

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED on : 02.06.2017

DELIVERED on : 10.07.2017

CORAM :

The Hon'ble MR.JUSTICE RAJIV SHAKDHER

AND

The Hon'ble MR.JUSTICE R.SURESH KUMAR

C.M.A. No.2377 of 2016

The Commissioner of Central
Excise, No.1, Foulks Compound,
Anai Medu, Salem 636 001 .. Appellant/Respondent

-vs-

M/s.JSW Steels Limited,
Salem orks, M.Kalipatti,
Pottaneri, Meri, Mettur,
Salem 636 453. .. Respondent/Appellant

Appeal filed under Section 35(G) of the Central Excise Act, 1944, against the Final Order No.41526 of 2015 dated 09.11.2015 made in Appeal.DB/125/2008/DE on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.V.Sundareswaran

For Respondent : Mr.K.S.Venkatagiri

सत्यमेव जयते
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J U D G M E N T

Rajiv Shakdher, J.

1.This is an appeal preferred by the Revenue against the judgment and order dated 09.11.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (in short 'the Tribunal').

1.1.The Tribunal, by virtue of the impugned judgment and order, partially allowed the appeal of the respondent / assessee. In sum, the Tribunal, while confirming the amounts paid by the assessee towards service tax and interest, set aside

the penalties imposed under various Sections of the Finance Act, 1994 (in short 'the Finance Act').

1.2.The Revenue, being aggrieved with that part of the judgment and order, whereby penalties levied on the assessee have been set aside, has come up with the instant appeal to this Court.

2.The record shows that the appeal was admitted on 03.11.2016, when, the following substantial questions of law were framed for consideration by this Court:

- i. Whether the Tribunal is correct in allowing the appeal of the assessee by deleting the mandatory penalty imposed on them ? and
- ii. Whether the Tribunal committed an error in concluding that the respondent is eligible for cenvat Credit on the service tax paid on the reverse charge mechanism ?

2.1.We must state at the very outset that after we had heard the submissions of learned counsels for parties, there was a consensus that apart from anything else, the following additional substantial question of law ought to have been framed. Accordingly, we would frame a question of law which would examine the tenability of the impugned judgment and order of the Tribunal, in the light of the provisions of Section 80 of the Finance Act.

2.2.Therefore, before we proceed further, it will be useful to formulate the said question of law :

''Whether in the facts and circumstances of the case, the Tribunal had misdirected itself in applying the provisions of Section 80 of the Finance Act ?''

3.In order to adjudicate upon the appeal and to answer the questions of law, which have been set out hereinabove, the following broad facts are required to be noticed.

3.1.The assessee before us is a company by the name of M/s.JSW Steel Ltd. (formerly known as M/s.Southern Iron & Steel Company Ltd.). The assessee appears to be in the business of manufacturing iron and steel bars and rods in their factory situate at Pottaneri. The assessee, admittedly, stands registered with the Central Excise Department for the purpose of service tax and has, accordingly, been accorded a registration number.

3.2.It appears that the Government of India (GOI), in 1992, introduced a Scheme which allowed Indian companies to access global capital markets through External Commercial Borrowings (ECBs). The ECBs, apparently, operated under Global Depository Mechanism (GDR) and American Depository Mechanism (ADR). Thus, under the Scheme formulated by GOI, the Indian companies having

good track record, which included good financial performance generally, could access International Banks / Financial Institutions for ECBs. The manner in which ECB operated was that every borrower, who was based in India, was required to pay commercial charges in the form of Agency fees as well as Arrangement fee, i.e., fee for arranging of loans. It appears that lending services, which were received by the Indian borrower such as, the assessee, were brought within the tax net under section 65 (12)(a)(ix) of the Finance (No.2) Act, 2004, with effect from 10.09.2004.

