008 thereby the capital goods imported under EPCG scheme had not suffered any additional duty under Section 3 of the Customs Tariff Act. Therefore the credit which was availed was not due to them. On being pointed out by CERA, appellant immediately paid the amount of the credit so wrongly availed, by making debit in their Cenvat credit account as well as by cash vide GAR-7 challan. Appellant also vide their letter dated 21.03.2011 informed the department of their mistake and the payment made. A show cause notice dated 130.10.2011 was issued to the appellant asking them to show cause as to why:-

*"(a) the inadmissible cenvat credit availed by them, on capital goods during the period April 2007 to April 2009 as shown in Annexure 'A' to this show came notice should not be demanded and recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with the proviso to Section 11A (1) of the Central Excise Act, 1944 (Now Section 11A1a of Central Excise Act, 1944 as amended by Finance Act, 2011).*

*(b) Interest on the above amount should not be recovered from them under Section 11AB of Central Excise Act, 1944 (now Section 11AA of the Central Excise Act, 1944 as amended by Finance Act, 2011).*

*(c) The amount of Rs. 3.13.57,481/- (Three Crore Thirteen lac Fifty Seven Thousand Four Hundred Eighty One only) and interest amounting to Rs. 1,26,11.353/- (One Crore Twenty Six lac Eleven Thousand Three Hundred Fifty Three Only) paid by M/s HII. (as detailed at para 8 above) should not be appropriated towards the duty and interest liability as above*

*(e) Penalty should not be imposed upon them under Rule 15 (2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944."*

2.2 This show cause notice has been adjudicated by the Commissioner by the impugned order. Aggrieved appellant has preferred this appeal.

3.1 We have heard Shri Rajesh Ostwal, Advocate for the appellant and Shri Deepak Bhilegaonkar, Additional Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- Appellant has admitted the mistake committed by them and has also made the same good by way of paying the amount of credit wrongly availed along with interest.
- They have not suppressed the fact nor misstated anything with intent to evade payment of duty. Accordingly penalty should not have been imposed on the appellant as has been held in following decisions:-
  - Cosmic Dye Chemical [1995 (75) ELT 721 (SC)]
  - Pushpam Pharmaceuticals Co. [1995 (78) ELT 401 (SC)]
  - Chemphar Drugs and Liniments [1989 (40) ELT 276 (SC)]
  - Lalit Ashok [2022 (66) GSTL 314 (Kar.)]

- Aswin Textiles Pvt. Ltd. [2015 (7) TMI 496 – CESTAT maintained as reported at [2021 (2) TMI 490 – MADRAS HIGH COURT.

➢ As the mistake was a genuine mistake, penalty should not have been imposed in view of the decisions as follows:-
  - Paharpur Colling Towers Ltd. [2007 (215) ELT 425 (T)] affirmed by Hon'ble High Court at [2015 (324) ELT A84 (All.)]
  - Gaurav Agro Plast Ltd. [2009 (236) ELT 31 (Guj.)]
  - Indian Aluminium Co. Ltd. [2010 (259) ELT 12 (SC)]
  - Vickers System International Ltd. [2008 (221) ELT 445 (T)]

➢ The entire disputed credit along with interest has been paid prior to issuance of show cause notice. Therefore penalty under Section 11AC should not have been imposed as has been held in following decisions:-
  - Gaurav Mercantile Ltd. [2005 (190) ELT 11 (Bom.)]
  - Rashtriya Ispa Nigam Ltd. [2003 (161) ELT 285 (T)] maintained by Hon'ble Apex Court reported at [2004 (163) ELT A53 (SC)].

3.3 Learned AR reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner has in the impugned order recorded as follows for imposing penalty upon the appellant:-

*"26. I have gone through the facts of the case, submissions made by the assessee in their written reply and at the time of their personal hearing.*

