

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

Date of Decision: 11th August, 2011

+ **W.P.(C) 5786/2011**

SLOTCO STEEL PRODUCTS PVT LTD & ANR Petitioners
Through Mr.Sidharth Luthra, Sr.Advocate with
Ms.Arundhati Katju, Adv.
versus

UNION OF INDIA & ANR Respondents
Through Mr.Himanshu Bajaj, Adv. R-1
Mr.Satish Kumar, Adv. R-2

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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

DIPAK MISRA, CJ

By this writ petition preferred under Article 226 of the Constitution of India, the petitioners have prayed for declaring the second proviso to Rule 4(3) of the Central Excise (Compounding of Offences) Rules, 2005 (for short 'the 2005 Rules') as ultra vires the Central Excise Act, 1944 (for brevity 'the Act') as it runs counter to the provisions of the Act and also as it plays foul of Article 14 of the Constitution of India.

2. We have heard Mr.Sidharth Luthra, learned senior counsel along with Ms.Arundhati Katju, learned counsel for the petitioner, Mr.Himanshu Bajaj and Mr.Satish Kumar, learned counsel for the respondents No.1 and 2 respectively.

3. It is submitted by Mr.Luthra, learned senior counsel that the proviso to the Rule in question runs counter to the language employed in Section 9A(2) of the Act and also travels beyond the rule making power as enshrined under Section 37(2)(id) of the Act. It is his submission that by incorporating such a provision by way of an amendment in the Rules in 2007, the right to appeal of the petitioner under Section 35G of the Act stands frustrated and once a statutory right of appeal is provided in an enactment, the same cannot be defeated by envisaging such conditions, as has been done in the Rule in question. It is also highlighted by him that the concept of compounding has a different connotation under the Code of Criminal Procedure and in a criminal case an accused at best can be convicted and burdened with fine but for the purpose of compounding, the rule making authority has imposed such conditions which are really rigorous and, therefore, it frustrates the concept of reasonableness, which offends Article 14 of the Constitution of India.

4. Learned counsel for the respondents have submitted that the challenge is absolutely baseless and does not deserve acceptance.

5. To appreciate the submissions put forth by Mr.Luthra, it is apposite to refer to Section 9A of the Act. It reads as follows: -

“9A. Certain offences to be non-cognisable.

- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under section 9 shall be deemed to be non-cognizable within the meaning of that Code.
- (2) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of such compounding amount as may be prescribed.

Provided that nothing contained in this sub-section shall apply to -

- (a) a person who has been allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of sub-section (1) of section 9;
- (b) a person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);
- (c) a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore;

- (d) a person who has been convicted by the court under this Act on or after the 30th day of December, 2005.”

6. Section 37, which confers power on the Central Government to make rules in sub-section (1) clearly postulates the Central Government may make rules to carry into effect the purposes of this Act. Section 37(2)(id) lays the following postulates: -

“37. Power of Central Government to make rules. –

(1) The Central Government may make rules to carry into effect the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may –

(i) to (ic) xxx xxx xxx

(2)(i)(d) provide for the amount to be paid for compounding and the manner of compounding under sub-section (2) of section 9A.”

7. In pursuance of the aforesaid provision, the 2005 Rules have been framed and there has been insertion of the second proviso to Rule 4 in 2007, which is under assail. For the sake of completeness, we shall produce Rule 4 in entirety.

“4. Procedure on receipt of application under rule 3.

(1) On receipt of an application under rule 3, the compounding authority shall call for a report from the reporting authority with reference to the particulars furnished in the application, or any other information, which may be considered relevant for examination of such application.

(2) Such report shall be furnished by the reporting authority within a period of one month or within such extended period as may be allowed by the compounding authority, from the date of receipt of communication from the compounding authority.

(3) The compounding authority, after taking into account the contents of the said application, may, by order, either allow the application indicating the compounding amount in terms of rule 5 and grant him immunity from prosecution in terms of rule 6 or reject such application:

Provided that application shall not be rejected unless an opportunity has been given to the applicant of being heard and the grounds of such rejection are mentioned in such order.

