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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

-.-

**CEA-68-2011 (O&M)
Reserved on :-15.04.2024
Pronounced on:-08.05.2024**

M/s Nandan Auto Tech Limited

....Appellant

VERSUS

Commissioner of Central Excise

....Respondent

**CORAM : HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA**

Present: Mr. Deepak Gupta, Advocate for the appellant.

Mr. Ajay Kalra, Sr. Standing Counsel,
For the respondent - CBIC

SUDEEPTI SHARMA, J.

The present appeal is filed under Section 35G of the Central Excise Act, 1944 for quashing of order dated 01.09.2010 (Annexure A-4), whereby Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for short, 'the Tribunal') allowed the appeal filed by the respondent holding that the appellant is liable to fine and penalty under Rule 25(1)(b) of the Central Excise Rules, 2002.

2. The brief facts of the case are that the appellant is engaged in manufacture of forged iron & steel products. The officers of DGCEI, on 23.08.2003, searched the business premise of the appellant. The officers physically verified the stock. The officers seized the stock. The respondent, on 20.02.2004,

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issued show cause notice proposing confiscation of seized goods. The appellant, because of non-availability of documents failed to file reply. The adjudicating authority vide order dated 14.05.2004 ordered to confiscate the goods and imposed fine and penalty of 5 lakh each. The adjudicating authority also imposed penalty upon the director. The appellate authority allowed the appeal of the director but dismissed the appeal of the appellant vide order dated 29.07.2004. The Tribunal allowed the appeal of the appellant by way of remand vide order dated 01.03.2005. The adjudicating authority vide order dated 04.01.2006 (A-1) again adjudicated the show cause notice and confirmed the confiscation and imposed fine of 5 lakh and penalty to the tune of Rs.9,29,896/-. The adjudicating authority imposed penalty under section 11AC of Central Excise Act, 1944. The appellant filed reply and furnished returns RG-23A Part-I Register and ER-1 (monthly return) for the month of July, 2003. The appellate authority vide order dated 31.03.2006 (A-2) allowed the appeal of the appellant with finding that raw material and finished goods were seized merely because of non-accountal of goods and there was no reason to believe that goods were meant for clandestine removal of goods.

3. The respondents assailed order dated 31.03.2006 before the Tribunal, who vide order dated 01.09.2010 (Annexure A/4) allowed the appeal. The same is impugned herein.

4. Learned counsel for the appellant contends that the Tribunal has already held that there was no evidence regarding clandestine removal of goods, therefore, presumption of Section 11AC is un-warranted. In support of his contentions, he has relied upon a judgment of this Court in the case of **Commissioner of Central Excise Vs. Sadashiv Ispat Ltd.** [2010 SCC Online P&H 1237] wherein it has been held as under:-

“8. A perusal of the impugned order shows that no evidence has been produced by the Revenue that the respondent had cleared the goods unaccounted and the goods were kept for clandestine clearance. In the present case, even if the goods had not been entered in the RG-1 register, yet the same cannot lead to the conclusion that the goods were meant for clandestine removal. Both the Commissioner as well as the Tribunal have returned a concurrent finding of fact that there was no mens rea on part of the respondent to clandestinely remove the goods.

* * * *

12. In the present case, the Department has failed to prove the element of mens rea for imposition of penalty. It has been so held by the Commissioner as well as the Tribunal that no case was made out to impose penalty. The finding recorded that no case was made out for imposition of penalty is not shown in any manner to be perverse.

13. In view of the above, we find no merit in this appeal and the same is accordingly dismissed.”

He further relies upon the judgment of Delhi High Court in the case of

Commissioner of Customs (Import & General) Vs. Care Foundation [2014(302)

E.L.T. 181 (Del.)], wherein it has been held as under:-

“6. In the opinion of this Court, no exception can be taken to the finding that since there was no demand under Section 28(8) of the Customs Act for duty, no penalty could have been imposed under that provision and consequently the penalty under Section 114A was not sustainable. The further reasoning that there could have been penalty under Section 112 but since that provision was not invoked, the direction to pay penalty at Rs. 2.34 crores was not warranted in the circumstances, does not appear to be in error of law. For these reasons the Court is of the opinion that the question of law framed has to be answered against the revenue and in favour of the assessee.”

