

CEA-96 of 2008 (O&M)

#1# 2024:PHHC:075915-DB

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

CEA-96 of 2008 (O&M)

M/s Jai Bharat Steel Industries

.....Petitioner

Versus

Commissioner of Central, Excise Ludhiana and Ors

.....Respondents

Date of Decision: 27.05.2024

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

Present: Ms. Nikita Garg, Advocate for the appellant.

Mr. Sourabh Goel, Sr. Panel counsel with
Ms. Shivani Sharma and
Ms. Geetika Sharma, Advocate for the respondents.

SUDEEPTI SHARMA, J

1. Present appeal is filed under Section 35-G of the Central Excise Act, 1944 (hereinafter to be referred as “the Act”) against order dated 16.08.2005 (Annexure P.24) passed by the Commissioner (Appeals) and order dated 22.10.2007 (Annexure P.25) passed by the Tribunal.

2. Brief facts of the case are that appellant is engaged in the manufacturing of rolled products of steel. The appellant had filed refund claim of Rs. 1,98,148.67 on 10.07.1989 on the ground that it had paid duty during the period 6/82 to 7/83 as leviable on Hoop/Flat/Strip of steel, whereas their products as M.S Bars were exempted from duty as held by

Hon'ble Supreme Court. The refund claim of Rs.1,98,148/- was rejected by the Assistant Commissioner vide Order-In-Original No.43/CE/Rfd/89 dated 25.10.1989 on the ground that the refund was time barred.

Feeling aggrieved, the appellant filed writ petition bearing CWP No.773 of 1990 before this Court against the above said Order-In-Original and this Court vide order dated 12.04.1991 ordered that an amount of Rs.1,98,148.67 along with cost of Rs.1,000/- be paid to the appellant within three months. The respondent-Department challenged order dated 12.04.1991 but their claim has been finally rejected upto Hon'ble Supreme Court. Thereafter, the appellant again requested for refund of Rs. 1,98,148.67/- vide its letter dated 30.05.1991 in terms of order passed by this Court.

3. In another demand case pertaining to the appellant, CEGAT vide its order No.E/165/92-BI dated 17.07.1992 set aside the demand of Rs.31,448/- and held that Show Cause Notice dated 01.06.1982 was time barred. The appellant vide its letter dated 08.12.1992 made a request to then jurisdictional Assistant Commissioner for refund of Rs.31,448/- because the said amount had already been paid by them in July, 1983. Subsequently, the appellant on its own took the credit of Rs. 1,98,148.67 and Rs. 31,448/- in their PLA account on 02.07.1993 and utilized the said credit for payment of duty.

4. Show Cause Notice dated 23.12.1993 was issued to the appellant for recovery of Rs.2,30,596/- as they had taken suo-moto credit without obtaining refund orders. The said Show Cause Notice was adjudicated by the then Deputy Collector Central Excise Collectorate, Chandigarh vide Order-In-Original No.108/CE/DC/94 dated 01.11.1994 wherein it was held as under:-

"I also direct the Assistant Collector, Patiala to take a decision as per the law on their refund application within one month and if refund becomes due same may be sanctioned and the refund amount should be adjusted against the credit already taken by the party in their PLA and if their claim is rejected party should pay the amount of Rs.1,98,148/- (should be 1,99,148) and Rs. 31,448 immediately after the receipt of the order of Assistant Collector. Till then status quo should be maintained on the issue."

5. Thereafter, the appellant filed two refund applications with Assistant Commissioner, Central Excise for refund of Rs.1,99,148/- and Rs.31,448/- but suppressed the fact of availing of suo-moto credit on 02.07.1993.

6. On receipt of refund application, two Show Cause Notices were issued to the appellant. Show Cause Notice in the case of Rs. 199,148.67/- was issued on the ground of undue enrichment and in the case of Rs.31,448/- on the grounds of limitation. Vide two Order-In-Original's, the Adjudicating Authority without taking note of the fact that the appellant had already taken suo-moto credit of the amounts and without taking into account the directions given in Order-In-Original dated 01.11.1994(supra), rejected the refund claim of Rs.31,448/- and ordered the amount of Rs.1,99,148.67/- to be credited to consumer welfare fund.

7. The Commissioner (Appeals) rejected appeal of the appellant in respect of refund claim of Rs.1,99,148.67/- but CEGAT vide its order dated 02.11.2000 ordered that refund should be granted with interest. In the refund claim of Rs.31,448/- the Commissioner (Appeals) allowed the appeal of the appellant. In both appeal proceedings either before Commissioner (Appeals) or before CEGAT, the fact of suo-moto refund of Rs.1,99,148.67/- and

Rs.31,448/- by way of taking credit in PLA account on 02.07.1993 was not brought on records by the appellant.

8. On the basis of CEGAT order dated 02.11.2000, the appellant again requested vide letter dated 12.04.2001 and 22.11.2002 for grant of refund again by suppressing fact of suo moto availment of credit. Refund of Rs.1,99,148.67/- and Rs.31,448/- were granted by way of issuing cheques. Both the cheques were got encashed by the appellant.