3.3.Evidently, on 18.04.2006, an amendment was made to the Finance Act with the insertion of Section 66A. Alongside the insertion of Section 66A in the Finance Act, the Taxation of Service (provided from outside India and received in India) Rules, 2006, were also framed. The result of this development was that the recipients of services, who were located in India such as, the assessee, were liable to pay service tax on gross fee paid by them to overseas service providers, i.e., 'lead arrangers'.

4.The record shows that the assessee entered into a Facility Agreement dated 18.09.2006 for availing of ECB in the sum of USD 30 millions. Furthermore, the record is also indicative of the fact that this information was furnished to the Reserve Bank of India (RBI) in the prescribed form, i.e., Form 83, which is dated 23.09.2006. For this purpose, it appears, the ICICI Bank Limited, having its branch at Vadodara / Bangalore, served as its agent, for which purpose, it was paid a processing fee amounting to USD 3,00,000 (INR 1,38,12,000). The said processing fee was paid by the assessee on 29.09.2006. On this processing fee, the ICICI Bank Limited, paid service tax amounting to Rs.16,90,589/-.

4.1.In addition to the processing fee, the assessee also paid USD 1200000 (INR 5,52,48,000) to ICICI Bank Limited having its branch in Singapore. The said sum was paid towards arrangement fee for arranging ECB, in terms of the Arrangement Fee letter dated 18.09.2006. This amount was paid on 29.09.2006.

4.2.As would be quite obvious, the service provider, i.e. ICICI Bank Limited, Singapore, was not resident in India and therefore, the assessee being the recipient of the service, under the extant provisions of the Act and Rules referred to above, was required to pay the requisite service tax. This aspect somehow escaped the assessee, even though under the Cenvat Credit Rules, 2004 (in short 'the 2004 Rules') it would perhaps have been entitled to credit, if it had paid service tax qua arrangement fee at the relevant point in time. We may indicate here that as a matter of fact, the assessee did raise this submission before the Tribunal, which has been taken note of in paragraph 5 of the impugned judgment and order. We are informed that cenvat credit was subsequently availed of by the

assessee post payment of service tax, which has not been questioned to-date by the Revenue.

4.3.It is because service tax was not paid by the assessee on the arrangement fee, at the relevant point in time, that the Revenue, upon obtaining information via the Director General of Central Excise Intelligence, called upon the assessee to furnish details with regard to payments made to foreign companies for arranging ECB. Apparently, information in that behalf was sought by the Revenue from the assessee vide its communication dated 15.03.2007, in exercise of powers under Section 14 of the Central Excise Act, 1944 (in short 'the CE Act') read with Section 83 of the Finance Act. Apparently, the information, as sought by the Revenue, was supplied by the assessee under the cover of its letter dated 24.03.2007. As indicated hereinabove, the assessee, apart from anything else, also furnished copies of the Facility Agreement dated 18.09.2006, and copy of the Form 83, dated 23.09.2006, filed with RBI. Upon receipt of the information as sought for by the Revenue, the statement of one Mr.P.Boopalan, Company Secretary and Chief General Manager (F & A), was recorded. The statement of Mr.Boopalan was recorded, once, immediately after the letter dated 15.03.2007 was issued and, thereafter, upon the assessee furnishing the information vide letter dated 24.03.2007. The dates on which Mr.Boopalan's statements were recorded are 20.03.2007 and 30.07.2007. In the interregnum, the Revenue, evidently, had also issued a letter dated 18.05.2007, which was responded to by the assessee vide communication dated 24.05.2007.

4.4.It appears, while the information and details were being sought with regard to payments made to entities outside India for arranging ECB, the assessee realized that even though it was only a recipient of the service, the law had been amended, which required payment of service tax by the recipient as against the non-resident service provider. It is in this background that the assessee deposited service tax along with requisite educational cess in the sum of Rs.67,62,355/-, on 31.05.2007. Apparently, on 29.11.2007, the assessee also furnished a copy of the arrangement letter dated 18.09.2006, to which we have made a reference above.

