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**THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 30.09.2011

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**CEAC No. 48/2005**

COMMISSIONER OF CENTRAL EXCISE,  
DELHI - I

..... APPELLANT

Vs

M/S PRABHAT ZARDA FACTORY (I) PVT. LTD.,  
DELHI

..... RESPONDENT

**Advocates who appeared in this case:**

For the Appellant: Mr Satish Kumar, Sr. Standing Counsel

For the Respondent: Mr P. Bashista & Mr R.P. Singh, Advocates

**CORAM :-**

**HON'BLE MR JUSTICE SANJAY KISHAN KAUL**

**HON'BLE MR JUSTICE RAJIV SHAKDHER**

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|----|----------------------------------------------------------------------------|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ?                                       | Yes |
| 3. | Whether the judgment should be reported in the Digest ?                    | Yes |

**RAJIV SHAKDHER, J**

1. The captioned appeal was admitted on 09.05.2006 whereby the following questions of law were formulated for determination by the court:

(i) Whether the amount of penalty leviable under Section 11-AC of the Central Excise Act, 1944 can be reduced even in cases where evasion of duty is established.

(ii) If answer to Question No. (i) is in the affirmative whether the authority reducing the amount of penalty is duty bound to record reasons for such reduction.

2. Briefly, the facts obtaining in the case are as follows: On 22.01.2001 the revenue received intelligence that the respondent was engaged in manufacture and clearance of “Raj Ratan Qiwan” falling under chapter heading No. 2404.40 of the schedule to the Central Excise Tarrif Act, 1985 without requisite registration. Consequently, on visiting the factory of the respondent, such, clandestinely manufactured goods were found, and consequently seized.

3. A notice dated 23.03.2001 was issued calling upon the noticees, which included the respondent, to show cause as to why seized goods ought not to be confiscated, and central excise duty as well as penalty ought not be imposed. After affording an opportunity to the respondent, the Jt. Commissioner of Central Excise passed an adjudication order confirming the demand and ordering confiscation of the goods seized. By virtue of the said order, penalty was imposed, both on the respondent and the directors personally.

4. The respondent, however, preferred an appeal with the Commissioner of Central Excise, Delhi-I [in short Commissioner (Appeals)]. The Commissioner (Appeals) vide order dated 08.08.2003 dismissed the appeal of the respondent.

5. Aggrieved by the order of the Commissioner (Appeals), the respondent preferred an appeal with the Customs Excise and Service Tax Appellate Tribunal (in short the “Tribunal”). By the impugned order dated 31.03.2005, the Tribunal partially allowed the appeal. The Tribunal while confirming the demand held that since the respondent herein, had paid the duty before issuance of the show cause notice, penalty was not leviable. The Tribunal came to this

conclusion based on its own view taken in the case of *CCE, Delhi –III, vs Machino Montell (I) Ltd. 2004 (168) ELT 466*.

6. Before us submissions were made on behalf of revenue by Mr Satish Kumar, Sr. Standing Counsel, while on behalf of respondent arguments were addressed by Mr P. Bashista. Mr. Satish Kumar submitted that the question of law ought to be answered in favour of the revenue in view of the decision of this court taken in the Commissioner of Central Excise vs Kandhari Radio Corporation passed in CEAC No. 6/2007 on 26.09.2011. Mr Satish Kumar submitted that in view of the fact that the Tribunal had confirmed the demand of duty under the provisions of Section 11AC of the Central Excise Act, 1944 there was no discretion available, in directing, as had been done by the Tribunal that, penalty be not levied.

7. On the other hand Mr Bashist appearing on behalf of the respondent submitted that since the respondent had accepted the imposition of duty and voluntarily deposited the duty demanded, no penalty ought to be levied as there was no intention to clear the goods clandestinely, and that clearance of the goods in issue had come about due to the lapse on the part of the employee.

8. Having heard the learned counsel for the parties what does not appear to be in dispute is that the show cause notice was issued on 23.03.2001. It appears that the duty was paid as per the averments made in paragraph 5 of the appeal filed by the revenue on 30.01.2001. The statement of the employee of the respondent, i.e., Sh. K.N. Malhotra was recorded on 22.01.2001, while that of Sh. Deepak Kumar Arya was recorded on 30/31.01.2001. It is also not in

dispute that seizure of the goods took place on 22.01.2001, which is when, statements of the aforementioned employees was recorded.

9. A bare perusal of the dates and events recorded hereinabove would show that duty demanded was paid after the raid but before the issuance of the show cause notice. The counsel for the respondent, before us, did not dispute any of these facts but only contended that since the duty had been paid, the order of the Tribunal ought to be sustained. In our view this course cannot be followed. It is not known on reading the decision rendered by the Tribunal in *Machino Montell* (*Supra*) that these very facts obtained in the said case. It is quite obvious that the respondent paid the duty after the evasion was unraveled. The payment of duty was made after the raid. The payment of duty was no voluntary act of the respondent. We may observe even otherwise this issue is no longer res integra. The Supreme Court in the case of *UOI vs Rajasthan Spinning & Weaving Mills (2009) 13 SCC 448* has held that payment of duty whether made, before or after the issuance of show cause notice is not an aspect which ought to be factored in by an authority seeking to impose penalty under Section 11AC. The court has also gone on to explain its own judgment in the case of *UOI vs Dharmendra Textile Processors 2008 (231) E.L.T. 3(SC)* by holding that once it is noticed that the conditions provided in Section 11AC are fulfilled, no discretion is left in the authority concerned to reduce the duty to an amount less than the duty determined. The relevant observations on the aforesaid aspects are extracted hereinbelow:-

*“.....5. 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 Dharmendra Textile 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 11AC of the Act....*

*....30. At this stage, we need to examine the recent decision of this Court in Dharmendra Textile. 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 Dharmendra Textile and we see no reason to understand or read that decision in that manner....*

*...34. The decision in Dharmendra 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 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. That is what Dharmendra Textile decides. It must, however, be made clear that what is stated above in regard to the decision in Dharmendra Textile is only insofar as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it) with regard to the several other statutory provisions that came up for consideration in that decision...”* (emphasis is ours)

10. The present case is one of evasion of duty. There were no arguments advanced before the Tribunal that the conditions prescribed under Section

11AC were not fulfilled. We had taken a similar view in the case of *Kandhari Radio Corporation* (*supra*) based on judgment of Supreme court in the case of *Dharmendra Textile* (*supra*) and *Sony India Ltd. vs Commissioner of Central Excise, Delhi 2004(167) E.L.T. 385 (SC)*. The judgment of the Supreme Court in *Rajasthan Spinning Mills* (*supra*), as discussed above, has further explained the import of the provision. Given the facts obtaining in the instant case, the contention of the revenue will have to be sustained that penalty equivalent to the duty demanded ought to have been imposed on the respondent.

11. Accordingly, the appeal is allowed and the impugned judgment of the Tribunal on the aspect of penalty is set aside. The necessary consequences of this is that question no. (i) is answered in favour of the revenue. The duty leviable under Section 11AC could not have been reduced by the Tribunal as was sought to be done. Since question no. (i) has been answered in favour of the revenue, question no. (ii) does not arise for consideration. The appeal is accordingly disposed of.

**SANJAY KISHAN KAUL,J**

**RAJIV SHAKDHER, J**

**SEPTEMBER 30, 2011**  
**kk**