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

{CEAC 27 OF 2005}

% Judgment delivered on: October 29,2010

The Commissioner of Central Excise ….Appellant

Through Mr. Satish Kumar, Sr. Standing Counsel with Mr. Antrik Sarkar, Advocate

Versus

M/s Haldiram Marketing Ltd. ….Respondent

Through Mr. Shekhar Vyas, Advocate

CORAM:-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI,J. (ORAL)

1. The Revenue has filed this appeal against the orders of Customs, Excise & Service Tax Appellate Tribunal dated 30th August, 2004 which was passed in the appeal preferred by the respondent herein. This appeal was admitted on the following substantial question of law:-

> "Whether a penalty imposed u/s 11 AC can be less than the amount of duty determined to be payable u/s 11 92) of the Central Excise Act, 1944?"

2. The question has arisen in the following factual background.

M/s Haldiram Marketing Ltd. (hereinafter referred to as "the party"), B-1/H-8, Mohan Co. Operative Industrial Estate, Mathura Road, New Delhi-110044 were engaged in the manufacture of

cookies, pastries and biscuits etc. falling under chapter heading 19 of the first schedule of the Central Excise Tariff Act, 1985.

3. During a visit by the Central Excise officers on a specific information, it was noticed that there were various machines which were being used in the manufacture of sweet meats of different types. Besides, electric baking ovens were also installed which were being used for making cookies, biscuits, pastries, breads, pizza base etc. These were being produced with the aid of power by way of being baked in those ovens. The respondent was not registered with Central Excise. The Director of the respondent informed that the stated items were being manufactured under the brand name of H.R. Haldiram's (logo) and that brand name "Haldiram" was owned by M/s Haldiram India Pvt. Ltd., B-I/H-8, MCIE, New Delhi. It was further stated that the biscuits/pastries were sold in plain white paper box laminated on the inner side with polythene coating, after which the same were put in a polythene bag bearing the brand name and logo of "Haldiram". The visiting Central Excise officers had seized 40 Kgs. of biscuits valued at ₹ 4800/-

4. From the statement of the Director of the respondent, the appellant took the view that the party was engaged in the manufacture and clandestine removal of excisable branded goods with intention to evade Central Excise Duty. The respondent had no obtained the Central Excise registration under Rule 174 of erstwhile Central Excise Rule, 1944 for the manufacture of said excisable goods. They had also cleared these goods without issuance of proper Central Excise invoices and without maintaining proper Central Excise records. As such it was considered that they appeared to

have contravened the provisions of erstwhile Rules, 9,52 (A), 53, 273(G) & 174 of Central Excise Rules, 1944.

5. Notification No. 8/2000-CE and 9/2000-CE both dated 1.3.2000 envisaged that the exemption contained in these notifications shall not apply to specified goods bearing a brand name or trade name (whether registered or not0 of another person. Since the respondent was engaged in the manufacture of goods in the brand name of another person, and as such they were liable to pay duty on the said branded goods.

6. A show cause notice C.No. CE-13/Prev/MOD-II/ Seizure-cum-offence/HR/21/2000/833 dated 5.2.01 was issued to the respondent proposing confirmation of duty amounting to ₹ 4,11,190/- confiscation of 40 Kgs. of biscuits seized by the visiting Central Excise Officers, under Rule 173 Q (1)(b) of the Central Excise Rules, 1944 for imposition of penalty on the respondent under Section 11AC read with Rule 173 (Q) of Central Excise Rules, 1944 and for imposition of penalty on Sh. M.L. Aggarwal, Director of the party under Rule 209A and recovery of interest under Section 11AB of the Central Excise Act, 1944.

7. The case was adjudicated by the Additional Commissioner vide Order-in Original No. 147/2001 dated 31.12.2001. The adjudicating authority had confirmed the demand of ₹ 4,11,190/- under Section 11A of the Central Excise Act, 1944. Since the duty had already been deposited by the respondent, it was appropriated to the Govt. account. 40 Kgs. of biscuits valued at ₹ 4800/- which were seized by the visiting Central Excise officers were ordered to be confiscated. However option to redeem the same was given to the respondent on

payment of redemption fine of ₹ 500/-. The adjudicating authority had also imposed a penalty of ₹ 4,11,190/- on the respondent under Section 11AC read with Rule 173 Q of the Central Excise Rules, 1944. He had also imposed personal penalty of ₹ 10,000/- of Sh. M.L. Aggarwal, Director of the respondent.

