

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 237 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MS JUSTICE SONIA GOKANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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COMMISSIONER OF CENTRAL EXCISE AND CUSTOMS SURAT

I....Appellant(s)

Versus

RAJESHREE DYG. AND PTG. MILLS (P) LTD....Opponent(s)

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Appearance:

MR RJ OZA, ADVOCATE for the Appellant(s) No. 1

RULE SERVED for the Respondent (s) No. 1

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CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 30/04/2013

CAV JUDGEMNT
(PER : HONOURABLE MS JUSTICE SONIA GOKANI)

1. This Tax Appeal is preferred under Section 35-G of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'), aggrieved by the order dated September 11, 2012 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (hereinafter referred to as 'the Tribunal'), proposing the following substantial questions of law for our consideration :

“(a) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in extending benefit of reduced penalty under section 11AC of the Central Excise Act, 1944, when the 1st and 2nd proviso to section 11AC specifically provide that the benefit of reduced penalty at 25% shall be available only if the duty determined under Section 11A(2), interest payable thereon under Section 11AB and penalty at 25% of the duty determined under Section 11A(2) has been paid within thirty days from the date of communication of the order of the Central Excise officer determining duty payable under Section 11A(2) of the 1944 Act ?

(b) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law by passing impugned order by relying upon the decision of this Hon'ble Court in the case of Aakash Fashion Prints Pvt. Ltd. even though the

said decision is challenged by the Department before the Hon'ble Supreme Court and thus it has not attained finality on the issue of jurisdiction of the Tribunal to extend benefit of reduced penalty in exercise of powers under section 11AC of the Central Excise Act, 1944 ?”

2. Brief facts are as under :

2.1 The assessee-respondent M/s.Rajshree Dyeing and Printing Mills (P) Ltd. is engaged in manufacturing of Dyed MMF falling under Chapter 54 of the Schedule to the Central Excise Tariff Act, 1985.

2.2 The Central Excise Officers headed by Superintendent (Preventive) visited the factory premises of the respondent on October 15, 2001 and found excess stock of Dyed MMF, which had no reflection in the daily stock account register or in any other documents required to be maintained under the law. By seizure panchnama, confiscation of the goods was carried out and statements of director of the unit and other merchant manufacturers during the course of investigation were recorded.

2.3 On completion of such investigation, *prima facie* it was revealed that the offence under the provisions of Central Excise laws was committed. The Director of the respondent-Unit and other merchant manufacturers were served with a show cause notice dated April 10, 2002, calling upon them to show cause

as to why the evaded duty with interest be not recovered along with the penalty.

2.4 The Additional Commissioner, Central Excise and Customs, Surat-I, adjudicated the said show cause notice after by-partite hearing and confirmed the duty amount under Section 11A of the Act. He further ordered confiscation of the seized material and imposed a fine. The penalty also was levied under Section 11AC read with Rule 25 of the Central Excise Rules, 2002. The order-in-original directed that if the amount of duty determined is paid along with interest under Section 11AB of the Act within 30 (Thirty) days from the date of communication of the order, the amount of penalty liable to be paid shall be 25% of the duty determined, provided the amount of reduced penalty is also paid within the stipulated period of 30 days. He imposed interest under Section 11AB of the Act and penalty under Rule 26 of the Central Excise Rules, 2002.

2.5 The assessee-respondent challenged the said order-in-original before the Appellate Commissioner, Central Excise and Customs, Surat-I. He set aside the order of imposition of penalty on the respondent-Unit and the personal penalty imposed upon the Director. However, he confirmed the order-in-original as far as recovery of duty with interest is concerned.

2.6 Such order dated September 29, 2006 aggrieved the Revenue and, therefore, the Department preferred

an appeal before the Customs, Excise and Service Tax Appellate Tribunal. The Tribunal vide its order dated September 11, 2012 confirmed the imposition of penalty under Section 11AC of the Act and extended the benefit of reduced penalty by observing that the assessee-respondent is liable to be penalised under Section 11AC of the Act, but the benefit as per Section 11AC for discharge of penalty at the rate of 25% of the amount of duty confirmed, is required to be extended following the decision of this Court in ***Commissioner of Central Excise, Ahmedabad-I v. Akash Fashion Prints Ltd., reported in 2009 (239) ELT 439 (Gu.)***, It is further mentioned that the assessee-respondent had already discharged such liability consequent to the oral order of Tribunal on January 18, 2012 during the course of hearing. Therefore, it directed the lower authorities to consider such amount as discharge of liability towards penalty and interest. Even the reduced amount of penalty imposed on the Director has also been deposited by the assessee-respondent.