*The brief facts of the case are that the assessee has imported capital goods under EPCG scheme against 9 bills of entry and availed credit of additional duty leviable under section 3 of the Customs Tariff Act 1975, during the period April 2007 to April 2009. During the course of CERA Audit, it was noticed that, all the imports were made under EPCG scheme and the assessee* *has availed the benefit of Customs notification No. 97/2004 dated 17.9.2004 (upto April 2008) and Notification No. 64/2008 dated 9.5.2008 (after April 2008). Thus, in respect of the said 9 bills of entry, the assessee has not paid additional duty, however, they availed credit of additional duty on these capital goods imported under EPCG scheme. Hence, the credit of Additional duty was wrongly availed by the assessee. The assessee has also not disputed the wrong availment of credit. The assessee agreed that they have availed the credit of additional duty by mistake. They contended that they also imported capital goods under DEPB scheme and in respect of such capital goods they have been availing additional duty paid. Accordingly, they have mechanically availed the credit of additional duty on capital goods imported under the EPCG scheme also. Admitting their mistake they have paid the wrongly availed credit total amounting to Rs. 3,13,57,481/- alongwith interest. Thus, I find that the assesse is not disputing the wrong availment of cenvat credit. Hence, the only issue to be decided here is whether the assessee is liable for penalty under Section 11AC read with Rule 15(2) of CCR 2004 or not.*

*27. In their written submission, the assessee stated that they have no malafide intention to evade payment of duty. The credit was taken without any intention of availment of wrong credit. As the ingredients of provisions of Section 11AC are not available in this case, they argued that penalty u/s 11AC is not imposable. In support of their contention they have cited various decisions of Hon'ble Supreme Court and Tribunal. Some of the case laws cited by them and the gist of the case laws are given below:*

*1. Pahwa Chemicals Pvt. Ltd. vs. CCE-2005(189)ELT 257(SC) Mere failure to declare does not amount to misdeclaration or willful suppression - some positive act on part of party to establish either willful misdeclaration or willful suppression is must- When all facts are within knowledge of Department and a party in the belief that affixing of a label makes no difference does not make a declaration, then there would be no willful misdeclaration or willful suppression - Section 11AC(1) of Central Excise Act, 1944.*

*2. Continental foundation Jt. Venture vs. CCE -2007(216) ELT 177(SC) "suppression" used in proviso to Section11 A of Central Excise Act, 1944 to be construed strictly - Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty- Suppression means failure to disclose full information with intent to evade payment of duty - An incorrect statement cannot be equated with a willful mis-statement - There cannot be suppression or mis-statement of fact, which is not willful and yet constitute a permissible ground for purpose of proviso to Section 11A ibid - Mis-statement of fact must be willful.*

*3. Cosmic Dye Chemical vs. Collector of CE-1995(75)ELT 721 (SC) Intent to evade duty must be proved for invoking proviso to Section 11A(1) of Central Excises & Salt Act, 1944 for extended period of limitation Intent to evade duty built into the expressions "fraud" and 'collusion" but "mis- statement" and "suppression" being qualified by immediately preceding words "willful" and "contravention of any of the provisions of this Act or rules being qualified by the immediately following words "with intent to evade payment of duty".*

*From the gist of the case laws cited above, it is observed that penalty under Section 11AC is not imposable when the ingredients of willful suppression of fact, mis-statement, collusion etc. are not present. In this case, I find that, the credit was availed during the period April 2007 to April 2009, the assessee not disclosed the irregular availment of credit on their own. It came to light has not d only at the time of Audit conducted by CERA. But for the Audit of CERA, the irregularity of availment of credit could have gone unnoticed. Even though the assessee claimed that there is no willful suppression of facts or intention to avail wrong credit on their part, the facts remains that the assessee has availed irregular credit and has not disclosed the same to the department.*

*28. Rule 15(2) of Cenvat Credit Rule provides for imposition of penalty on wrong availment of credit. For sake of reference the said rule is reproduced below:*

*"In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilized wrongly by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made there under with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of Section 11AC of the Excise Act."*

*From the Rule cited above, it can be seen that penalty is imposable for wrong availment of credit on the ground of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Excise Act, with intention to evade payment of duty. In this case, the assessee has availed wrong credit and not disclosed the same to the department. This clearly establishes the fact that they have contravened the provisions of Rule 9 read with Rule 3 of Cenvat Credit Rules and Rule 12 of the Central Excise Rules. Accordingly, Rule 15(2) read with Section 11AC has been rightly invoked in this case. Hence I hold that the assessee is liable for penalty under Rule 15(2) of Cenvat Credit Rules read with Section 11AC of Central Excise Act 1944. However, as the assessee has already paid the wrongly availed credit along with interest, the penalty imposable under Section 11AC read with Rule 15(2) of CCR, 2004 is restricted to 25% of the wrongly availed credit. Section11AC(3) applicable during the relevant period is reproduced below:*