8. Aggrieved by the orders of the adjudicating authority, the respondent had filed an appeal before the Commissioner, Central Excise (appeals). The Ld. Commissioner (appeals) vide her Order-in-Appeal No. 03-CE/20/04 dated 20.01.2004 had upheld the order of the adjudicating authority. The Ld. Commissioner (A) had however ordered that the duty proposed to be demanded shall have to be abated from the cum duty price actually received and liable to be received as a consideration for sale of goods and directed the jurisdictional Assistant Commissioner to re-quantify the duty demand. The Department had filed an appeal before CESTAT against the orders of the Commissioner (appeals) on cum-duty-price aspect which is still pending.

9. Aggrieved by the orders of the Commissioner (Appeals), the party M/s Haldiram Marketing Ltd. had also filed an appeal before CESTAT. The CESTAT vide its final Order No. 607-08/04-NB © dated 30.08.2004, has upheld the demand of duty. The respondent in their appeal before the CESTAT had contended that no penalty could be imposed under section 11AC and no interest demanded under Section 11AB when the duty amount had been paid, and had prayed for setting aside the orders of Commissioner (A) to this effect. The CESTAT has, however, reduced the mandatory penalty from ₹ 4,11,190/- to ₹ 20,000/- and also set aside the penalty imposed upon the Director of the respondent.

10. It is in this backdrop the question of law which was framed is as to whether it was open to the CESTAT to reduce the mandatory penalty specified in Section 11AC of the Act. In so far as this question is concerned, it stands decided authoritatively by the Supreme Court in the case of ***Union of India*** *Vs.* ***Dharamendra Textile Processors,*** *2008 (231) E.L.T. 3 (S.C).* It is categorically held by the Apex Court in the said case that the quantum of penalty specified under Section 11AC of the Central Excise Act, 1944 cannot be reduced by the authorizes and no discretion in this behalf is vested with the adjudicating authorities. It is further held that mens rea is not an essential ingredient thereunder. The operative portion of the judgment delineating the aforesaid principle is extracted below:-

> "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. The mater shall now be placed before the Division Bench to deal with the matter in the light of what has been stated above, only so far as the cases where challenge to vires of Rule 967Q(5). In all other cases the orders of the High Court or the Tribunal, as the case may be, are quashed and the matter remitted to it for disposal in the light of present judgments. Appeals except Civil Appeal Nos. 3388 of 2006, 3397 of 2003, 3398-99 of 2003, 4096 of 2004, 4316 of 2007, 4317 of 2007, 5277 of 2006, 675 of 2007, 1420 of 2007 and appeal relating to SLP (C) No. 21751 of 2007 are allowed and the excepted appeals shall now be placed before the Division Bench for disposal".

11. We may also point out at this stage that this judgment came up for discussion before the Supreme Court in ***Union of India*** *Vs.* ***Rajasthan Spinning & Weaving Mills,*** *2009 (238) E.L.T. 3 (S.C.).* *A*fter taking note of the judgment in ***Dharamendra Textile*** *(supra),* the Apex Court specifically rejected the contention of the department to the effect that once it was found that there was a case of non-payment or short payment of duty, the penalty clause would automatically get attracted and the authority has no discretion in the matter. It was clarified by the Supreme Court that the pre-conditions stipulated under Section 11AC of the Act, namely, non-payment or short payment of duty was the result of fraud, collusion or any willful mis-statement, suppression of the facts, or contravention of any provisions of this Act or the Rules made there under with the intent to evade payment of duty, had also to be satisfied. The court thus held that once these conditions are satisfied, the penalty as prescribed under Section 11AC of the Act had to be imposed and in that event there was no discretion with the authority to impose lesser penalty than what is prescribed in the aforesaid provision.

12. Having regard to this law laid down by the Supreme Court in the aforesaid two judgments, we answer the question in the negative i.e. the penalty imposed under Section 11AC of the Act cannot be less than the amount determined to be payable under Section 11A (2) of the Central Excise Act, 1944 as Section 11AC laid down in such circumstances 100% penalty is to be imposed. There would not be any discretion with the CESTAT to reduce the penalty. The order of the Tribunal reducing the penalty, therefore, has to be set aside.

13. At the same time we find that the Tribunal or even the Commissioner (A) did not go into the question as to whether the condition laid down under Section 11AC of the Act were satisfied or not. It appears from the perusal of the orders passed by the adjudicating authorities that the assessee had taken a plea that non-payment was bona fide as the assessee was under the impression that the goods being not branded were not excisable.

14. In these circumstances, while setting aside the impugned order we remit the case back to the CESTAT to take a view as to whether the conditions stipulated under Section 11AC of the Act were satisfied in the present case or not.

15. We make it clear that this question would be gone into by the CESTAT only if such a plea was raised by the assessee in the grounds of appeal before the Tribunal.

16. The party shall appear before the Tribunal on 23rd November, 2010.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

OCTOBER 28, 2010
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