5.Despite the fact that the assessee had already paid the requisite service tax, the Revenue issued a Show Cause Notice dated 27.12.2007 (SCN). Via the said SCN, the Revenue proposed, to not only appropriate the service tax, which included the educational cess already deposited by the assessee, but also called upon the assessee to show cause as to why interest ought not to be levied under Section 75 of the Finance Act, coupled with penalties under Section 76 for failure to pay service tax and under Section 78 for suppressing the factum of receipt of taxable services from a non-resident service provider.

5.1.The SCN was adjudicated upon and an order-in-original dated 10.03.2008 was passed, whereby the sum of Rs.67,62,355/- deposited by the assessee was appropriated in terms of the demand raised in the SCN. Furthermore, the assessee was called upon to pay the following:

- i. appropriate interest under Section 75 of the Finance Act;
- ii. penalty at the rate of Rs.200/- per day from the date when the tax ought to have been paid till it was paid, i.e. 17.04.2006 and thereafter, at the rate of 2% of the quantified service tax amount or Rs.200 per day whichever was higher on the tax amount to be paid from 18.04.2006, till the date of payment, under Section 76 of the Finance Act;
- iii. penalty amounting to Rs.1,000/- under Section 77 of the Finance Act for failure to obtain registration and file ST 3 Return and;
- iv. penalty in a sum of Rs.67,62,355/-, which was equivalent to the amount of tax paid, under Section 78 of the Finance Act, for suppression of value of taxable service with an intent to evade payment of service tax on the said service and for failure to pay service tax.

5.2.The assessee, it appears, was not inclined to resist the payment qua interest on account of delayed payment of service tax and accordingly, remitted the requisite amount, i.e. a sum of Rs,5,73,225/-, to the Revenue on 25.11.2008.

5.3.The assessee, being aggrieved by the order-in-original dated 10.03.2008 qua the penalties imposed under various Sections, preferred an appeal to the Tribunal.

5.4.As indicated above, the Tribunal sustained the order-in-original to the extent it confirmed the payment of service tax and interest. The Tribunal, thus, allowed the appeal of the assessee partially by setting aside the penalties imposed upon it. It is in this background that the Revenue has preferred the instant appeal.

6.Given the aforesaid background, arguments on behalf of the Revenue was advanced by Mr.Sundareswaran, while those on behalf of the assessee were advanced by Mr.Venkatagiri.

7.Mr.Sundareswaran assailed the impugned judgment and order of the Tribunal on the ground that there was no good reason for setting aside the penalties qua the assessee, as it had failed

to show that there was ''reasonable cause'' for failure to pay service tax.

7.1. According to the learned counsel, the assessee's stand that they were under a bona fide belief that service tax was not required to be paid by the recipient on the arrangement fee could not be alluded to as a ''reasonable cause'' for failure to pay service tax. In other words, the expression ''reasonable cause'' appearing in Section 80 of the Finance Act did not contemplate such circumstance.

7.2. Furthermore, it was contended that the circumstances obtaining in the matter would show that the assessee had every intention to evade payment of service tax, as service tax was paid by it only after summons were issued by the Revenue on 15.03.2007. It was contended that for imposition of penalty under Sections 76, 77 and 78 of the Finance Act, it was not necessary to prove that mens rea obtained, i.e., that the assessee had intention to evade payment of service tax. The mere infraction of the provisions of the Act would lead to levy of penalty under the aforementioned provisions. In other words, the submission was that the levy of penalty was mandatory once infraction of the provisions of the Act and the Rules framed thereunder was established.