2.7 The order impugned has been challenged in the present appeal raising the aforementioned substantial questions of law.

3. At the time of issuance of notice, we had noted that the Department seeks to distinguish the present case from the line of decision rendered in the case of Akash Fashion Prints Ltd. (*supra*). The only question that remains before this Court is as to whether at an appellate stage such an opportunity can be afforded, when the adjudicating officer in the order-in-original confirmed the duty

determined with demand of interest and availed the opportunity to the assessee-respondent to pay duty and interest along with reduced penalty within 30 days.

4. The learned counsel Mr.Rajesh Oza appearing for the Department has stressfully argued that the Tribunal failed to appreciate that this is a case of clandestine removal of excisable goods and on detection of the evasion of duty by the Department, only a part of the duty had been paid after a lapse of about 150 days from the date of demand of duty by the adjudicating authority. He has given details as to when the amount of duty has been paid. The order-in-original is dated June 24, 2003. The duty came to be paid by the assessee-respondent from November 29, 2001 to November 25, 2003. The interest on the penalty of the Director had been paid on February 16, 2012 and, therefore, the assessee-respondent when did not pay the entire amount of duty, penalty and interest within 30 days of the communication of the order-in-original, no benefit can be availed at an appellate stage. The learned counsel further urged that in the order-in-original the option had been granted to the assessee-respondent to pay 25% of the reduced penalty along with duty and interest within 30 days. However, the same had not been paid as was required under the law and, therefore, when the assessee-respondent did not pay the amount as stipulated under the law, the benefit of reduced penalty cannot be made available at the stage of second appeal.

5. Although notice has been duly served, the assessee-respondent chose not to appear and contest. This being a pure and neat question of law, we noted to examine such question firstly by examining the law on the subject.
6. This Court in the case of Akash Fashion Prints Ltd. (*supra*) observed that the lower authorities have not given any option to pay the duty, interest and reduced penalty of 25% of the duty amount within 30 days of the order to the assessee-respondent and thereafter, in number of such appeals, the Tribunal gave an option to the assessee to deposit the entire dues along with 25% of the amount of penalty within a period of 30 days from the date of communication of its order. Some of the relevant observations of this Court in the case of Akash Fashion Prints Ltd. (*supra*) read as under :

“4. When the matter came up for hearing today, the learned counsel for the appellant at the outset prayed for time so as to have the appeal listed along with other matters wherein issue regarding penalty under Section 11AC of the Central Excise Act, 1944 (the Act), is stated to be pending by way of various Tax Appeals. When the attention of the counsel was invited to the order made by the Adjudicating Authority and the fact that the Tribunal had reduced the penalty to 25% of the penalty imposed, the learned counsel once again reiterated request for adjournment. In light of the peculiar facts of the case, the request has been turned down by the Court.

5. Section 11AC of the Act provides for levy of penalty in cases of short-levy or non-levy of duty in certain cases. The first proviso thereunder provides for exception to the main provision by stipulating that where the duty and the interest are 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 under Section 11AC of the Act shall be 25% of the duty so determined; and under second proviso, it is provided 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 a period of thirty days referred to in the first proviso.

6. In the facts of the present case, the duty amount of Rs.1,03,628/= was paid on 07.01.2002, as recorded by the Tribunal, whereas the duty amount was fixed by the Adjudicating Authority on 24.02.2004. Therefore, admittedly, the amount which was paid prior to the raising of demand has to be considered as having been in compliance with the first proviso. Accordingly, the equivalent penalty of Rs.1,03,628/= under Section 11AC of the Act shall stand reduced to 25% if the assessee complies with requirement of second proviso to Section 11AC of the Act. It is in this context that the Tribunal has reduced the penalty amount.

7. In the circumstances, it is not possible to accept the submission on behalf of the appellant that the penalty ought not to have been reduced. The appeal is accordingly dismissed in absence of any substantial question of law."

7. In this case, as noted by the Court, the duty amount of Rs.1,03,628/- was fixed by the adjudicating authority on February 24, 2004. However, such amount was paid by the assessee-respondent on January 07, 2002. As the amount was paid prior to raising of the demand, the Court was of the opinion that the Tribunal was correct in respect of compliance of first proviso to Section 11AC of the Act. It also upheld the Tribunal's finding that equivalent penalty of Rs.1,03,628/- shall stand, in such circumstances, reduced to 25% if the assessee-

respondent complies with the requirement of second proviso to Section 11AC of the Act.