Provided further that application shall not be allowed unless the duty, penalty and interest liable to be paid have been paid for the case for which application has been made.

(4) A copy of every order under sub-rule (3) shall be sent to the applicant.

(5) The applicant shall, within a period of thirty days from the date of receipt of order under sub-rule (3) allowing the compounding of offences, pay the compounding amount, as ordered to be paid by the compounding authority and shall furnish the proof of such payment to the compounding authority.

(6) The compounding amount once paid shall not be refunded except in cases where the court rejects grant of immunity from prosecution.

(7) The applicant cannot claim, as of right, that his offence shall be compounded."

8. First, we shall advert to the contention whether the said proviso runs counter to the statutory provision or supplants it or anyway transgresses the mandate of the provision. Mr.Luthra would submit that Section 9A(2) uses the terms "such compounding amount" but there is no prescription that the compounding amount would include tax, penalty and interest. Learned senior counsel would submit that even Section 37(2)(id) stipulates the amount to be paid but there is no envisagement that it would include tax, penalty and interest and, therefore, the Rule fundamentally travel beyond the statutory provisions.

9. It is worth noting that Section 9A permits compounding of criminal offences under the Act. Rule 31(2)(1)(d) empowers the Central Government to make rules both on the amount to be paid for compounding and the manner in which the compounding can be made under Section 9A(2) of the Act. The compounding amount has not been defined or prescribed in the Act though it is implicit that to compound an offence, payment of the compounding amount has to be made. In terms of

rule making power, the compounding amount has been fixed under the Rules. There cannot be any dispute that the Act postulates rules shall be framed to fix the compounding amount. The contention of the learned senior counsel for the petitioner that the compounding amount will only mean the amounts specified as specified in the table and will not include duty, penalty or interest payable by an assessee should be rejected. Compounding an offence under the Act has an insegregable nexus with the evasion of duty, etc. and consequently tax, penalty and interest is payable thereon. There is no cavil over the factum that duty, penalty and interest are adjudicated. At the time of launching of prosecution the person concerned is well aware of the duty, penalty and interest element. Read in this manner, the compounding amount can mean the amounts specified in the rule as well as duty, penalty and interest relatable to the alleged evasion/offence and payable by the assessee. The legislative intendment that can be gathered from the scheme of the Act supports the said interpretation. Any other interpretation would lead to absurdity with only the compounding amount being paid without any obligation to pay tax, penalty and interest due on account of the evasion/offence. The same would result in the dropping of prosecution on payment of the

compounding amount but the person concerned can continue to avoid payment of tax, penalty and interest due. What the rule seeks to do is to prescribe and fix the compounding amount, which means a prescribed/fixed amount to be paid in addition to the duty, penalty and interest. The rule has rightly fixed and quantified the compounding amount least it is left to the discretion of the authorities. However, the compounding amount would include the duty, penalty and interest also.

10. Secondly, Section 37(2)(1)(d) authorizes and empowers the Central Government to make rules about the manner in which compounding will be undertaken. The term “manner” is very wide. Consequently, the impugned proviso stipulates that unless duty, penalty or interest are paid, a compounding application would not be heard and allowed. The rule prescribes the manner in which the compounding application would be entertained and dealt with. The rule, therefore, is not ultra vires the parent enactment and the rule making power. Therefore, we are disposed to think that the second proviso does not supplant the statutory provision or travel beyond the rule making power, as we are of the considered opinion that Section 9A and 37(2)(id) have to be read in a conjoint manner as that is the basic purpose of the legislature’s intention. Thus, we are not

persuaded by the aforesaid submission of Mr.Luthra.