7.3. In support of these submissions, learned counsel relied upon the following judgments:

- A) Amco Batteries vs. CCE, 2003 (153) ELT 7 (SC)
- B) CCE vs. Mahindra & Mahindra, 2005 (179) ELT 21 (SC)
- C) CCE vs. Narayan Polyplast, 2005 (179) ELT 20 (SC)
- D) CCE vs. Narmade Chematur Pharmaceuticals Ltd., 2005 (179) ELT 276 (SC)
- E) Union of India vs. Rajasthan Spinning & Weaving Mills, 2009 (238) ELT 3 (SC)
- F) CCE vs. Prabhat Zarda Factory I Pvt Ltd., 2012 (281) ELT 665 (Del-DB)

8. As against the aforesaid, Mr. Venkatagiri largely relied upon the judgment of the Tribunal and submitted that no interference is called for in the matter. In addition thereto, the learned counsel contended that the assessee was under a bona fide belief that ICICI Bank Limited, being a corporate entity registered in India, it was not required to pay service tax on the arrangement fee paid to its Singapore Branch. In this context, the learned counsel emphasized that this belief was strengthened as in so far as the processing fee was concerned, the service provider which was the Vadodara / Bangalore branch of the ICICI Bank Limited, had paid the requisite service tax.

8.1.The learned counsel further submitted that the bona fides of the assessee could not be doubted, in view of the fact that the moment the Revenue, in a sense, raised a red flag with regard to the assessee's failure to pay service tax on the arrangement fee, the said tax was paid on 31.05.2007. The learned counsel also highlighted the fact that the assessee had also paid the interest demanded by the Revenue with regard to delayed payment of service tax. It was also brought to our notice that the assessee had availed of cenvat credit in respect of service tax paid on the arrangement fee; a transaction qua which the Revenue had raised no objection to date.

8.2.Thus, the submission was that there was no good reason for the assessee not to pay service tax on the arrangement fee, as it was eligible for cenvat credit qua the service tax paid based on reverse charge mechanism.

8.3.The argument being that since the payment of service tax and the credit which the assessee was entitled to qua the same presented a revenue neutral circumstance, the Tribunal took note of this fact and therefore, correctly came to the conclusion that penalties ought not to have been levied for infraction of the provisions of the Act and the Rules framed thereunder.

8.4.In support of his submissions, the learned counsel relied upon the following judgments:

- A) Navin Chemicals Mfg. & Trading Co. Ltd. vs. Collector of Customs, 1993 (68) ELT 3 (SC)
- B) Union of India vs. Rajasthan Spinning & Weaving Mills, 2009 (238) ELT 3 (SC)
- C) Commissioner of Central Excise, Belgaum vs. Chadha Auto Agencies, 2013 (32) STR 265 (Kar.)
Daurala Organics vs. Commissioner of Central Excise, 2014 (35) STR 214 (All.)
- D) Commissioner of C.Ex., Chennai-IV vs. Tenneco RC India Pvt. Ltd., 2015 (323) ELT 299 (Mad.)

9.Having heard the learned counsel for parties and on perusal of the record, what emerges is as follows:

- (a) That the assessee paid service tax, inclusive of educational cess, in the sum of Rs.67,62,355/-, albeit, upon issuance of communication dated 15.03.2007 by the Revenue, but prior to the issuance of SCN, which is dated 21.05.2007.
- (b)The SCN, apart from seeking confirmation and appropriation of the service tax deposited by the assessee, also sought to impose interest and penalties under Section 75, and Sections 76 and 78 of the Finance Act respectively.
- (c)There was no proposal in the SCN to levy any penalty under

Section 77 of the Finance Act.

- (d) The demand raised in the SCN under various heads was confirmed by the order-in-original dated 10.03.2008.
- (e) The assessee paid interest in a sum of Rs.5,73,225/- on 25.11.2008.
- (f) The assessee has, on its own showing, claimed cenvat credit qua the service tax paid in respect of the arrangement fee, in its capacity as the recipient of the service, in line with the provisions of Section 66A of the Finance Act and the Rules framed thereunder.
- (g) Though the Revenue has raised a ground in the instant appeal with regard to the tenability of the cenvat credit claimed by the assessee, nothing has been placed on record to demonstrate that the Revenue has agitated the said issue by taking recourse to an appropriate proceeding.