9. The appellant did not respond to the two letters dated 23.09.2003 and 13.11.2003, issued by the Department asking them to deposit the amount of refund availed by the appellant twice wrongly. The appellant did not answer and the Department issued Show Cause Notice dated 22.01.2004 to recover amount. The Adjudicating Authority vide impugned Order-In-Original adjusted the refund claims of Rs.1,98,148.67/- along with cost of Rs.1,000/- and the refund claims of Rs. 31,448/- against suo moto credit entries made in their PLA account by the appellant on 02.07.1993. The Adjudicating Authority also confirmed demand of Rs.31,448/- and Rs.1,99,148.67/- holding that the same was refunded erroneously alongwith interest w.e.f. the date of cheques and also imposed a penalty of Rs.2,30,596/- on the appellant under section 11AC of the Act.

10. Learned counsel for the appellant contends that the appellant was entitled to the refund of Rs.1,98,148.67 paise from the Department and when the Department rejected the claim of the appellant, it challenged the order by way of filing CWP No.773 of 1990 (Annexure P.1) before this Court and this Court vide judgment dated 12.04.1991 allowed the writ petition, directing the respondents to pay the amount of refund to the tune of Rs.1,98,148.67 paise to the appellant within three months from the date of receipt of copy of the judgment. She further contends that no penalty could

be imposed under Section 11AC of the Act, since Section 11AC of the Act can only be invoked if there is an intention to evade payment of duty. She further submits that since no *mens rea* was there, therefore, the penalty has wrongly been imposed and the impugned orders are, thus liable to be set aside.

11. Per contra, learned counsel for the revenue fully supports the impugned orders and opposed the appeal.

12. We have heard learned counsel for the parties and perused the paper book thoroughly.

13. A perusal of the record shows that the Customs Excise Service Tax Appellate Tribunal after dealing with all the factual aspects, dismissed the appeal filed by the appellant. It is also apparent that the factum of receiving the refund twice of the same amount for which the appellant was not entitled to, by concealing the facts, is not denied by the appellant in the written submissions. Moreover, no cogent evidence has been brought on record on behalf of the appellant to show its bonafide regarding encashment of the two cheques i.e one dated 01.04.2003 for Rs.31488/- and another dated 22.05.2003 for Rs.1,99,148.67/-. The relevant portion of impugned order dated 22.10.2007 (Annexure P.25) is reproduced below:

“2. It is not disputed that the appellant has availed the refund of the aforesaid two amounts twice. Earlier, the refund was availed by making a suo moto credit entry in the PLA on 02.07.1993 for paying duty on finished goods without getting any formal sanction order enabling the appellant to do so. Thereafter, the appellant again obtained refund of these two amounts by encashing two cheques; one dated 01.04.2003 for Rs.31,448/- and another dated 22.05.2003 for

Rs.1,99,148/- which were issued in response to their two refund applications dated 07.10.1995.

3. The appellant in their written submissions filed on 17.01.2005 had admitted that the said amounts received again on 01.04.2003 and 22.05.2003 were liable to be given back to the Department. It was, however, urged that no interest should be demanded nor any penalty imposed in respect of those amounts.

4. to 7. xxx xxxxx xxxxx

8. On going through the relevant material on record and the reasoning adopted by the authorities below, it clearly appears that the appellant had even after taking their refund of the amounts in question by making suo moto credit entry in the PLA on 02.07.1993 again applied for refund of these two amounts on 07.10.1995. The contention that, the communication sent on 07.10.1995 was only a letter and not a refund application, is wholly misconceived and contrary to the facts on record. It has been found that after the order dated 01.11.1994 was passed by the Deputy Commissioner, the appellant made two refund applications, both on 7.10.1995, under covering letter dated 07.10.1995 requesting for refund of the claim amounts at the earliest. In these communications/applications, the fact of having availed the refund by suo moto credit entries on 02.07.1993 was not at all mentioned. This clearly amounted to suppression of material facts. If it had been disclosed that, the refund was already taken by making suo moto credit entry in the PLA account on 02.07.1993, there was no occasion for the Department to issue refund cheques of the same amounts on 01.04.2003 and 22.05.2003 to the appellant. Even in their communications dated 12.04.2001 and 22.10.2002, the appellant did not disclose that suo moto credit was already taken in respect of the same

amounts by the appellant on 02.07.1993. The appellant, in fact, again requested for sanction of refunds along with upto date interest by their letters dated 12.04.2001 and 22.10.2002. The appellant knowing full well that refund was already taken for the same amounts, accepted cheques and encashed them. There cannot be a more blatant display of fraud than the course adopted by the appellant in getting the refund again for the same amounts without disclosing that it was already taken by making credit entries in their PLA. Therefore, the ingredients for imposing penalty under section 11-AC of the Act are clearly established.”

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 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, 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 subsection (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. 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."

16. Hon'ble Supreme Court in **State of Gujarat and Another Vs. Saw Pipes Ltd.(Known as Jindal Saw Ltd.) [(2023) 112 GSTR 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 i.e., 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 subsection (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 subsection, 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 subsection (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

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."

17. 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 thereunder 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, the *mens rea* of the appellant is

proved from his conduct since it took the benefit of refund twice by suppressing fact of *suo moto* availment of credit.

18. For the foregoing reasons, we do not find any error much less perversity in the order impugned, warranting intervention by this Court.

19. Dismissed.

20. All the pending misc application(s), if any, shall stand disposed of.

(Sanjeev Prakash Sharma)
Judge

(Sudeepti Sharma)
Judge

May 27, 2024

manoj

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No