**where any duty as determined under sub-section 11A and the interest payable thereon under Section 11AA in respect of transactions referred to n clause (b) is paid within thirty days of the date of communication of order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five percent of the duty so determined."*

*I find that the assessee has already reversed the credit along with interest. Hence, in view of the provisions of Section 11AC (3) cited above, they are eligible for the reduced penalty of 25% of the demand confirmed."*

4.3 From the facts of the case it is evident that the appellant does not dispute the demand of wrongly availed credit of Rs.3,13,57,481/- along with interest. They are only disputing the penalty imposed on them under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Central Excise Act.

4.4 From the entire findings recorded in the impugned order, we do not find any reason by which it could have been concluded that the case of willful suppression/misstatement, collusion etc. has been made out against the appellant. The mistake committed by the appellant could have been an inadvertent mistake. In the case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] Hon'ble Supreme Court has clearly stated that without proving the existence of such ingredients, penalty under Section 11AC should not have been imposed. Relevant paras of the said judgment are reproduced below:-

*"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."*

4.5 In the present case the appellant has, on being pointed out, paid the entire amount of the credit wrongly taken along with interest much prior to the issuance of show cause notice. On being informed, the issue should have been settled under Section 11A(2B) of the Central Excise Act. We rely upon the decision in the case of Gaurav Mercantiles Ltd. [2005 (190) ELT 11 (Bom.)] wherein it has been held as follows:-

*"**4.** Factual matrix reveals that the show cause notice was issued on 19-4-2002 whereas entire amount of duty and penalty was paid on 31-1-2001 and 1-9-2001. It is thus clear that the entire duty liability was paid prior to the issuance of show cause notice.*

***5.** Learned Counsel appearing for the respondent-assessee tried to support the order of the Tribunal on the basis of two judgments; one of the Madras High Court in the case of CCE, Madras v. Jkon Engineering (P) Ltd., 2005 (67) RLT 157 (Mad.) and another from the Karnataka High Court in the case of Commissioner of C. Ex., Mangalore v. Shree Krishna Pipe Industries, 2004 (165) E.L.T. 508 (Kar.), wherein both the Courts have taken a view that where duty or penalty imposed has been deposited before issuance of show cause notice under Section 11AC of the Central Excise Act, 1944, no action under Section 11AC of the Central Excise Act should be initiated or taken.*

***6.** It is also brought to our notice that a view similar to above view had also been taken by the Tribunal at Bangalore in the case of Rashtriya Ispat Nigam Ltd. v. Commissioner of Central Excise, Vishakhapatnam, 2003 (161) E.L.T. 285 (Tri. - Bang.). The above view taken by the Tribunal at Bangalore was a subject matter of appeal before the Apex Court. Appeal has been dismissed by the Apex Court [see 2004 (163) E.L.T. A53]. In this view of the matter, it can safely be concluded that the view taken by the Tribunal was accepted by the Apex Court."*

4.6 Following Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] Hon'ble Supreme Court has in the case of India Aluminium Co. Ltd. observed as follows:-

"***4.*** *Having heard the learned counsel appearing for the appellant and on going through the record, we are of the considered opinion that this case does not call for any interference in our hands particularly in view of the ratio of the decisions of this Court in Union of India v. Rajasthan Spinning and Weaving Mills reported in 2009 (238) E.L.T. 3 (S.C.). In paragraph 19 of the said judgment this Court has observed that the 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 for adopting any of the means mentioned in the Section. Since the present is a case of bona fide mistake, therefore in terms of the ratio laid down by this Court in the aforesaid decision, no interference is called for."*

4.7 The order of the Commissioner to the extent of imposition of penalty under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Central Excise Act cannot be upheld.

5.1 Appeal is allowed modifying the order of the Commissioner to the extent indicated in para 4.7 above.

(Order pronounced in the open court)

**(Sanjiv Srivastava)**
**Member (Technical)**

**(Dr. Suvendu Kumar Pati)**
**Member (Judicial)**

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