10. It is, in the background of the aforesaid facts and circumstances that, the assessee had assailed the order-in-original dated 10.03.2008 raising several issues with regard to its liability to pay service tax, which, in a sense, led it to carry a bona fide belief that it was not liable to pay service tax on the arrangement fee, in view of the fact that it was a recipient of the service, provided by the Singapore branch of ICICI Bank Ltd. This aspect emerges on perusing the averments made in the appeal filed by the assessee with regard to its interpretation of the provisions of Section 65 (12) and Explanation 2 of Section 66 of the Finance Act, in the foreground of the transaction which stood consummated between itself and the Singapore branch of ICICI Bank Limited.

11. The sum and substance of the assessee's stand was that vide Facility Agreement dated 18.09.2006, it entered into an agreement with the ICICI Bank Limited, whereby it was required to arrange ECB from other banks and financial institutions. In that context, it was argued by the assessee that the Singapore Branch of ICICI Bank Limited was not providing lending services to the assessee, as contemplated in Clause (ix) of sub-section (12) of Section 65 of the Finance Act. It was further argued that since the ICICI Bank Limited was an entity incorporated under Laws of India and maintained its registered office in India, it verily believed that the said entity had to discharge the liability of paying service tax even with regard to arrangement fee. This belief, according to the assessee, was strengthened by the fact that vis-a-vis the processing fee, service tax amounting to Rs.16,90,589/- was paid by ICICI Bank Limited. The fact that the entirety of the transaction entered into with ICICI Bank Limited (which included the Facility Agreement dated 18.09.2006) was disclosed to RBI via Form 83

dated 23.09.2006, according to the assessee, was demonstrable of the fact that there was no intent to evade payment of service tax.

11.1. Therefore, it appears, in the appeal filed with the Tribunal, (despite the fact that the assessee had already paid the service tax and the interest), the challenge was laid to the entire order-in-original which, not only confirmed the demand qua service tax, but also went on to impose interest and penalties under various provisions to which we have made a reference hereinabove.

11.2. The Tribunal, however, as alluded to above, allowed the assessee's appeal only partially and while doing so, gave the following operative reasons in paragraph 5 of the impugned judgment and order:

'5. Heard both sides in detail and on perusal of the documents, we find that the appellants having come to know about their liability to pay service tax as the recipient of the service, immediately paid the entire amount of service tax along with education cess amounting to Rs.67,62,355/-. We also find that the appellant have remitted the interest amount of Rs.5,73,225/- on 25.11.2008, for delayed payment of service tax. The have filed challan for proof of payment of interest. The appellant assessee on being informed about their liability to pay service tax have readily accepted and discharged their liability in full, which is not in dispute. Having regard to the facts and circumstances of this case, which show that the appellants were eligible for cenvat credit on the service tax paid on the reverse charge mechanism, we find that there is bonafide reason for invoking sec.80. Further, we also find that this is a case where the appellants have been able to show reasonable cause for delayed payment under bonafide belief as to taxability of service and in view of the revenue neutral situation, we find that the penalties imposed on the appellants cannot be sustained and has to be set aside. In the result, the amount paid towards service tax and interest thereon and appropriated is sustained and penalties imposed on the appellants are set aside. The appeal is partially allowed in the above terms.'

11.3. A perusal of the impugned judgment of the Tribunal would show that the Tribunal has, in effect, accepted the plea of the assessee with regard to the challenge laid to the penalties levied by invoking the powers under Section 80 of the Finance Act. During the relevant period, Section 80(i) of the

Finance Act, read as follows:

"80.(i) Notwithstanding anything contained in the provisions of section 76, section 77, or section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure."

11.4. As would be evident upon a bare perusal of Section 80 (i), it opens with the non-obstante clause. Accordingly, it terms of the said Section an assessee can plead for waiver of imposition of penalties levied under Sections 76, 77 and 78 of the Act, if it is able to demonstrate that a "reasonable cause" obtained for non-payment of service tax.