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5. Per contra, learned counsel for the respondent argued on the lines of impugned order dated 01.09.2010.

6. We have heard learned counsel for the parties and perused the whole record of this case.

7. The question of law involved in the present appeal is whether penalty under Rule 25 of the Central Excise Rules, 2002 can be imposed without invoking provisions of Section 11 AC of the Central Excise Act, 1944 wherein 'mens rea' is necessary ingredient?

8. We answer the question of law in favour of the assessee and against the revenue.

9. Hon'ble Supreme Court in the case of Commissioner of Central Excise, Chandigarh Vs. Pepsi Foods Limited [(2011) 1 Supreme Court Cases 601], held as under:-

“20. In the instant case in the order-in-original a penalty has been Imposed which is equal to the amount of duty. Such penalty has been imposed in exercise of power under Section 11-AC of the Act. Section 11-AC of the Act as it stood at the relevant point of time runs as under:

"11-AC. Penalty for short-levy on 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 misstatement 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 11-A, shall also be liable to pay a penalty equal to the duty so determined:

* * *

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 purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account:" (emphasis supplied)

21. From a perusal of the aforesaid section, especially the underlined portion, it is clear that in order to attract the penalty provision under Section 11-AC, criminal intent or "mens rea" is a necessary constituent. In the reply to the show- cause notice the stand which has been taken by the respondent is that it has been paying the duty and there is no mala fide intention on its part to evade the payment of duty. The further stand is that the goods were cleared from the factory only on payment of duty. This stand which has been taken in the reply to the show-cause notices was not found to be incorrect in the order-in-original. As such the imposition of penalty of the equal amount of duty under the order-in-original cannot be sustained.

22. It is well settled that when the statutes create an offence and an ingredient of the offence is a deliberate attempt to evade duty either by fraud or misrepresentation, the statute requires "mens rea" as a necessary constituent of such an offence. But when factually no fraud or suppression or misstatement is alleged by the Revenue against the respondent in the show-cause notice the imposition of penalty under Section 11-AC is wholly impermissible.

23. The Court in this connection may remind itself of the fundamental principle: (AC P. 496 E)

“that an accused person cannot be convicted without proof of mens rea, unless, from a consideration of the terms of the statute and other relevant circumstances, it clearly appears that that must have been the intention of Parliament."

(See the decision of the House of Lords in Vane v. Yiannopoulos and the opinion of Lord Reid at AC p. 496 E: All ER p. 823.)

24. *In Vanes, the word "knowingly" was used in the statute as a condition of creating liability.*

25. *The aforesaid dictum of Lord Reid has been followed by this Court also. A reference in this connection may be made to **Union of India v. Rajasthan Spg. & Wvg. Mills**. This Court considering Section 11-AC of the Act held in ELT para 19 at p. 12 of the Report as follows: (SCC p. 459, para 29)*

"29. From the aforesaid discussion it is clear that penalty under Section 11-AC, 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." (emphasis supplied)

26. *Following the aforesaid well-settled principles, this Court quashes that part of the order-in-original which imposes penalty without any finding of fraud or misstatement against the respondent. This part of the order-in-original is quashed. Save as aforesaid, the order-in-original is upheld. These appeals filed by the Revenue are allowed to the extent indicated above. No costs."*

10. Hon'ble Supreme Court in **State of Gujarat and Another Vs. Saw Pipes Ltd. (Known as Jindal Saw Ltd.)** [(2023) 112 GST 221], held as under:-

"6.1 While appreciating the submissions made on behalf of the respective parties on the levy of the penalty and interest under Section 45(6) and Section 47(4A) of the Act, the relevant sections ie.. Section 45 and Section 47(4A) of the Act, 1969 are required to be referred to, which are as under: -

"45. Imposition of penalty in certain cases and bar to prosecution.