8. In the case of **Swati Chemical Industries Ltd. and others, reported in 2009(248) ELT 421**, as can be noted from the said decision of the Tribunal, the option of reduction of duty was not granted by both, the Commissioner of Appeals as well as adjudicating authority. Instead of remanding the matter, the Tribunal gave an option to the assessee to deposit the entire dues along with 25% penalty within 30 days from the date of communication and in such case held that penalty would stand restricted to 25% of the duty amount. The Tribunal took note of some of the judgments of the High Court as well as Apex Court and gave such an option. Such decision of the Tribunal came to be challenged before this Court by way of Tax Appeal No.963 of 2011. This Court rejected such appeal by observing thus :

*“2. Heard learned counsel Mr.R.J.Oza and perused the order of the Tribunal, which as relied on the decision in case of **Swati Chemical Industries Ltd. & Ors.,reported in 2009(248) ELT 421**.*

*This matter, when was challenged by way of this Appeal before this Court, the order of Tribunal was confirmed in case of **Commissioner of Customs & Excise, Ahmedabad-I v. Akash Fashion Prints Private Limited, reported in 2009 (239) E.L.T 439 (Guj)**. In various judgments of this Court, this view has been upheld. As the Department could not point out any reason for taking contrary view then already taken in earlier Tax Appeals, and with no question of law remain to be determined by this court, the present Tax Appeal fails and is dismissed.”*

9. This Court in the case of ***Exotic Associates v. Commissioner of Central Excise, reported in 2010 (252) ELT 49 (Guj.)***, was confronted with the similar issue. It referred to the decision of various High Courts, particularly the decision of ***K.P. Pouches (P) Limited v. Union of India, 2008 (228) ELT 31 (Delhi)*** and the decision of Punjab and Haryana High Court in the case of ***Commissioner of Central Excise, Rohtak v. J.R. Fabrics Private Limited, 2009 (238) ELT 209 (P&H)***, and allowed the appeal filed by the assessee remanding the matter to the Additional Commissioner inasmuch as the assessee was not given any option to pay duty determined within 30 days from the date of adjudication of the order by observing thus :

*“12. This very question has come up before the Delhi High Court in the case of **K. P. Pouches (P) Limited V/s. Union of India, 2008 (228) ELT 31 (DELHI)** wherein the Court after discussing the controversy between the parties in paragraph 27 of the judgment has observed that to obviate any similar situation from arising in future, the adjudicating authority in its adjudication order under the Act should explicitly set out the options available to the Assessee under Section 11AC of the Act. Once the chances are made known to the assessee and it still does not take advantage of the first Proviso to Section 11AC of the Act, it will be entirely at its own peril. The Court, therefore, held that it would be beneficial both from the point of view of the revenue as well as the assessee, if the options available to the assessee are mentioned in the adjudication order itself.*

13. Pursuant to the above judgment of the Delhi High Court, the Central Excise department has issued Circular on 22.05.2008 wherein it is clarified

that in all the cases wherein penalty under Section 11AC of the Act is imposed, the provisions contained in the first and second Proviso to Section 11AC should be mandatorily mentioned in the order in original itself by the adjudicating authority.

14. The Punjab & Haryana High Court is also faced with the similar situation and in its judgment in the case of **Commissioner of Central Excise, Rohtak V/s. J.R. Fabrics Private Limited, 2009 (238) ELT 209**, the Court took the view that it is appropriate to notice that the period in question is 28.07.2001 to 28.02.2002 and there is no dispute that the proviso added by the Act No.X of 2000 is made applicable with effect from 12.05.2000, which provides that an amount equal to 25% of the amount of duty of excise be paid as penalty if the amount of duty of excise is paid within 30 days from the date of communication of the order by the Central Excise Officer. In that case, the order in original also imposes penalty which is equivalent to the amount of duty of excise assessed by the adjudicating authority. The assessee was, however, not given any option as to whether he wants to pay the duty within 30 days from the date of the adjudication order. The Court, therefore, took the view that the conclusion reached by the Tribunal that the assessee was liable to pay penalty to the extent 25% of the amount of duty of excise demanded by the officer concerned. While arriving at this conclusion, the Court has also considered the decision of the Apex Court in the case of Dharmendra Textile (Supra) and observed that the provisos first and second which were added in the year 2000 were not the subject matter of consideration before their Lordships in Dharmendra Textile Processor's case (Supra). The Court, therefore, did not find any substance in the contention raised on behalf of the revenue, especially, in the face of express provision made by the four provisos in the year 2000.