11.5. A perusal of the Order-in-original dated 10.03.2008 in the instant case shows that it goes on to levy penalty under Section 77 of the Finance Act, when, there was not even a proposal made to that effect in the SCN.

11.6. In so far as the penalty under Section 76 was concerned, according to us, what was inexplicable is, as to why the same was claimed from 18.04.2006, when, arrangement fee equivalent to INR 5,52,48,000/- was paid only on 29.09.2006, and therefore, necessarily, time for payment of service tax was available till 05.10.2006.

11.7. We must note herewith, while these aspects, both concerning Section 77 and 76 of the Finance Act were raised in the appeal filed with the Tribunal, the Tribunal some how did not specifically advert to these aspects. Be that as it may, the point, however, remains, is that, time was available for payment of service tax, on arrangement fee, till 05.10.2006, which was not disputed before us, by the Revenue.

11.8. As regards penalty levied under Section 78 of the Finance Act is concerned, the same kicks in, only if, there is an element of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of Chapter V or the Rules made thereunder, with intent to evade payment of service tax. The said provision is triggered in circumstances where service tax has not been levied or paid or has been short levied or short paid or erroneously refunded.

11.9. An assessee, whose case purportedly falls within the purview of provisions of Section 78 of the Finance Act, is required to be served with a notice under sub-section (1) of Section 73 calling upon it, to pay, in addition to service tax and interest specified in such notice, penalty which is

equivalent to 100% of the amount of such service tax demanded thereof.

12. The record shows that in the order-in-original the only reasoning, which has been provided (after a long discussion with regard to the contentions advanced by parties, the provisions of the Act, and the reference to judgments), is that, penalty was being imposed on account of "non-registration" and "non-payment of tax" by the assessee in contravention of the Finance Act.

12.1. For the sake of convenience, the relevant paragraphs, i.e. 19.01 and 19.02, of the order-in-original is set forth hereinafter:

"19.01 It is clearly established that the assessee had not disclosed the fact of paying commission to the ICICI Bank at Singapore and had not registered themselves with the department and failed to pay service tax in contravention of provisions of Finance Act, 1994. It is held in the following decisions that person who is guilty of suppression are liable to penalty under both Section 76 and 78 of Finance Act, 1994....."

19.02 Non-registration and non-payment of tax in contravention of provisions of Finance Act itself clearly shows their intention to suppress the fact in order to evade tax. Penalty is imposable irrespective of guilty intention..."

12.2. As would be seen from the Order-in-original, there is no finding that the assessee's failure to pay service tax on arrangement fee was a conscious and/or deliberate act of wrong doing and deception. While there can be no cavil with the proposition that penalty under Section 78 constitutes a statutory offence and that, the Revenue was not required to establish the presence of mens rea; however, before the penalty is imposed, the Revenue would have to establish that non-payment of service tax was a result of conscious and/or deliberate act of wrong doing and deception.

12.3. In so far as the first proposition is concerned, one may have regard to the following decisions:

i) Union of India vs. Dharmendra Textile Processors, 2008 (231) ELT 3 (SC).

ii) Gujarat Travancore Agency, Cochin vs. Commissionee of Income-Tax, Kerala, (1989) 177 ITR 455 (SC).

iii) Addl. Commissioner of Income Tax, Gujarat, vs. I.M.Patel and Co., 1992 SCR (2) 914.

12.4. As regards the second proposition, we may only quote with profit, the observations made by the Supreme Court in: UOI vs. Rajasthan Spinning & Weaving Mills, 2009 (238) ELT 3 (SC)].

17. The main body of sub-section 1 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 assesseees 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 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 statutes 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.

(emphasis is ours)

12.5. The aforesaid observations made in Rajasthan Spinning and Weaving Mills Ltd case, would clearly indicate that penalty under Section 78 of the Finance Act is mandatory subject to the caveat that the adjudicating authority comes to the conclusion that non-payment of service tax was a conscious and/or deliberate act of wrong doing and deception.

