R E P O R T A B L E

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3527 OF 2009
(Arising out of S.L.P. (Civil) No. 15927 of 2007)

Union of India ..Appellant

Versus

M/s Rajasthan Spinning & Weaving Mills ..Respondent

AND

CIVIL APPEAL NO. 3525 OF 2009
(Arising out of S.L.P. (Civil) No. 4078 of 2008)

Commissioner of Customs and Central Excise … Appellant

Versus

M/s. Lanco Industries Ltd. …Respondent

J U D G M E N T

AFTAB ALAM,J.

1. Leave granted in both the SLPs.

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* Vs. *Dharamendra Textile Processors*, 2008 (231) ELT 3 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.

3. Though both the appeals turn on a question of law, it would be nevertheless useful to take a brief look at the facts of the two cases.

4. In the appeal arising from SLP (C) No.15927/2007 the respondent-assessee is a manufacturer of P/V yarn. On July 12, 2000 the Preventive Party of Central Excise Division, Udaipur visited the assessee's factory premises and on scrutiny of its internal records took the view that in clearances of goods on ex-mill sales there was short payment of duty by Rs.1,09,682.00 and by Rs.69,900.00 on sales made from the assessee's depot. The short payment of duty, according to the Revenue, took place in the following circumstances. The assessee was collecting handling and forwarding charges at the rate of Rs.6.00 per bag/ carton up to October, 1996 and after that at the rate of Rs.8/-. The amount of handling and forwarding charges was shown in the invoices separately from the assessable value of the goods. During the material time the assessee had collected a sum of Rs.7,46,219.00 as handling and forwarding charges on its sales from the mill. The assessee paid duty only on the difference between the amount collected by it and the actual expenditure incurred on loading and handling of goods within the factory. In this way a sum of Rs.5, 59,603.00 was left out of reckoning for levy of excise duty. The excise duty on the aforesaid sum came to Rs.1, 09,682.00. In the same manner there was short payment of duty amounting to Rs.69, 900.00 on sales made from the assessee's depot.

5. On the aforesaid facts the Additional Commissioner, Central Excise, Jaipur issued a show cause notice to the assessee on March 27, 2001. In the notice it was expressly acknowledged that on being pointed out the assessee deposited the full amount of duty (that is, Rs.1,09,682.00 + Rs.69,900.00) on August 26, 2000. Nevertheless, the notice went on to say that with effect from October 1, 1996 the requirement to submit the invoices to the Central Excise department was dispensed with and the assessee had discontinued submitting its invoices to the concerned authorities. This resulted into suppression of material facts on its part that the handling and forwarding charges were not being added on to the assessable value of the goods. The Additional Commissioner, therefore, invoked the provision of penalty as well. The assessee filed its show cause against imposition of penalty but the Joint Commissioner by his order dated September 26, 2001 not only confirmed the demand of duty (that was already deposited by the assessee) but also imposed penalty amounting to Rs.1,79,522/- under section 11AC of the Act. On appeal, however, the Tribunal set aside the imposition of penalty on the sole ground that the assessee had made payment of the full duty amount even before the issuance of notice.

6. M/s Lanco Industries Limited, the respondent-assessee in the appeal arising from SLP (C) No. 4078/2008 is a company engaged in the

manufacture of pig iron. The assessee sold pig iron and molten metal to another company called M/s. Lanco Kalahasthi Castings Limited (LKCL) which was in existence at the material time before its amalgamation with the respondent company, with effect from, April 8, 2004 as per the order of the Andhra Pradesh High Court, dated February 20, 2004 in Company Petition no. 182-83/ 2003. LKCL had its factory at a distance of about 150 metres from the assessee's factory where the pig iron and molten metal, on sale, were transferred for manufacture of ductile iron pipes by the transferee company. The sold goods were cleared from the factory of the assessee on payment of central excise duty on transaction value, that is, the price actually charged by it from LKCL. LKCL would get full CENVAT credit for the duty paid by the respondent company and would reimburse to the assessee the amount of duty at actuals.