15. Considering the above judgment of the Delhi High Court as well as Punjab & Haryana High Court and further considering the impugned order of the Tribunal, we are of the view that the matter

requires to be considered afresh in light of the above decisions of the Delhi High Court as well as Punjab & Haryana High Court. It is an admitted position that the assessee was not given any option as to whether he wants to pay the duty demand within 30 days from the date of the adjudication order and in that case, he has to pay only 25% of the penalty. Since this aspect was not considered by the authorities below, we are of the view that interest of justice would better be served if the matter is remanded to the adjudicating authority with a direction to frame an order denovo after giving the assessee an option to pay duty amount within 30 days by making it explicitly clear in the order itself that if the assessee wants to avail such option, he is permitted to do so.

16. In the above view of the mater, we allow the appeal filed by the assessee for statistical purpose and remand the matter to the Additional Commissioner to pass a fresh order in light of the observations made hereinabove. It is, however, made clear that looking to the peculiar facts of the case, the Court has adopted this course and it shall not be treated as precedent."

10. This very issue also came to be decided in the case of ***Commissioner of Excise and Customs, Surat-I v. Harish Silk Mills, reported in 2010 (255) ELT 393 (Guj.)***. The question raised before this Court was that the adjudicating authority was not under statutory obligation to spell out in the order the availability of the benefit of reduced penalty prescribed under Section 11AC of the Act and give an option to the assessee made liable for penalty under this provision. The Court held thus :

"10. However, Mr.Oza has made two more submissions in this Tax Appeal. He has emphatically stated that the respondent has not complied with pre-condition for availment of benefit of reduced

penalty under proviso to Section 11AC of the Central Excise Act, 1944. As per the first proviso, the duty amount was not paid with interest and even the reduced penalty of 25% is not deposited by the respondent within 30 days from the date of such determination, as required under second proviso to Section 11AC of the Act. So far as second issue is concerned, Mr.Oza submitted that the adjudicating authority is not under any statutory obligation to set out in its order the availability of benefit of reduced penalty prescribed under proviso to Section 11AC of the Central Excise Act and to give an option to such person liable for penalty under that Section. Both these issues were dealt with by this Court in Tax Appeal No.572 of 2007 with tax Appeal No.869 of 2007 decided on 18.11.2009. It is also important to note that the adjudicating authority has not calculated the interest neither in the order-in-original nor even thereafter. It is, therefore, too much to expect from the respondent assessee to pay the interest alongwith the duty amount in absence of such calculation of interest. As far as statutory obligation of the adjudicating authority is concerned, the Central Excise Department itself has issued Circular on 22.5.2008 wherein it is clarified that in all cases wherein penalty under Section 11AC of the Act is imposed the provisions contained in the first and second proviso of Section 11AC should be mandatorily mentioned in the order-in-original itself by the adjudicating authority. It is, therefore, not open for the revenue to agitate this issue before the Court in contradiction of the Circular issued by the Central Excise Department. This Court in **Messers Exotic Associates (Supra)** has directed the adjudicating authority to pass a fresh order giving option to the assessee to pay the duty amount within 30 days by making it explicitly clear in the order itself that if the assessee wants to avail such option he is permitted to do so. In the case on hand since the duty amount has already been paid by the respondent assessee and if the interest and/or reduced penalty of 25% were not paid by the respondent assessee, the adjudicating authority may send a communication to the respondent assessee indicating therein that the particular

amount of interest and/or 25% of the penalty of the duty amount is not paid by the respondent assessee and hence if the assessee wants to avail the benefit of the reduced penalty of 25%, such amount of interest and/or penalty of 25% should be paid within 30 days from the date of receipt of such communication, failing which they would be liable to pay penalty under Section 11AC equivalent to the amount of duty.

11. Before parting, we observe that the order passed by the Tribunal cannot be said to be a non-speaking and non-reasoned order. The authorities cited by Mr.Oza in support of his submission that a non-speaking order is passed by the Tribunal and hence it deserves to be dismissed, were duly considered by us and we are of the view that they are not applicable to the facts of the present case. The Tribunal while dismissing the Departmental Appeal observed that the quantum of the penalty is to the extent at around 25% of the duty amount and does not call for any interference. The Tribunal is taking consistent view in the matters of penalty levied under Section 11AC and when the duty amount is paid before issuance of show cause notice, the penalty is reduced to 25% of the duty amount. If the duty amount with interest is not paid in time and even reduced penalty of 25% of the duty amount is not paid in time and option is not given to the respondent assessee, we have taken the view that such option should be given to the assessee and period of 30 days would commence from the date of giving such option. In this view of the matter, no interference is called for in the order of the Tribunal."