12.6. Furthermore, in the facts and circumstances of the instant case, what is also required to be kept in mind is, the provisions of Section 80 of the Finance Act, which obtained on the Statute book, during the relevant period. We may note that Section 80 was omitted from the Statute, with effect from 14.05.2015, vide Finance Act, 2015 (20 of 2015).

13. Thus, having regard to the fact that no such finding of deliberate and/or conscious wrong doing and deception has been returned in the Order-in-original dated 10.03.2008 and given the fact that the assessee has claimed Cenvat Credit in respect of service tax paid by the assessee, qua which, the Revenue has raised no objection, [at least nothing suggestive of this fact was shown to us during the course of hearing], the Tribunal, in our view, was justified in coming to the conclusion that the

assessee had been able to show reasonable cause for waiver of imposition of penalty under Section 76, 77 and 78 of the Finance Act.

14. We must, at this juncture, note that Mr.Sundareswaran submits that the mere fact that the assessee had taken credit for the tax paid, and in that sense, the liability was revenue neutral, would not furnish a ground for waiver of penalty, in our opinion, misses a crucial point. As observed by the Supreme Court in: CCE vs. Mahindra & Mahindra, 2005 (179) ELT 21 (SC) that, though the availability of credit to an assessee is neither conclusive or decisive, it certainly is a relevant aspect which is required to be considered. Consequently, the weight which the Court or the Tribunal has to accord to this aspect would depend on the facts and circumstances of each case.

15. In this particular case, the assessee had paid service tax on a reverse charge mechanism basis, as soon as it received a communication dated 15.03.2007. The assessee did not wait for issuance of the SCN. Not only did the assessee pay the service tax, but it also paid interest, albeit, after the demand was confirmed. The assessee, it appears, therefore, verily believed that since, arrangement fee had been paid to ICICI Bank, which is an entity incorporated in India, it is that entity which would be required to pay service tax. The assessee continued to hold this belief and, as a matter of fact took a specific ground, in that behalf, even in the appeal filed with the Tribunal.

16. Having said so, we are not to be understood, that merely because service tax was paid prior to SCN, therefore, penalty ought to be waived. What is required to be looked at is, the cumulative set of facts obtaining in each case, and then, assessing as to whether non-payment of service tax was a conscious and/or deliberate act of wrong doing and/or deception. Our sense of the matter is that, it was not, and, therefore, the conclusion reached by the Tribunal, in our view, is correct.

17. Thus, for the foregoing reasons, we are inclined to sustain the order of the Tribunal. The appeal of the Revenue will, consequently, have to be dismissed.

17.1. It is ordered accordingly.

18. Consequently, in so far as question No.(i) is concerned, since, it is a civil obligation emanating from a statutory

offence, imposition of penalty would follow, if, once it is established that the non-payment of tax was a result of a conscious and/or deliberate act of deception or wrong doing.

18.1. In so far as question No.(ii) is concerned, based on the submissions made before us, in our opinion, the question has been rendered redundant, in view of the Revenue apparently having not challenged the credit taken by the assessee with regard to service tax paid by it on arrangement fee.

18.2. As regards question No.(iii), which was framed by us, in our view, it would have to be answered in favour of the assessee and against the Revenue. The Tribunal, in our opinion, given the facts and circumstances of the case, has rightly, invoked the provisions of Section 80 of the Finance Act.

19. There shall be no order as to costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

sra/sl

To

1. The Asst. Registrar,
Customs, Excise & Service Tax Appellate
Tribunal (CESTAT), No.26, Sashtri Bhavan,
Annexe Building, Haddows Road,
Chennai 600 006.

2. The Commissioner of Customs, Central
Excise & Service Tax, Salem.

+ 1 cc to M/s.Mr.V.Sundareswaran, Advocate,SR..47911

+ 1 cc to M/s.K.S.Vendatagiri, Advocate,SR.48213

C.M.A. No.2377 of 2016

GP(CO)
NR 23/08/2017