11. The second plank of submission of Mr.Luthra that the rule itself creates an anomalous situation inasmuch as the offence and the compounding amount which is a part of the table does not include the tax, penalty and interest. For the sake of completeness, we reproduce the table herein: -

Sl.No.	Offence	Compounding amount
1.	Offence specified under section 9(1)(a) of the Act	Rupees fifty thousand for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
2.	Offence specified under section 9(1)(b) of the Act	Upto fifty percent of the amount of duty evasion, subject to minimum of ten percent of duty evasion.
3.	Offence specified under section 9(1)(bb) of the Act	Upto fifty percent of the amount of duty evasion, subject to minimum of ten percent of duty evasion.
4.	Offence specified under section 9(1)(bbb) of the Act	Upto twenty five percent of the amount of duty evasion, subject to minimum of ten percent of duty evasion.
5.	Offence specified under section 9(1)(bbbb) of the Act	Upto fifty percent of the amount of CENVAT Credit wrongly taken or utilized, subject to minimum of ten percent of said amount.
6.	Offence specified under section 9(1)(c) of the Act	Rupees fifty thousand for the first offence and to be

		increased by hundred per cent of this amount for each subsequent offence.
7.	Offence specified under section 9(1)(d) of the Act	Upto twenty five percent of the amount of duty evasion, subject to minimum of ten percent of duty evasion.

12. On a bare perusal of the said table, what has been provided therein is the rate for first offence or the percentage qua in respect of the punishment for certain offences. The said table does not anyway run counter to the concept of tax, penalty and interest. There is no waiver therein. The table is in accord with the rule and the anomalous situation, which has been conceived by Mr.Luthra is not acceptable.

13. Learned senior counsel would further submit that his right to appeal, which is statutory one under Section 35G stands frustrated. It is urged by him that once he has challenged the demand, the tax, penalty and interest in the statutory forum, he has to pay the same for compounding. It is apt to note that the concept of compounding is different under the Code of Criminal Procedure and, therefore, the fixation of the amount is rigorous. In essence, learned senior counsel has endeavoured to bring it under the umbrella of protection of the Article 14

of the Constitution of India. Section 9A makes every offence non-cognizable notwithstanding anything contained in the Code of Criminal Procedure. That apart, in a non-cognizable offence, if a person tries to get the benefit to avoid a criminal prosecution, he has to satisfy the conditions precedent. It is optional. It is not statutorily mandatory that the person should apply for compounding. Whether or not to apply for compounding is the wish of the person concerned. The person can contest the prosecution proceedings on merits. A person, who intends to avoid facing a criminal prosecution, has to fulfill the said condition. It is well nigh impossible to visualize that a person would apply for compounding but state that he would not pay the tax, penalty and the interest due. The cases wherein the conditions are treated to be rigorous lie in a different realm. In this regard, in certain cases where at the first instance of adjudication an amount is fixed as a pre-deposit like SARFAESI Act, the Apex Court in *Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311 had declared the said provision to be illegal. However, where pre-deposits are prescribed as mandatory, the said provisions have been declared to be constitutionally valid. [See: *Governance of A.P. v. Laxmi Devi*, (2008) 4 SCC 720, *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of*

City of Ahmedabad, AIR 1968 SC 623 and Shyam Kishore v. MCD, (1993) 1 SCC 22.]

14. In the case at hand, as we perceive, when there is a compounding for the purpose admitting a tax evasion, the condition stipulated for entertaining the application cannot be regarded as onerous. Section 9A(2) also uses the terminology “in such manner of compounding”. The manner cannot be said to be in the realm of a prescription or procedure alone. Had it been so, the legislature would have used the word “in the mode of payment”. The manner, while prescribing, can lay down certain conditions precedent, it does not whittle down the purpose of compounding.

15. Thus judged, we find the second proviso to Rule 4(3) of the Rules does not become ultra vires. In the result, we do not find any merit in this writ petition and, accordingly, the same stands dismissed without any order as to costs.

CHIEF JUSTICE

AUGUST 11, 2011
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SANJIV KHANNA, J