11. This Court in Miscellaneous Civil Application No.11 of 2013 in Tax Appeal No.963 of 2011 has noted that this Court has followed the consistent view that the assessee is required to be given option to pay the duty determined with interest and 25% penalty within stipulated period of 30 days from the date of adjudication of the order and if

so paid, the amount of penalty would be reduced to 25% of the amount of duty. However, when such an option is not given, the matters have been remanded to the concerned authorities and the period of 30 days is directed to be considered from the date of availing such option.

12. In the said Tax Appeal, this Court remanded the matter to the Tribunal and it also noted that none of the authorities below had availed any option to the assessee to pay the duty determined with interest and penalty of 25% of the duty within 30 days. The Tribunal also was of the opinion that the duty determined under Section 11AC of the Act was subsequent to the year 2000 and, therefore, the case of the assessee was falling under the explanation to Section 11AC of the Act and, therefore, the Court deemed it fit not to review the order of the Tribunal which had availed option to the respondent-assessee.
13. The Bombay High Court in the case of ***Commissioner of Central Excise, Raigad v. Castrol India Ltd., reported in 2012 (286) ELT 194 (Bom.)***, was examining the question whether the Tribunal was justified in directing the assessee to pay 25% of the penalty levied under Section 11AC within 30 days from the date of communication of the order passed by the Tribunal. When the first and the second proviso to Section 11AC specifically provides that the benefit of reduced penalty at the rate of 25% shall be available only if the duty determined under Section 11A(2) of the Act, the interest payable thereon under Section 11AB and

penalty at the rate of 25% of the duty determined under Section 11A(2) of the Act have been paid within 30 days from the date of communication of the order-in-original determining the duty under Section 11A(2) of the Act. The Court examined at length various aspects of the Central Excise Act, 1944. There was no dispute with regard to applicability of Section 11AC as amended by the Finance Act, 2000 with effect from May 12, 2000 to the facts of the case of the assessee-respondent before the Bombay High Court. The assessee had not paid 25% penalty imposed under Section 11AC within 30 days from the date of communication of the order-in-original under Section 11A(2) of the Act. The assessee instead of paying 25% of the penalty within stipulated period had preferred an appeal against imposition of penalty under Section 11AC of the Act and in such circumstances, when the Tribunal had permitted the assessee to pay 25% of the penalty beyond the time prescribed under the proviso to Section 11AC of the Act, the Bombay High Court held this impermissible under the law by holding thus :

“22. Thus, the legislature while mandatorily imposing penalty under Section 11AC equal to 100% of the duty determined under Section 11A(2), provides an incentive to the assessee covered under Section 11AC by providing that if the duty determined under Section 11A(2) together with interest payable under Section 11AB is paid within the stipulated time, then, the penalty payable would be 25% determined, subject to the condition that 25% of the penalty is also paid within the time stipulated therein. Section 11AC neither requires the Central Excise Officer to determine the quantum of 25% penalty nor does it require the Central Excise Officer to communicate the availability of the option under Section 11AC. Once

the duty is determined under Section 11A(2) and 100% penalty is imposed under Section 11AC, it is for the assessee to avail the incentive by paying the duty, interest and 25% of the penalty within the time stipulated under the section. If the assessee fails to fulfill the conditions set out in the first and the second proviso to Section 11AC within the time stipulated therein, then, the incentive is lost and the assessee is required to pay penalty at 100%. Therefore, in the absence of any obligation cast upon the Central Excise Officer under Section 11AC to determine penalty at 25%, the argument that if the Central Excise Officer fails to determine 25% penalty, the appellate authority can determine 25% penalty and permit the assessee to pay penalty within thirty days from the date of communication of the order passed by the appellate authority cannot be accepted.

