$~11

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

\+ **CEAC No. 27/2017**

Date of decision: 7th May, 2018

SHIVA ALLOYS PVT. LTD. ..... Appellant
Through: Ms. Vidushi Shubham, Mr.Jitendra Singh, Advocates

versus

COMMISSIONER OF CENTRAL EXCISE, DELHI-I ..... Respondent
Through: Mr. Amit Bansal, Mr.Akhil Kulshrestha, Advocates

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

This appeal by M/s Shiva Alloys Private Limited impugns order dated 19th January, 2017 passed by the Customs, Excise and Service Tax Appellate Tribunal in Excise Appeal Nos. E/3053-3054/2009-Ex [DB] and E/3221 & 3223/2009-Ex [DB].

2. By order dated 19th February, 2018, the following substantial question of law was framed:

> "Whether the Customs, Excise and Service Tax Appellate Tribunal was right in upholding levy of 100% penalty under Section 11AC of the Excise Act, 1944 notwithstanding that the entire payment of

> disputed tax was paid by the appellant on or before passing of the order-in-original?"

3. In our opinion, the question raised is covered by the decision of the Supreme Court in ***Union of India versus Rajasthan Spinning and Weaving Mills***, 2009 (238) ELT 3 (SC) and judgment of Division Bench of this Court in ***Commissioner of Central Excise Delhi-I versus Prabhat Zarda Factory (I) Private Limited***, 2012 (281) ELT 665 (Delhi).

4. The undisputed factual position is that the appellant was a manufacturer of S.S. ingots and S.S. flats. Search operation was conducted in the factory of the appellant by the Central Excise Officer on 19th November, 2005, and shortage of 4510 kg of S.S. ingots was found on comparison with the balance shown in the books. Two concerns, namely, M/s Shree Shyam Cutter and M/s Shree Ganesh Cutter situated in Wazirpur industrial area were also subjected to search on the next date, i.e. 20th November, 2005 and 76.10 M.T. and 120.50 M.T. S.S. flats were found lying in the said premises. M/s Shree Shyam Cutter and M/s Shree Ganesh Cutter could not explain lawful possession of S.S. flats found in their premises. The Director of appellant Mr. Ram Kumar Aggarwal in his statement recorded on 20th November, 2005 had admitted that the goods found in the premises of M/s Shree Shyam Cutter and M/s Shree Ganesh Cutter belonged to them and they were cleared without payment of duty. No invoices were issued for removal of the said goods. Statement of one, Jaswant who had transported S.S. flats to the premises of M/s Shree Shyam Cutter and M/s Shree Ganesh Cutter was recorded. On the

basis of evidence, show cause notice dated 15th May, 2006s was issued to the appellant and M/s Shree Shyam Cutter and M/s Shree Ganesh Cutter, sole proprietorships of Ravinder Kumar Aggarwal and Anil Kumar Garg, respectively. Thereafter, order-in-original dated 27th March, 2008 was passed affirming the proposals/additions suggested in the show cause notice. On appeal, Commissioner (Appeals) confirmed the order-in-original and the demand raised.

5. These demands and adjudication order have been affirmed by the Tribunal by the impugned order with one modification that the redemption fine imposed on M/s Shree Shyam Cutter and M/s Shree Ganesh Cutter have been reduced from Rs.6,50,000/- and Rs.10,50,000/- to Rs.3,50,000/- and Rs.6,50,000/-, respectively. Personal penalty imposed on Mr.Ram Lal Aggarwal, Director of the appellant, Ravinder Kumar Aggarwal and Anil Kumar Garg, sole proprietors of M/s Shree Shyam Cutter and M/s Shree Ganesh Cutter have been reduced to Rs.1,00,000/- each.

6. On merits whether the addition was justified or not, we have declined to interfere as was recorded in our order dated 19th February, 2018. This order observes that the findings recorded by the Tribunal are findings of fact, based on statements on oath recorded during the course of search and material physically found which corroborates and confirms the statements made.