(1) Where any dealer or Commission agent becomes liable to pay purchase tax under the provisions of sub-section (1) or (2) of section 16, then, the Commissioner may impose on him, in addition to any tax payable -

(a) if he has included the purchase price of the goods in his turnover of purchase as required by subsection (1) of section 16, a sum by way of penalty not exceeding half the amount of tax, and

(b) if he has not so included the purchase price as aforesaid, a sum by way of penalty not exceeding twice the amount of tax.

(2) If it appears to the Commissioner that such dealer -

(a) has failed to apply for registration as required by section 29, or

(b) has without reasonable cause, failed to comply with the notice under section (41, 44 or 67]

(c) has concealed the particulars of any transaction or deliberately furnished inaccurate particulars of any transaction liable to tax, the Commissioner may impose upon the dealer by way of penalty, in addition to any tax assessed under section 41 or reassessed under section 44 or revised under section 67 a sum not exceeding one and one-half times the amount of the tax.

(3) If a dealer fails to present his licence, recognition or as the case may be, permit for cancellation as required by section 35 or 36, the Commissioner may impose upon the dealer by way of penalty, a sum not exceeding two thousand rupees.

(3A) If a dealer fails to furnish any declaration or any return by the prescribed date as required under sub-section (1) of section 40, the commissioner shall impose upon such dealer by way of penalty for each declaration or return, a sum of two hundred

rupees for every month or part of a month comprised in the period commencing from the day immediately after the expiry of prescribed date and ending on the date on which a declaration or return is furnished.

(4) If a dealer fails without sufficient cause to furnish any declaration or any return [as required by proviso to sub-section (1) or subsection (2) of section 40], the Commissioner may impose upon the dealer by way of penalty, a sum not exceeding two thousand rupees.

(5) Where in the case of a dealer the amount of tax -

(a) assessed for any period under section 41 or 50; or

(b) reassessed for any period under section 44; exceeds the amount of tax already paid under sub-section (1), (2) or (3) of section 47 by the dealer in respect of such period by more than twenty five per cent of the amount of tax so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed or reassessed as aforesaid and the amount paid.

(6) [Where under sub-section (5) a dealer is deemed to have failed to pay the tax to the extent mentioned in the said sub-section, there shall be levied on such dealer a penalty not exceeding one and one-half times the difference referred to in subsection (5).]"

** * * **

"47. Payment of Tax and Deferred Payment of Tax, etc.

(4A) (a) Where a dealer does not pay the amount of tax within the time prescribed for its payment under subsection (1), (2) or (3), then there shall be paid by such dealer for the period

commencing on the date of expiry of the aforesaid prescribed time and ending on the date of payment of the amount of tax, simple interest, at the rate of [eighteen per cent), per annum on the amount of tax not so paid or on any less amount thereof remaining unpaid during such period.

(b) Where the amount of tax assessed or reassessed for any period, under section 41 or section 44, subject to revision if any under section 67, exceeds the amount of tax already paid by a dealer for that period, there shall be paid by such dealer, for the period commencing from the date of expiry of the time prescribed for payment of tax under sub-section (1), (2) or (3) and ending on date of order of assessment, reassessment or, as the case may be, revision, simple interest at the rate of [eighteen per cent] per annum on the amount of tax not so paid or on any less amount thereof remaining unpaid during such period."

6.2 *On a fair reading of Section 45 of the Act, it can be seen that as per sub-section (2) of Section 45 of the Act, 1969, penalty is leviable if it appears to the Commissioner that a dealer has concealed the particulars of any transaction or deliberately furnished inaccurate particulars of any transaction liable to tax. In the present case, it cannot be said that the dealer has concealed the particulars of any transaction or deliberately furnished inaccurate particulars of any transaction liable to tax. However, in so far as penalty leviable under sub-section (6) of Section 45 of the Act, 1969 is concerned, the penalty leviable under the said provision is as such, a statutory penalty and there is no discretion vested with the Commissioner as to whether to levy the penalty leviable under sub-section (6) of Section 45 of the Act, 1969 or not. Sub-section (5) of Section 45 provides that in the case of a dealer where the amount of tax assessed for any period under sections 41 or 50 or re- assessed for any period under*