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26. By comparing Section 11AB with Section 11A(2B) and (2C) and also by referring to Section 11AC as substituted with effect from 8th April, 2011, it was contended by the counsel for the assessee that it was never the intention of the legislature to levy 100% penalty under Section 11AC. We see no merit in the above contention because, firstly sub-section 2B and 2C to Section 11A are applicable to cases not involving fraud, collusion, suppression of facts etc, whereas Section 11AC applies to cases where there is intention to evade payment of duty on account of fraud, collusion or any willful misstatement or suppression of facts etc. Secondly, to attract Section 11AC criminal intent or mens rea is a necessary constituent, where as, under Section 11A, the criminal intent or mens rea is not the necessary constituent. Therefore, the provisions of Section 11AC cannot be interpreted with reference to the provisions contained in Section 11A of the 1944 Act. Similarly, the Section 11AC as substituted with effect from 8th April 2011 does not support the case of the assessee because, even under those provisions the penalty imposable under Section 11AC is the penalty equal to the duty determined under Section 11A(10) i.e. 100% of the duty sought

to be evaded and the incentive to pay lesser penalty is also given in those provisions subject to the conditions set out therein. Thus, under Section 11AC as substituted with effect from 12th May 2000 as also substituted with effect from 8th April 2011, the penalty mandatorily imposable is 100% of the duty sought to be evaded, but if the assessee pays the duty sought to be evaded with interest and penalty at the rates specified therein within the stipulated time, then, the balance penalty would not be payable.

27. Moreover, the third and the fourth proviso to Section 11AC make it further clear that, it is only when the duty determined as payable under Section 11A(2) is increased by the appellate authority or the Court as the case maybe, then, the twenty five per cent of the increased penalty has to be paid within thirty days of the communication of the order by which such increase in the duty take effect. Thus, the appellate authority under the fourth proviso to Section 11AC is authorised to permit the assessee to pay penalty beyond the time prescribed under Section 11AC only in respect of the increased penalty required to be paid on account of the increase in the duty determined as payable under Section 11A(2) in the appellate proceedings and not in any other cases. Therefore, when the liability to pay 25% penalty under the first and the second proviso to Section 11AC is required to be paid within thirty days from the date of communication of the order the Central Excise Officer determining duty under Section 11A(2), it would not be open to the appellate authority or the Court to direct the assessee to pay 25% penalty beyond the date stipulated in the first and the second proviso to Section 11AC. For all the aforesaid reasons, we find it difficult to endorse the contrary views expressed by the Delhi High Court, P & H High Court and the Gujarat High Court in the cases referred to by the counsel for the assessee."

14. The Delhi High Court in the case of ***Sri Sai Enterprises v. Commissioner of Central Excise***, reported in

2013 (288) ELT 40, was examining the question whether the assessee, who had not taken the advantage of first proviso to Section 11AC of the Act and had not paid duty or interest, can be availed the benefit of reduced percentage of penalty.

In a matter before the Delhi High Court, the order-in-original did not give option to pay duty and interest along with 25% penalty to the assessee. The assessee on its own, after receipt of the order, did not approach the Assessing Officer making a request for giving such option and preferred an appeal against such order without deposit of duty and interest. The Court, therefore, held that the conduct of the assessee was indicative that he never wanted to avail the benefit of first proviso to Section 11AC of the Act. The assessee's plea that they were compelled to pay duty due to the fault of the Department was negated by the Court. The Court also distinguished the decision rendered in the case of K.P. Pouches (P) Ltd. (*supra*). The Delhi High Court noticed that in the case of K.P. Pouches (P) Ltd. (*supra*), the assessee had already paid the full duty before issuance of show cause notice and, therefore, was of the opinion that the assessee who had paid the duty in advance cannot be denied the benefit of Section 11AC of the Act. The Court noted thus :

“9. The Court also noticed that the order in original did not refer to Section 11AC and in these circumstances in paragraph 27 of the judgment it was observed as under:-

“27. To obviate any similar situation from arising in future, we are of the opinion that in its adjudication order the

adjudicating authority under the Act should explicitly state the options available to the Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself.”

10. Pursuant to the aforesaid observations, the respondent had issued instructions vide file No. 208/07/2008-CX-6 dated 22nd May, 2008, which reads as under:-

“It is seen that these provisos to Section 11AC of the Act have been specifically inserted to ensure speedy recoveries of the disputed amount. It is an incentive given to the assessee that if he pays the duty amount along with interest, the penalty is reduced to 25% of the duty. This provision is beneficial to the Department as well as the assessee as rightly pointed out by Delhi High Court and therefore, the assessee should be made aware of the option available to him.”

11. Subsequently, the tribunal issued circular No. 898/18/09-CX dated 15th September, 2009. For the sake of convenience, paragraphs 2 and 3 of the said circular are reproduced:-

“2. The matter has been examined. The provisions relating to reduction of penalty to 25% are contained in proviso (1) to (4) of Section 11AC. In terms of proviso (1) and (2), a penalty imposed under Section 11AC can be reduced to 25% on fulfillment of following conditions.

i. Duty determined under Section 11A(2) and interest payable thereon has been paid within 30 days.

ii. The said period of 30 days is calculated from the date of communication of the order passed by a Central Excise Officer determining the duty.

iii. The reduced 25% penalty is also paid within 30 days of the date of communication of the order passed by the Central Excise Officer.