7. It is accepted and admitted that the appellant herein did not pay the penalty imposed under Section 11AC of the Central Excise Act. Mere payment of differential duty, i.e. duty on the goods S.S. ingots found short by 4510 kg and S.S. flats found in the premises of M/s

Shree Shyam Cutter and M/s Shree Ganesh Cutter would not matter once the conditions for imposition of penalty under Section 11AC was satisfied. This is clear ratio of ***Rajasthan Spinning and Weaving Mills*** (supra), wherein it has been held as under:

> "2. What are the conditions and the circumstances that would attract the imposition of penalty under Section 11AC of the Central Excise Act ('The Act', hereinafter)? In the two cases before us the Tribunal has taken the view that there was no warrant for levy of penalty since the assessees had deposited the balance amount of excise duty (that was short paid at the first instance) even before the show cause notice was issued. On the other hand, on behalf of the Revenue, the appellants in the two appeals, it was contended, relying upon a recent decision of this Court in Union of India v. Dharamendra Textile Processors, 2008 (231) E.L.T. 3 (S.C.) 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. In our view the reason assigned by the Tribunal to strike down the levy of penalty against the assessees is as misconceived as the interpretation of Dharamendra Textile is misconstrued by the Revenue. We completely fail to see how payment of the differential duty, whether before or after the show cause notice is issued, can alter the liability for penalty, the conditions for which are clearly spelled out in Section 11AC of the Act.
>
> XXXX XXXX
>
> 5. In our view the reason assigned by the Tribunal to strike down the levy of penalty against the assessee is as misconceived as the interpretation of Dharmendra

Textile is misconstrued by the Revenue. We completely fail to see how payment of the differential duty, whether before or after the show cause notice is issued, can alter the liability for penalty, the conditions for which are clearly spelled out in Section 11AC of the Act.

XXXX XXXX

30. At this stage, we need to examine the recent decision of this Court in Dharmendra Textile. In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short-payment of duty the penalty clause would automatically get attracted an the Authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharmendra Textile and we see no reason to understand or read that decision in that manner.

XXXX XXXX

34. The decision in Dharmendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the Authority concerned would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharmendra Textile decides. It must, however, be made clear that what is stated above in regard to the decision in Dharmendra Textile is only insofar as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it) with regard to the several other statutory

> provisions that came up for consideration in that decision."

8. Thus, the payment of duty, whether made before or after issuing of show cause notice, is not determinative and a relevant factor for deciding whether or not penalty should be imposed under Section 11AC of the Excise Act. This issue is to be decided having regard to the satisfaction or non-satisfaction of the conditions stipulated in Section 11AC of the Act. The pre-conditions which have to be satisfied are fraud, misrepresentation, suppression of facts and contravention of the Act and Rules. This position has been clearly stated in ***Prabhat Zarda Factory (I) Private Limited*** (supra).

9. We would also record that Supreme Court in ***Rajasthan Spinning and Weaving Mills*** (supra) has clarified and explained their earlier decision in the case of ***Union of India versus Dharmendra Textile Processors***, 2008 (231) ELT 3 (SC) holding that once the conditions mentioned in Section 11AC were fulfilled, then there is no discretion left with the authority concerned to reduce the penalty to an amount less than the duty determined. This decision again highlights that the conditions mentioned in Section 11AC should be first fulfilled.

10. The appellant does not dispute and does not challenge the conditions mentioned in Section 11AC of the Act were satisfied as the appellant does not contest and submit that fraud, misrepresentation or suppression of facts in contravention of provisions of the Act or the

Rules were missing and absent. The facts found are to the contrary and compelling.

11. Learned counsel for the appellant has relied on ***Commissioner of Customs & Central Excise, Noida versus Supreme Industries Ltd.***, 2016 (341) ELT 607 (All). In the said decision, it was held that there was no question of fraud, misrepresentation or suppression of fact and hence penalty and interest could not be levied. Facts of the present case are different.

12. We would again observe that the counsel for the appellant has accepted that appellant had not paid 25% of the penalty within the stipulated time of 30 days. Therefore, 100% penalty has to be paid by the appellant.

13. In view of the aforesaid discussion, the substantial question of law is answered against the appellant and in favour of the respondent.

14. The appeal is dismissed. In the facts of the case, there would be no order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

MAY 07, 2018
pk