Section 45 exceeds the amount of tax already paid by the dealer in respect of such period by more than 25% of the amount of tax so paid, the dealer shall be deemed to have failed to pay the tax to the extent of difference between amount so assessed or re-assessed as aforesaid and the amount paid. Considering sub-section (5) of Section 45 of the Act, 1969, if a dealer is deemed to have failed to pay the tax to the extent mentioned in sub-section (5), there shall be levied on such dealer a penalty not exceeding one and one-half times the difference referred to in sub-section (5). Under the circumstances, to the aforesaid extent and on the difference of tax, as per sub-section (5) of Section 45, the respondent assessee dealer shall be liable to pay the penalty as mentioned under subsection (6) of Section 45.

6.3 *Section 45 confers power to levy/impose penalty in certain cases. In certain cases, enumerated in Section 45 of the Act, the penalty imposable is distinct with the assessment such as Section 45(1)(a) (b). However, in so far as penalty imposable under Section 45(5) and 45(6) of the Act is concerned, it has a direct bearing or connection with the order of assessment and the determination of the tax liability. Subsection (5) of Section 45 provides that where in the case of a dealer the amount of tax assessed for any period under Section 41 or 50; or re-assessed for any period under Section 44: exceeds the amount of tax already paid by the dealer under sub-section (1), (2) or (3) of Section 47 of the Act, in respect of such period by more than 25% of the amount of tax so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed or re-assessed as aforesaid and the amount paid. Sub-section (6) of Section 45 provides that where under sub-section (5), a dealer is deemed to have failed to pay the tax to the extent mentioned in the said sub-section, there shall be levied on such dealer a penalty not exceeding one and one-half times the difference referred to in sub-section (5). Thus, on a bare reading of sub- sections (5) and (6) of Section 45, it is evident that it is*

integral part of the assessment that the penalty be levied on the difference of amount of tax paid and amount of tax payable as per the order of assessment or re-assessment as the case may and the same shall be automatic. Therefore, when the penalty on the difference of amount of tax paid and tax payable is more than 25% of the amount of tax so paid, there shall be automatic levy of penalty under Section 45(6) of the Act.

6.4 *From the language of Section 45(6) of the Act, it can be seen that the penalty leviable under the said provision is a statutory penalty. The phrase used is "shall be levied." The moment it is found that a dealer is deemed to have failed to pay the tax to the extent mentioned in sub-section (5) of Section 45, there shall be levied on such dealer a penalty not exceeding one and one-half times the difference referred to in sub-section (5). As per sub-section (5), where in the case of a dealer the amount of tax assessed or re-assessed exceeds the amount of tax already paid by the dealer in respect of such period by more than 25% of the amount of tax so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed or re-assessed and the amount paid. Therefore, the moment it is found that a dealer is to be deemed to have failed to pay the tax to the extent mentioned in subsection (5), the penalty is automatic. Further, there is no discretion with the assessing officer either to levy or not to levy and/or to levy any penalty lesser than what is prescribed/mentioned in Section 45(6) of the Act, 1969. In that view of the matter, there is no question of considering any mens rea on the part of the assessee/dealer.*

6.5 *At this stage, a few decisions of this Court as well as decisions of the Gujarat High Court (on levy of penalty and interest under the Gujarat Sales Tax Act) are required to be referred to. In the case of Dharamendra Textile Processors (supra) after referring and*

considering another decision of this court in the case of Shriram Mutual Fund (supra), it is observed and held that when the term used "shall be leviable," the adjudicating authority will have no discretion.

