IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 32 OF 2006

The Commissioner of Central Excise, Mumbai – II	}	**Appellant**
versus		
M/s. Hindustan Petroleum Corporation Ltd.	}	**Respondent**

Mr. M. M. Dwivedi with Mr. Joel Carlos for the appellant.

Mr. M. H. Patil with Ms. Aparna Hirandagi for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.
DATED :- DECEMBER 5, 2016

P.C. :-

1. This appeal was placed for directions in order to ascertain as to whether the substantial questions of law, on which it was admitted and entertained, are covered by any judgment of a higher court. This was necessary to be ascertained because the tribunal followed a larger Bench decision in the case of *Commissioner of Central Excise, Delhi-III vs. Machino Montell (India) Ltd.*[1].

2. It is common ground that this decision of the tribunal was challenged by the Commissioner of Central Excise (Delhi-III) and

---
1 **2004 (62) RLT 709**

an order was passed by the Hon'ble High Court of Punjab and Haryana at Chandigarh. That was to send the matter back to the Commissioner (Appeals) for fresh decision on the issue of penalty.

3. Later on, the Revenue submits that the decision of the Hon'ble Supreme Court of India in the case of *Union of India vs. Dharamendra Textile Processors*[2] concludes the issue and the larger Bench decision of the tribunal cannot be said to be a good law.

4. It is only to ascertain this fact that the matter was placed on board earlier for directions with a full understanding that in the event the parties conclude their arguments in a short time, this court would dispose of the appeal finally.

5. By consent, therefore, we have placed the matter today. Though it is placed under the same caption, the above understanding continues.

6. The Commissioner/Revenue approached this court aggrieved by an order passed on 16th May, 2005 by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (CESTAT).

2 **2008 (231) ELT 3 (SC)**

7. The facts in a nut shell are that respondent M/s. Hindustan Petroleum Corporation Ltd. (HPCL) is holder of Central Excise registration. It is engaged in the manufacture of various petroleum products and which are classified under the First Schedule to the Central Excise Tariff Act, 1985.

8. It is the case of the Revenue that by suppression of facts and willful misstatement, the assessee cleared goods worth crores of rupees. However, there was a short payment of Central Excise duty amounting to Rs.5,17,31,394/-. The clearances were from 1st March, 1994 to 28th February, 1997. After detection of the wrongful acts, the respondent assessee belatedly paid the duty. That was paid from February to June, 1997 by various PLA entries.

9. A show-cause-cum-demand notice was issued, *inter alia*, calling upon the assessee to show cause to the duty demanded with interest and penalty.

10. A reply was filed to the show cause notice, in which, certain contentions were raised. However, after the assessee's version was taken into consideration, an order was passed by the Commissioner of Central Excise, Mumbai – III (order-in-original) on 23rd June, 1998.

11. Aggrieved by the order passed by the Commissioner, the respondent/assessee approached the tribunal.

12. The tribunal concluded that having paid the duty and there being no element of any willful mis-statement or suppression of facts that the interest and penalty were not recoverable. The show cause notice and the adjudication order was quashed.

13. This appeal was admitted on the substantial questions of law and formulated in the order of admission.

14. The learned counsel appearing for the Revenue would submit that the tribunal's findings cannot be sustained in law. It is submitted that the tribunal should not have condoned the lapses on the part of the assessee. The condonation of these lapses would seriously jeopardise the interest of the Revenue. The mandatory interest and penalty could not have been waived given the clear language of the statute. Reliance is placed on the judgment of the Hon'ble Supreme Court of India in the case of *Union of India vs. Dharamendra Textile Processors* (supra).

15. On the other hand, Mr. Patil appearing for the assessee would submit that the provisions of section 11AB and 11AC are not applicable to the cases pertaining to a period prior to their

insertion. In that regard, our attention is invited to the difference in the language of the two provisions. It is submitted that the common thread underlying both, section 11AA enabling recovery of interest on delayed payment and 11AC enabling recovery of penalty for short levy or non-levy of duty etc., is that there should be a finding of fraud, collusion or any willful misstatement or suppression of facts. In the present case, there is a clear finding of fact that each of the acts and deeds of the assessee were known to the Revenue and its officials. It is not as if any clandestine or illegal act deliberately with a view to evade the duty was committed. Once there are no malafides attributed and of the nature referred above, then, the questions of law as framed should not be answered in favour of the Revenue. They can be answered safely in favour of the assessee without disturbing the tribunal's order. Mr. Patil has brought to our notice a clarificatory order passed by a two Judge Bench of the Hon'ble Supreme Court of India in the case of *Union of India vs. Rajasthan Spinning and Weaving Mills*[3].