3. From the above it is clear that in order to avail the benefit of 25% penalty, the duty, interest and penalty are required to be paid within 30 days of communication of the order passed by the adjudicating authority. Further, the reading of proviso (4) would also support this interpretation because the said proviso stipulate that wherever duty amount is increased at any appellate stage, in that case in order to avail the benefit of 25% penalty, the assessee is required to pay differential amount within 30 days of the passing of the order by the appellate authority. A combined reading of all the 4 proviso would, therefore, make it clear that the benefit of 25% penalty is applicable only when the assessee has paid duty, interest and the reduced penalty within 30 days of communication of the order passed by the adjudicating authority. However, if the penalty amount is increased at the appellate stage, in that case the 25% of differential amount of penalty can be paid within 30 days of communication of said appellate order. Therefore, the view taken by the Commissioner (Appeal) is not as per the provision of law.”

15. Allahabad High Court in the case of **Commissioner of Customs and Central Excise v. Majestic Auto Ltd., reported in 2013 (289) ELT 95 (All.)**, examining the powers of the Appellate Tribunal to reduce the penalty amount under Section 11AC of the Act, which is less than the amount of penalty specified under Section 11AC of the Act, held that where the penalty is leviable under Section 11AC on fulfillment of condition as enumerated under Section 11AC of the Act, the penalty equal to the amount of duty determined is mandatory and there is no discretion with the Tribunal to reduce the said penalty. Penalty equal to the duty would need to be imposed once Section 11AC is made applicable. The Allahabad High

Court examined various judgments on the Issue and held thus :

“13. From the proposition as laid down in above cases, the ratio deducible is that the quantum of the penalty equal to the duty determined as contemplated by Section 11AC is mandatory and there is no discretion in the adjudicating authority or the Tribunal to impose different amount of penalty. In a case where penalty is leviable under section 11AC on fulfilment of the conditions as enumerated in Section 11AC, the penalty equal to the amount of duty determined is mandatory and there is no discretion in the Tribunal to reduce the said penalty. However, as laid down by the apex Court in Union of India Vs. Rajasthan Spinning and Weaving Mills (supra), the penalty under section 11AC can be imposed only when conditions mentioned in Section 11AC exist. The authorities have no discretion in fixing the quantum of penalty and penalty equal to the duty must be imposed once section 11Ac is made applicable.”

16. What can be deduced from the discussion hereinabove is that the provision of a statute when interpreted in a true spirit, it does contemplate payment of duty and interest as well as penalty within 30 days from the communication of the order passed by the adjudicating authority along with 25% of the penalty amount to avail the benefit of 25% reduced penalty. It also culls out from proviso (4) to Section 11AC of the Act that wherever duty amount is increased at an appellate stage, for availing the benefit of 25% reduced penalty, the assessee needs to pay differential amount of duty within 30 days of crystallisation of such amount.
17. At this stage, a note is to be made of the instructions issued by the Department vide File No.208/07/2008-CX-6 dated May 22, 2008. This talks of making the assessee

aware of the proviso to Section 11AC of the Act. This being an incentive given to the assessee and being beneficial for both, Department and the assessee, the assessee if pays duty amount along with interest, the penalty is reduced to 25% of the duty and, therefore, such instruction specifies that this proviso having been inserted for speedy recovery of the disputed amount, the awareness needs to be created.

A note also need to be taken of the circular dated September 15, 2009 being Circular No.898/18/09-CX, which interprets the provision relating to reduction of penalty to 25% contained in provisos (1) to (4) of Section 11AC of the Act, which requires that on determination of duty under Section 11A(2) of the Act, both the duty and interest need to be paid within 30 days. Hence, calculation of 30 days is from the date of communication of the order passed by the Central Excise Officer determining the duty and the reduced 25% penalty is also to be paid within 30 days from the date of such order passed by the Central Excise Officer. It also further notes that for availing benefit of reduced percentage of penalty of 25%, the assessee needs to pay duty, interest and reduced penalty within 30 days of communication of the order and in the event of any change and direction for enhanced amount of payment of duty at an appellate stage, such differential amount would need to be paid by the assessee within 30 days from the date of passing of the order.