6.6 *In the case of Shriram Mutual Fund (supra), while dealing and/or considering similar provision under the SEBI, it is observed and held that mens rea is not an essential ingredient for contravention of the provisions of a civil Act. While interpreting the similar provision of SEBI Act, it is observed that the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In the case before this Court, the Tribunal relied on the judgment in the case of Hindustan Steel Ltd. (supra). However, this Court did not agree with the view taken by the Tribunal relying upon the decision in the case of Hindustan Steel Ltd. (supra) by observing that it pertained to criminal/quasi criminal proceedings. This Court observed that the decision in the case of Hindustan Steel Ltd. (supra) shall not have any application as the same relates to imposition of civil liabilities under the SEBI Act and the Regulations and the proceedings under the said Act are not criminal/quasi-criminal proceedings. In paragraphs 34 and 35, it is observed and held as under: -*

*"34. The Tribunal has erroneously relied on the judgment in **Hindustan Steel Ltd. v. State of Orissa [(1969) 2 SCC 627: AIR 1970 SC 253]** which pertained to criminal/quasi-criminal proceedings. That Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of imprisonment up to six months and fine for the offences under the Act. The said case has no application in the present case which relates to imposition of civil liabilities under the SEBI Act and the Regulations and is not a criminal/quasi-criminal proceeding.*

35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by

the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention was made by the defaulter with guilty intention or not. We also further hold that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of section 15D(b) and section 15E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.

"6.7 In the case of Guljag Industries (supra) while considering Sections 78(2) and 78(5) of the Rajasthan Sales Tax Act, 1994 which provided for penalty equal to thirty percent of the value of goods for possession or movement of goods, whether seized or not, in violation of the provisions of Clause (a) of sub-section (2) or for submission of false or forged documents or declaration, this Court in paragraph 9 observed as under: -

“ 9. Existence of mens rea is an essential ingredient of an offence. However, it is a rule of construction. If there is a conflict between the common law and the statute law, one has to construe a statute in conformity with the common law. However, if it is plain from the statute that it intends to alter the course of the common law, then that plain meaning should be accepted. Existence of mens rea is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals. A penalty imposed for a tax

delinquency is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime."

* * * *

6.11 *Even otherwise, the word used in section 45(6) is "shall be levied". The dealer shall be liable to pay the penalty not exceeding one and one half times of the difference of the tax as mentioned in sub-section (5) of section 45 of the Act, 1969. The language used in Section 45 is precise, plain and unambiguous. The intention of the legislature is very clear and unambiguous that the moment any eventuality as mentioned in section 45(5) occurs, the penalty shall be leviable as mentioned in sub-section (6) of Section 45. **No other word like mens rea and/or satisfaction of the assessing officer and/or other language is used like in section 11AC of the Central Excise Act.** It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. As per the settled position of law, the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. The courts cannot aid the legislatures' defective phrasing of an Act; they cannot add or mend, and by construction make up deficiencies which are left there.*

6.12 *Under the circumstances, on strict interpretation of Section 45 and Section 47 of the Act, 1969, the only conclusion would be that the penalty and interest leviable under Section 45 and 47(4A) of the Act, 1969 are statutory and mandatory and there is no discretion vested in the Commissioner/Assessing Officer to levy or not to levy the penalty and interest other than as mentioned in Section 45(6) and Section 47 of the Act, 1969. It is needless to observe that such an interpretation has been made having regard to the tenor of Sections 45 and 47 of the Act, 1969 and the language used therein.*

6.13 *In so far as the decisions relied upon by the learned counsel appearing on behalf of the respondent-assessee-dealer, referred to hereinabove, are concerned, none of the decisions shall be applicable to the facts of the case at hand, while dealing with Section 45 and Section 47 of the Act, 1969. The words/language of the relevant provisions that fell for consideration in the decisions relied upon on behalf of the respondent is altogether different from the language used in Section 45 and Section 47 of the Act, 1969. In the case of Dharamendra Textile Processors (supra), this Court was considering section 11AC of the Central Excise Act. **In Section 11AC, the words used are "fraud, collusion or any wilful misrepresentation or any wilful misstatement or suppression of facts" and "intent to evade payment of duty." In that view of the matter, the mens rea will play an important role. Therefore, the said decision shall not be applicable while considering Section 45 and Section 47 of the Act, 1969. A similar decision in the case of Pepsi Foods Ltd (supra). also shall not be applicable and/or of any assistance to the respondent-assessee-dealer."***

11. In view of the above decisions of Hon'ble Apex Court 'mens rea' will play important role while invoking the provisions of Section 11 AC of the Central Excise Act, 1944.