16. With the assistance of both sides, we have perused the memo of appeal and all the annexures. The Commissioner, in the order-in-original, rendered a finding that the assessee/respondent

3 **2009 (238) ELT 3 (SC)**

before us is a public sector undertaking. It is manufacturing liquefied petroleum gas and other petroleum products. That was sold for domestic as well as industrial user on the basis of the price fixed by the Ministry of Petroleum and Natural Gas, Government of India. The price fixed for industrial users is much higher than the domestic purpose. It is ascertained by the Department that the assessee has effected clearance to industrial purpose at the price fixed for the domestic purpose. This malpractice has been followed by it for a period from 1st March, 1994 to 28th February, 1997. The above act resulted in evasion or short payment of duty to the tune of Rs.5,17,31,612/-, but the duty was paid off. Yet, the penalty should be imposed for the simple reason that the amount of duty was paid after the Department detected the case. This was, thus, not a case of mere omission, but a well organised activity. No leniency can be shown to the asessee when the amount was utilised for a period of three years.

17. It is this finding of fact which was challenged by the assessee before the tribunal. The tribunal found that at the time of clearance from the factory, the assessee was not aware of the end use of the product. It was discovered that 95% of the clearances were meant for domestic customers and that is how

the matter was approached by the assessee. When the matter was pending before the Commissioner, the assessee came forward with a suggestion that they would make payment of differential duty after the actual sale for non-domestic purposes takes place. That is how the differential duty was paid.

18. The contest before the tribunal was, therefore, restricted to the applicability of the provisions then prevailing, namely, section 11AB enabling recovery of interest and section 11AC enabling recovery of penalty. As far as this aspect of recovery of interest and the recovery of penalty is concerned, the argument is that both were leviable.

19. In the case of *Dharamendra Textile Processors* (supra), the Hon'ble Supreme Court of India was concerned with the correctness of a judgment of the Hon'ble Supreme Court of India in the case of *Dilip N. Shroff vs. Joint Commissioner of Income Tax*, Mumbai. The argument was whether section 11AC of the Central Excise 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. The 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 argued on the other hand that section 11AC is identically worded to section 271(1)(c) of the Income Tax Act, 1961 and in a given case, it was open to the assessing officer not to impose any penalty. That is how the arguments proceed and in para 8 of the three Judge Bench judgment section 11AC was reproduced so also Rule 96ZO and ZQ. We are not concerned with the later two rules. The Hon'ble Supreme Court also referred to section 271 and reproduced it. The penalty is mandatory or otherwise was thus the focal point in issue. The Hon'ble Supreme Court of India applied the well settled principles of interpretation and came to the conclusion that the plea that there is an element of discretion in Rules 96ZO and 96ZQ cannot be sustained. *Dilip N. Shroff* (supra) was not correctly decided. That is how wherever there is no discretion or the language of the statute does not permit exercise thereof, then, there is no warrant to read that stipulation into the same. This is the finding and conclusion reached.

20. *Machino Montell* (supra) was a case where the Commissioner approached the High Court of Punjab and Haryana.

An imposition of penalty under section 11AC was, *inter alia* the issue. The penalty order was set aside in appeal holding that the assessee had already deposited the duty fixed before issuance of show cause notice and as such the penalty was not called for. The Revenue filed an appeal, which was dismissed by the tribunal. Thereafter, the High Court of Punjab and Haryana referred to section 11AC and came to the conclusion that the applicability of section 11AC is not excluded at the threshold merely on deposit of an amount after having been caught and before the issuance of show cause notice. However, in para 10 of its order, the said High Court clarified as under:-

> "10. Question will remain whether situation mentioned in Section 11AC exists, which has to be determined irrespective of the deposit of duty due, prior to issuance of notice. Since this question has not been determined by the Commissioner (Appeals) or by the Tribunal, whose decisions are based on the only consideration of deposit, we set aside the order of the Commissioner (Appeals) and the Tribunal and remand the matter back to the Commissioner (Appeals) for a fresh decision on the question of penalty after determining the question whether the non-payment of duty in the present case at the relevant time, which was made up later, was on account 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 as laid down under Section 11AC and as held by the adjudicating authority. The Tribunal will also take a fresh decision on the question of liability to pay interest."

