

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

% Judgment delivered on: 01.09.2011

+ CEAC No. 20/2006

CIT ..... APPELLANT

Vs

RADHIKA CONTAINERS PVT. LTD. .... RESPONDENT

**Advocates who appeared in this case:**

For the Appellant: Mr Mukesh Anand & Mr Shailesh Tiwari, Advocates  
For the Respondent: None

**CORAM :-**

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

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

**SANJAY KISHAN KAUL, J (ORAL)**

1. At the outset we may note that the respondent in this case has been served through publication, as reflected in the order dated 01.04.2011. Thereafter, the matter was posted for hearing on 18.07.2011. Since the Division Bench did not assemble on the said date, the matter was posted for today, i.e., 01.09.2011. There is no appearance on behalf of the respondent even today, despite the matter being passed over once. In these circumstances, the respondent is proceeded ex-parte.

2. Mr Anand, learned counsel for the revenue, submits that the appeal can be heard on the basis of the material available on record. He further submits that the appeal be admitted and decided as it has been pending for a considerable period of time on a short issue, which is covered by the judgment of the Supreme Court.

3. In view of the above circumstances, the appeal is admitted. The only question of law which is propounded for our consideration by the revenue is as follows:

*(i) Whether the Customs Excise & Service Tax Appellate Tribunal (in short 'CESTAT') erred in law in reducing the penalty imposed to an amount which is less than the duty amount re-quantified by it, ignoring the provisions of Section 11AC of the Central Excise Act, 1944'.*

4. The brief facts of the case in so far as they are necessary to decide the issue at hand are as follows: The Anti-Evasion Branch of the revenue while conducting a cordon and search exercise i.e. 'nakabandi' at Udyog Nagar, Main Rohtak Road, Nangloi intercepted a vehicle which was loaded with empty drums of fibre board. On the driver being questioned, the goods were traced to the premises of the respondent. Importantly the driver did not carry with him documents to cover the goods except a delivery challan bearing no. 38 dated 15.09.1999. The officers of the Anti-Evasion Branch recorded the statement of the driver, and thereafter, conducted a raid at the premises of the respondent. In the raid it was found that

finished goods, as well as the raw-material, were short in comparison to the last recorded balances in RG-1 register. It is in these circumstances that on 08.03.2000 a show cause notice was issued to the respondent.

4.1. After receipt of the reply, the matter was taken up for adjudication by the Additional Commissioner Central Excise (in short 'Addl. Commissioner'). By an order dated 11.01.2001 the Addl. Commissioner confirmed the demand and proceeded to impose, inter alia, penalty on the respondent in the sum of ₹ 6,13,028/- in addition to penalty imposed on the directors personally.

4.2. Being aggrieved the respondent as well as the directors preferred the appeals with the Commissioner of Central Excise (Appeals) (in short the 'Commissioner'). By an order dated 11.11.2003 the Commissioner upheld the order-in-original, i.e., the adjudication order. However, the penalty imposed on the respondent was reduced to ₹ 2 lacs.

4.3. The matter was carried in appeal by the respondent to CESTAT. The CESTAT by the impugned judgment dated 01.09.2006 sustained the view taken by the authorities below with a slight modification in so far as quantification of the duty was concerned. The CESTAT gave benefit to the respondent to the extent that, the value of clearances of goods, on which duty had been demanded, was treated as cum – duty price. Based on adoption of this

principle, the duty was re-calculated, and thus, crystallized at ₹ 5,64,907/-. In respect of duty imposed on the respondent, the CESTAT reduced it to ₹ 2 lacs. It is this part of the order, whereby penalty imposed has been reduced to ₹ 2 lacs, that the revenue has come up in appeal.

5. Mr Anand on behalf of the revenue has relied upon the judgment of the Supreme Court in *UOI vs Dharmendra Textile Processors 2008 (231) E.L.T. 3(SC)* and *Sony India Ltd. vs Commissioner of Central Excise, Delhi 2004(167) E.L.T. 385 (SC)*. In addition reliance was placed on the judgment of the Division Bench of Bombay High Court in the case of *C.C.E & C., Aurangabad vs Godavari Manar Sahakari Sakhar Karkhana Ltd. 2008 (228) E.L.T. 172 (Bom)* as also our order passed in *Commissioner of Central Excise vs M/s Poonam Sparks Pvt. Ltd.* in *CEAC No. 9/2004 dated 12.07.2011*.

6. We have heard the learned counsel for the revenue. In our view the matter is no longer res integra. The view taken by the Supreme Court in at least of the aforementioned judgments' (i.e., Sony India Ltd.) has also been considered, and has found resonance in the Division Bench's judgment of the Bombay High Court in *Godavari Manar Sahakari (supra)*. In that case the Bombay High Court specifically considered a contrary view taken by the Division Bench in so far as the quantification was concerned in the case of *UOI vs Kirloskar Oil Engines Ltd. 2006 (206) E.L.T. 85 (Bom)*. The

relevant observations made in paragraphs 9 & 10 of the Judgment in the case of *Godavari Manar Sahakari (supra)* are extracted hereinbelow:

*“9. The reasons for such a stiff and stringent provision, are not far to guess. As can be seen from the scheme of Sections 11A, 11AA, 11AB and 11AC of the Act. It is evident that Section 11A prescribes procedure for recovery of duties not levied or not paid, or short-levied or short-paid, or erroneously refunded. Sub-Section (1) within itself and within its proviso covers the cases of duty not paid/ short paid in absence of mens rea or with intention. Section 11A(2) prescribes interest on delayed payment of the duty, in cases where, in spite of determination under Section 11A(2), the duty so determined is not paid within three months. Interest on delayed payment of duty, as can be charged under Section 11AB, is chargeable in both the cases, i.e., evasion of duty without, mens rea and wild intention to evade. It can be said that interest chargeable under Section 11AB, is a sort of civil liability imposed upon assessee for retaining the amount to which revenue was entitled, with him and utilizing the same, instead of allowing the same to come into the State coffer. Section 11AC is applicable only to those cases, where there is evasion of duty intentionally, by fraud, collusion or willful misstatement or suppression of facts. It may not be erroneous to say that penalty under Section 11AC is a sort of penal provision and, therefore, the said provision is harsh and stringent. The person, who deliberately evades the duty, is required*

to pay penalty equivalent to the amount of duty determined as evaded by fraud, collusion etc.

10. We, therefore, accept the submission of learned Assistant Solicitor General that under Section 11AC, there is no discretion left with the authority to impose any different quantum of penalty."

7. We are in respectful agreement with the view taken. We had taken a similar view in *Poonam Sparks (supra)* case based on the view of the Supreme Court in *Dharmendra Textile (supra)*.

8. In view of the above, the question is answered in the affirmative and in favour of the revenue. The appeal is allowed. The order of the CESTAT is set aside to the extent it reduced the penalty to less than the amount quantified as the duty evaded by the assessee. With the aforesaid directions the appeal is disposed of.

SANJAY KISHAN KAUL, J.

SEPTEMBER 01, 2011  
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RAJIV SHAKDHER, J.