18. It is fervently argued before us that the Bombay High Court rightly held that Section 11AC of the Act does not

require the Central Excise Officer to determine the quantum of 25% penalty nor does it require to communicate the availability of the option under Section 11AC. The onus is upon the assessee to pay duty, interest and 25% of the penalty within the time stipulated under the provision and if he fails to fulfill the condition set out under the first and second provisos within the time stipulated, then the incentive is lost and he is required to pay 100% penalty.

19. It is also contended that in the cases where the intention to evade the payment of duty is made out on account of fraud, collusion or any willful misstatement, Section 11AC would apply. Under Section 11AC of the Act as substituted with effect from May 12, 2000, penalty imposable is 100% of the tax duty evaded. However, as mentioned hereinabove, if the duty and interest along with penalty at the rate specified therein is paid within the stipulated time period, the balance penalty is permitted not to be paid by way of an incentive. We are conscious of the fact that this being the provision embedded in the statute itself, nobody can be permitted to plead ignorance of the law. We are also aware that this being the law and intent of legislation being also very clear all concerned are expected to know the law. However, rather than allowing too technical an approach of Revenue, we need not be oblivious of stark reality.
20. At the same time, it would not be too much to expect the revenue authorities to clearly spell out the fulfillment of such requirements in the order itself. The Circular issued by the CBDT shall need to be regarded at this stage,

which also noted that the provision has been made for the speedy recovery of the amount in the interest and benefit of both, the Department and the assessee. Thus, if the duty and interest are to be paid along with reduced rate of penalty within the stipulated period. This Court in a number of decisions has also taken a stand that if both the authorities have failed to avail the option of reduced penalty i.e. the order-in-original and Appellate Commissioner, the Tribunal can surely avail such benefit at the appellate stage.

In the instant case, however, what can be noted is that in the order-in-original itself, the adjudicating authority had made available such an option to the assessee by spelling out in no unclear terms that the duty and interest if are paid along with reduced rate of penalty, the penalty shall be worked out at the reduced rate of 25%. The petitioner, however, has chosen not to pay either the duty or interest or the reduced rate of penalty and instead challenged such order before the Commissioner, who of course set aside the order of imposition of penalty on the respondent-Unit and a personal penalty imposed upon the Director. Insofar as duty with interest is concerned, it confirmed the same. At this stage also, no amount came to be paid by the respondent-assessee and it challenged the impugned order of Appellate Commissioner before the Tribunal, which not only confirmed the duty and interest, but also confirmed the imposition of penalty and while so doing it, it extended the benefit of reduced penalty by following the decision rendered in the case of Akash Fashion Prints Ltd. (supra). The Tribunal has committed an error, in our

opinion, by applying the ratio of Akash Fashion Prints Ltd. (*supra*). This Court in Akash Fashion Prints Ltd. (*supra*) when found that none of the revenue authorities being order-in-original or Appellate Commissioner availed the option to pay reduced amount of penalty within the stipulated period and in such background the Tribunal gave an option to deposit the entire duty and interest along with reduced penalty, the Court upheld such stand of the Tribunal. The Court took note of the first and second provisos to Section 11AC and also noted that the duty amount had been paid by the assessee two years prior to the adjudicating authority finalising the duty amount and thus, the amount so paid prior to raising of the demand was considered due compliance of the first proviso and, therefore in such circumstances, this Court upheld the order of the Tribunal which permitted the payment of reduced rate of penalty at an appellate stage.

21. In the instant case, neither the duty amount nor the interest has been paid either prior to raising of the demand or after the demand had been finalised in the order-in-original. It is also not the case that the order-in-original does not spell out the availment of reduced rate of penalty in the event of payment of both, duty and interest, within the stipulated period of 30 days. Assessee paid the duty, interest and penalty on January 18, 2012 pursuant to an interim direction, however, payment at that stage surely was not in consonance with the spirit and intent of provision as entire round of litigation before Appellate Commissioner was already resorted to by then, despite a clear indication in order-in-original. In such circumstances, at

the appellate stage, the Tribunal has committed an error of having made available the option of reduced penalty. This is not only contrary to the spirit of law on the subject, but it is a wrong application of the ratio laid down in the case of Akash Fashion Prints Ltd. (*supra*) to the facts of the case of the assessee-respondent.

22. For the foregoing reasons, the Tax Appeal, therefore, is allowed. The impugned order of Tribunal availing option of reduced amount of penalty is quashed. Rule is made absolute to the extent above. No order as to costs.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

Aakar