12. Relevant portion of the impugned order dated 01.09.2010 passed by the Customs and Excise Appellate Tribunal is reproduced as under:-

"7. I have carefully considered the submission from both sides and perused the records.

8. On perusal of closing balance as on 31.07.2003 and the stock found as on 23.08.03, it is noticed that while there was scrap of 17.574 MTs as on 31.07.03, on 23.08.03 the stock of said material was only 6 MTs. Similarly, stock of raw material was 48.120 MT as on 31.7.03 and the stock of raw material as on 23.08.03 was 115 tons valued at Rs.18,41,600/-. The forging reworking quantity was 10.400

MT as on 31.7.03 and the same was 15.46 tons as on 23.8.03 and the stock of forging machined was 1291 pcs as on 31.7.03 and quantity found as on 31.07.03 is 48.45 tons valued at Rs.31,49,250/-. The respondents who is registered" as a manufacturer is under a strict obligation to maintain raw material accounts on a day-to-day basis Indicating the receipt and Issue of the same and also maintain, on a day-to-day basis, quantity of final products manufactured and cleared by them. Failure to maintain accounts of goods manufactured and cleared by them clearly attracts the penal provision under Rule 25(1)(b) of the Central Excise Rules, 2002. The case of the respondent is still worse. They have not kept in any of their records in their factory on the date of visit of the officers. The, claim that some records were taken away by the officers of DGCEI without proper Inventory is clearly not substantiated. It is on record that the goods have been seized and the records have been seized as per enclosures attached to panchnama and every page of the panchnama including enclosures stands signed by the Independent witnesses. Further, surprisingly, I find the appellants who claimed that the RG-1 has been taken away by DGCEI have produced copies of RG-1 register along with reply to the show cause notice. From the above, it is clear that the respondents have clearly failed in maintaining the proper records relating to the raw materials received by them and Issued by them as well records of finished goods as manufactured by them and cleared by them at least for the period 01.08.2003 to 23.08.2003 i.e. till date of the visit of the officers. Under these circumstances, the goods seized were liable for confiscation. Therefore, the order of the Commissioner (Appeals) in setting aside the confiscation cannot be allowed to survive and the same is set aside. For irregular maintenance of records, the respondents are also liable to penalty.

9. However, as submitted by the Id. Advocate, the original authority has clearly erred in presuming that the said unaccounted goods were meant for removal without payment of duty. It is not disputed that the

seized goods included not only finished- goods but also raw materials and in process materials. There is also no evidence relied upon regarding any clandestine removal by the party during the period prior to 23.08.03. Therefore, such a presumption is not warranted and the provisions of Section 11AC is not attracted.

10. In the light of the above, the appeal is disposed of as follows:-

(a) Order of the Commissioner (Appeals) is set aside and order of the original authority is restored.

(b) While restoring the order of the original authority. Redemption fine is reduced from 5.00 Lac to 2.5 Lac.

(c) While restoring the order of the original authority, penalty imposed is reduced from 9,29,896/- to 2.5 Lac.

13. The order of the Commissioner Appeals dated 04.01.2006 shows that adequate evidence was produced before the adjudicating authority to prove that the stock as per sale and purchase documents worked out to be the same as verified by the officers on 23.08.2003. The invoice for purchase of raw material and those issued for removal of finished goods during 01.08.2003 to 22.08.2003 sufficiently established that the stock found in the office on 23.03.2003 could not be intended for removal without payment of duty. The raw material and finished goods could not be seized merely for reason of non-availability of raw material account and RG.1, where there existed sufficient evidence in the form of valid invoices for purchase and sale of finished goods and on that basis stock stood reconciled. It was observed by the Commissioner that invoices with respect to the raw material and finished goods were correct and convincing and when valid invoices are on record, there could not be any intention to clear the goods clandestinely. The record shows that all the goods were accounted for, since the invoices with regard to the

raw material and finished goods were there on record. It has been specifically noted down by the Commissioner as follows:-

“ The Appellants have however produced before me the records of all invoice and the photocopies of RG28A, Pt.1 & Part II and RG-1 register for a period 01.08.2003 – 22.08.2003, as a result of which the objection regarding production of these documents is also over-ruled.”