7. The Central Excise officers on scrutiny of the annual record of the respondent for the period July 1, 2000 to March 31, 2004 took the view that the assessee had been clearing molten iron and pig iron to M/s. LKCL on an improper assessable value. In the annual reports of the respondent company for the years 2000-01 and 2001-02 LKCL was listed as one of its associate companies. The annual reports further revealed that the two companies had a number of common directors on their respective boards, as key managerial

personnel. The common directors were also related to each other. The two companies were having related party transactions in the form of sale of goods etc. In light of the facts disclosed in the respondent company's annual reports the Central Excise authorities took the view that after the amendment of Section 4 with effect from July 1, 2000, in relation to the respondent company, LKCL was 'related person' within the meaning of section 4(3) (b) (ii) of the Central Excise Act. That being the position the value of molten iron and pig iron cleared by the assessee to LKCL, for payment of duty was required to be determined in terms of Rule 8 of Central Excise Valuation (Determination of Price of Excisable goods) Rules 2000, i.e., @ 115% of the cost of production upto August 4, 2003 and after that date @ 110% in terms of the amendment introduced in the rule by notification No. 60/2003-CE (NT), dated August 5, 2003. The authorities calculated the amount of duty short-paid by the assessee for the period July 1, 2000 to March 31, 2004 at Rs. 56,04,274.00 for pig iron and Rs. 70,05,163.00 for molten metal, totalling to Rs. 1,26,09,437.00. Accordingly, the Commissioner, Central Excise, issued notice to the assessee on July 27, 2005 raising the demand of differential duty, **besides interest and penalty,** alleging that the assessee had willfully suppressed the relevant facts from the department with intent to evade the proper payment of duty.

8. The assessee in his reply explained that it had deposited the entire amount of the demand on the same day (July 27, 2005). Moreover, the whole exercise was revenue neutral and, therefore, there was no reason to impose interest, much less any penalty. The Commissioner, however, not only confirmed the demand of duty but by his order dated January 25, 2006 also levied interest under section 11AB and 100% penalty under section 11AC of the Act observing whether or not the demand was revenue neutral was not relevant to the issue before him. Against the order of the commissioner the assessee filed an appeal before the Customs Excise and Service Tax Appellate Tribunal. The Tribunal allowed the appeal by its order dated September 5, 2006 as noted above.

9. On behalf of the assessees in both the cases it was submitted the stand of the Revenue that there was any short payment of duty and the consequent demand for recovery of the differential duty was quite untenable but the assessees had made payment of the demands simply in order to buy peace and to avoid any litigation. In those circumstances the imposition of penalty was wholly unjust, unwarranted and unauthorised in law.

10. Mr. Ashok Desai, learned Senior Advocate appearing for the assessee in the appeal arising from SLP (C) No. 4078/2008 submitted that the view taken by the Revenue that the assessee and LKCL, with respect to each other,

were 'related person' was quite unsound. Nevertheless, the assessee paid the entire demand of Rs.1,26,09,437.00 first, in order to avoid litigation and secondly because the payment did not result in any actual monetary outflow for the assessee; whatever payment was made by the assessee, LKCL took CENVAT credit for it and reimbursed the full amount of duty to the assessee. He further submitted there was no question of suppression of any material fact by the assessee since all the information on which the show cause notice and the adjudication order were based were admittedly taken from the assessee's annual report which was a material in public domain. He also submitted that there could not be possibly any intent to evade any excise duty as the whole exercise was revenue neutral in as much as whatever sum the assessee paid as excise duty on transaction with LKCL it got back as reimbursement from the transferee. There being no element of fraud or suppression of facts etc. with intent to evade payment of duty any imposition of penalty was illegal and unauthorised.

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 misstatement 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.

12. In ***Cosmic Dye Chemical*** V ***Collector of Central Excise***, (1995) 75 ELT 721 a three Judges Bench of this Court observed as follows:

> "5.The main limb of Section 11A provides limitation of six months. In cases, where duty is not levied or paid or short-levied or short-paid or erroneously refunded, it can be recovered by the appropriate officer within six months from the relevant date. (The expression 'relevant date' is defined in the Section itself). But the said period of six months (substituted by one year with effect from May 12, 2000) gets extended to five years where such non-levy, short levy, etc., is "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 with intent to evade payment of duty….
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> "6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". *It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful.*"
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> (emphasis added)

13. The same position was reiterated in *Continental Foundation Jt. Venture* vs *Commissioner of Central Excise*, (2007) 216 ELT 177 to which one of us (Kapadia J.) was a party. In Paragraphs 10 and 12 of the judgment it was observed as follows:

> "10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.
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> "12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful."
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> (emphasis supplied)

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 sections 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 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 assessees 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.
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> "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.

25. In light of the discussion made above it is evident that in both the appeals, orders were passed by the Tribunal on a wrong premise. In both the appeals, therefore, the impugned orders passed by the Tribunal are set aside and the matters are remitted to the respective Tribunals for fresh consideration, in accordance with law, and in light of this judgment. As the matters are quite old it is hoped and expected that the Tribunal would pass the final order within four months from the date of the receipt of this order.

26. The two appeals are allowed but with no order as to costs.

……..J.

[S.H. Kapadia]

…….J.
[Aftab Alam]

New Delhi,
May 12, 2009.