21. We see that a complete answer is now provided by the two Judge Bench judgment in the case of *Rajasthan Spinning and*

Weaving Mills (supra). There, the issue was what are the conditions and circumstances that would attract the imposition of penalty under section 11AC. In the case of *Rajasthan Spinning* (supra), the tribunal had taken a view that there was no warrant for levy of penalty since the assessee had deposited the balance amount even before the show cause notice was issued. However, the Revenue contended that in the case of *Dharmendra Textile* (supra), the Hon'ble Supreme Court had taken a view 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. The Hon'ble Supreme Court of India came to the conclusion in the case of *Rajasthan Spinning* (supra) that the reason assigned by the tribunal to strike down the levy of penalty against the assessee is as misconceived as the interpretation of *Dharamendra Textile* (supra). That is misconstrued by the Revenue. The Hon'ble Supreme Court of India concluded that it fails to understand how payment of the differential duty, before or after, can alter the liability of penalty, the conditions for which are squarely spelt out in section 11AC. After noting the facts at length, the arguments of both sides, the Hon'ble Supreme Court of India concluded as under:-

> "11. In a case of non-payment, short-payment or erroneous refund of duty normally three issues are likely to arise relating to (i) recovery, (ii) interest and (iii)

penalty. The three issues are dealt with under section 11A (Recovery of duties), section 11AA (Interest for the period from three months after the determination of duty payable till the date of payment of duty), section 11AB (Interest for the period from the first day of the month succeeding the month in which duty was payable till the payment of duty) and section 11AC (Penalty for short levy or non levy of duty).

Section 11A reads as follows:

> "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, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year 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 "one year", 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 one year or five years, as the case may be.

(1A) When 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 the rules made thereunder with intent to evade payment of duty, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under Section 11AB and penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on 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.

Provided that if such person has paid the duty in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notice are served under sub-section (1) shall, without prejudice to the provisions of section 9, 9A and 9AA, be deemed to be conclusive as to the matters stated therein:

Provided further that, if such person has paid duty in part, interest and penalty under sub-section (1A), the Central Excise Officers, shall determine the amount of duty or interest not being in excess of the amount partly due from such person.

(2A) Where any notice has been served on a person under sub- section (1), the Central Excise Officer,-

(a) in case 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 the rules made thereunder with intent to evade payment of duty, where it is possible to do so, shall determine the amount of such duty, within a period of one year; and

(b) in any other case, where it is possible to do so, shall determine the amount of duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section (1)

(2B) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. - Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was 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.

Explanation 2.- For the removal of doubts, it is hereby declared that the interest under Section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub- section.

(2C) The provisions of sub-section (2B) shall not apply to any case where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

(3) For the purposes of this section-

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means,-

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid-

(A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

> (b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;
>
> (c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund."

From sub-section (1) read with its proviso it is clear that in case the short payment, non payment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in default within one year from the relevant date (defined in sub-section (3)). In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years.

.....

14. Sub-section (1A) of section 11A provides that in case the person in default to whom the notice is given under the proviso to sub section (1) makes payment of duty in full or in part as may be accepted by him, together with interest under section 11AB and penalty equal to 25% of the accepted amount of duty within thirty days of the date of receipt of notice then the proceeding against him would be deemed to be conclusive (without prejudice to the provisions of section 9, 9A and 9AA as provided in the proviso to sub-section (2) of section 11A. Sub-section (1A) and the proviso to sub-section (2) were inserted with effect from July 13, 2006 and, therefore, have no application to the periods relevant to the two appeals.

15. 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 no application.

16. The other provision with which we are concerned in this case is section 11AC relating to penalty. It is as follows:

> 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 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, 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 such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined:
> Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:
>
> Provided also 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 purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court , then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation. - For the removal of doubts, it is hereby declared that-

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

17. The main body of sub-section 91) 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 can not 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 section 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 11A92) 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 vs. 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 vs. 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.
>
> 24. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far 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."

22. In the light of this authoritative pronouncement by the Hon'ble Supreme Court of India, we see no reason to overturn or reverse the view taken by the tribunal. The view taken in its order passed and in the year 2005 cannot be said to be perverse or vitiated by any error of law apparent on the face of the record. More so, after the judgment of the Hon'ble Supreme Court of India.

23. As a result of the above discussion, the appeal fails. It is dismissed, but without any order as to costs.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**