A perusal of the above shows that the Tribunal has totally ignored the documents produced before the Commissioner Appeals.

14. For proper adjudication of the case in hand relevant provisions of The Central Excise Act, 1944 and Central Excise Rules, 2002, are being reproduced hereunder:-

“11AC – Penalty for short-levy or non-levy of duty in certain cases:-

(1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows:-

(a) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any willful 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, the person who is liable to pay duty as determined under sub-section (10) of Section 11A shall also be liable to pay a penalty not exceeding ten per cent, of the duty so determined or rupees five thousand, whichever is higher.

Provided that where such duty and interest payable under section 11AA is paid either before the issue of show cause notice or within thirty days of issue of show cause notice, no penalty shall be payable by the person liable to pay duty or the person who has paid the duty

and all proceedings in respect of said duty and interest shall be deemed to be concluded;

(b) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (a) is paid within thirty days of the date of communication of the order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent of the penalty imposed, subject to the condition that such reduced penalty is also paid within the period so specified;

(c) 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 or collusion or any willful 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 (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined:

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. Of the duty so determined;

(d) where any duty demanded in a show cause notice and the interest payable thereon under section 11AA, issued in respect of transactions referred to in clause (c), is paid within thirty days of the communication of show cause notice, the amount of penalty liable to be paid by such person shall be fifteen per cent. Of the duty demanded, subject to the condition that such reduced penalty is also paid within the period so specified and all proceedings in respect of the said duty, interest and penalty shall be deemed to be concluded;

(e) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (c) is paid within thirty days of the date of communication of the order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent. Of the duty so determined, subject to the condition that such reduced penalty is also paid within the period so specified.

(2) Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10) of section 11A, then, the amount of penalty payable under clause (c) of sub-section (1) and the interest payable under section 11AA shall stand modified accordingly and after taking into account the amount of duty of excise so modified, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay such amount of penalty and interest so modified.

(3) Where the amount of duty or penalty is increased by the appellate authority or tribunal or court over the amount determined under sub-section (10) of section 11A by the Central Excise Officer, the time within which the interest and the reduced penalty is payable under clause (b) or clause (e) of sub-section (1) in relation to such increased amount of duty shall be counted from the date of the order of the appellate authority or tribunal or court.

RULE 25. Confiscation and penalty.

(1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse (or an importer who issues an invoice on which CENVAT credit can be taken] or a registered dealer, -

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules;

(b) does not account for any excisable goods produced or manufactured or stored by him, or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty.

Then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse [or an importer who issues an invoice on which CENVAT credit can be taken) or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [five thousand rupees), whichever is greater.

(2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.”

15. A bare reading of Section 11AC of the Act, 1944 shows that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, for any reasons other than the reason of fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or of Rules made there-under with intention to evade payment of duty, he shall be liable to pay penalty. Meaning thereby that there should be an intention to evade the payment of duty and in the present case

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intention to evade the payment of duty is not proved by the authorities while passing the order of penalty.

16. A perusal of the record shows that there was no intention to evade duty, which is requisite of Section 11AC of the Act. And Rule 25 of the Rules 2002 is not an independent rule and cannot be invoked unless it covers the ingredients to impose penalty as imposed in Section 11AC of the Act.

17. So far as Rule 25 is concerned, it starts as “*subject to the provisions of Section 11AC of the Act*” which shows that Rule 25 would be applicable only in cases where Section 11AC is invoked.

18. In view of the above the present appeal is allowed and order dated 01.09.2010 (Annexure A-4) is hereby quashed.

19. Pending application, if any, also stand disposed of.

(SANJEEV PRAKASH SHARMA)
JUDGE

(SUDEEPTI SHARMA)
JUDGE

08.05.2024
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Whether speaking/non-speaking : Speaking
Whether reportable : Yes/No