

(2012) 06 BOM CK 0070

In the Bombay High Court

Case No : Central Excise Appeal No. 22 of 2012

The Commissioner of Central Excise, Raigad
Commissionerate, 4th Floor, Kendriya Utpad Shulka Bhavan,
Plot No.1, Sector 17, Khandeshwar, New Panvel, Navi Mumbai
-410 206

APPELLANT

Vs

M/s. Castrol India Ltd., A-8/A-14, MIDC, Patalganga, Dist.
Raigad

RESPONDENT

Date of Decision : 25-06-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11 AC, 11A, 11A(10), 11A(2), 11A(2B)

Citation : (2012) 114 BOMLR 2592 : (2012) 192 ECR 97

Hon'ble Judges : M.S. Sanklecha, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : Pradeep S. Jetly and J.B. Mishra, for the Appellant; Anupam Dighe, Avikshit Moral, Arjun Shrivastav, advocates instructed by . India Law Alliance Respondent and Mr. M.H. Patil, Amicus Curiae, for the Respondent

Judgement

J.P. Devedhar, J.—This appeal filed u/s 35G of the Central Excise Act, 1944 ["1944 Act" for short] was admitted on 8th February, 2012 on two substantial questions of law. However, at the hearing of the appeal, the aforesaid substantial questions of law have been by consent reframed into one substantial question of law as follows:

Whether the CESTAT was justified in directing the assessee to pay 25% of the penalty levied u/s 11AC within 30 days from the date of communication of the order passed by the Tribunal, when the first and second proviso to Section 11AC specifically provide that the benefit of reduced penalty at 25% shall be available only if the duty determined u/s 11A(2), interest payable thereon u/s 11AB and penalty at 25% of the duty determined u/s 11A(2) has been paid within thirty days from the date of communication of the order of the Central Excise Officer determining duty payable u/s 11A(2) of the 1944 Act ?

Since the above question has been raised in several appeals, we requested Mr. M.H. Patil, Advocate to assist the Court as Amicus Curiae. Accordingly, we have heard Mr. Jetly, counsel for the appellant-revenue, Mr. Dighe, counsel for the respondent-assessee and Mr. M.H. Patil as Amicus Curiae.

2. The assessee is a manufacture of excisable goods. The assessee inter alia during the year 2000 had availed Modvat credit of central excise duty paid on inputs used in the manufacture of the final products under Rule 57AB of the Central Excise Rules, 1944 ["1944 Rules" for short.

3. In the year 2002, it was noticed by the departmental audit party that during November-December, 2000 the assessee had actually availed modvat credit amounting to Rs.31,53,034/-as against the admissible credit amounting to Rs.3,40,861/-. Thus, the excess credit taken by the assessee during the aforesaid period was to the tune of Rs.28,12,173/-.

4. On being pointed out by the Central Excise Authorities regarding the availment of excess credit during the period from November, 2000 to December, 2000, the assessee on 21st March, 2002 paid the excess credit availed by reversing the credit to the extent of Rs.28,12,173/-.

5. As the excise authorities were of the opinion that the assessee had availed the excess credit with an intention to evade payment of duty, a show cause notice was issued on 8th January, 2003 calling upon the assessee to show cause as to why the excess credit availed by them should not be disallowed and the amount deposited on 21st March, 2002 should not be appropriated under Rule 57AH(2) of the 1944 Rules read with the proviso to Section 11A of the 1944 Act. By the said show cause notice, the assessee was also called upon to show cause as to why interest at the appropriate rate should not be recovered from them under Rule 57AH(1) of the 1944 Rules and Section 11AB of the 1944 Act. The assessee was also called upon to show cause as to why penalty should not be imposed u/s 11 AC of the 1944 Act and Rules 57AH(2) of the 1944 Rules.

6. After the issuance of the show cause notice dated 8th January, 2003, the assessee on 31st March, 2003 paid interest amounting to Rs.8,24,364/-on the excess credit availed by the assessee. Thereafter, in its reply to the show cause notice, the assessee contended that the excess credit was taken through oversight and due to the clerical error / punching error and that as soon as the error was pointed out, the excess credit has been reversed even before the issuance of the show cause notice and, therefore, the question of appropriating the credit reversed as duty or imposing penalty u/s 11AC of the 1944 Act does not arise.

7. Rejecting the contention of the assessee, the Commissioner of Central Excise, passed an Order in Original on 12th November, 2003 u/s 11A(2) of the 1944 Act holding that the excess credit of Rs.28,12,173/-was taken with an intention to evade payment of duty and, therefore, the credit of Rs.28,12,173/-reversed by the assessee was liable to be appropriated against the credit denied and interest

of Rs.8,24,364/-paid by the assessee was liable to be appropriated against interest payable u/s 11AB of the 1944 Act. As the excess credit was availed with an intention to evade duty, the adjudicating authority held that Section 11AC was attracted and accordingly levied mandatory penalty of Rs.28,12,173/-(equal to the duty confirmed) u/s 11AC of the 1944 Act.

8. The assessee filed an appeal before the CESTAT to challenge the penalty imposed u/s 11AC of the Act. The CESTAT by its order dated 19th May, 2011 held that the finding recorded by the Commissioner of Central Excise to the effect that the excess credit was taken by the assessee with an intention to evade the duty having not been challenged, the decision of the Commissioner in holding that Section 11AC of the 1944 Act is not attracted in the present case cannot be faulted. However, the CESTAT following the decision of the Delhi High court in the case of K.P. Pouches (P) Ltd. Vs. Union of India (UOI), held that since the option for pay the reduced penalty under the proviso to Section 11AC has not been given in the adjudication order dated 12th November, 2003, the benefit of reduced penalty u/s 11AC of the Act cannot be denied to the assessee. Accordingly, the CESTAT reduced the penalty to 25% and directed the assessee to pay 25% of the penalty imposed within 30 days of the communication of the order of CESTAT dated 19th May, 2011, failing which the assessee would be liable to pay 100% of the penalty. Challenging the aforesaid order of CESTAT, the revenue has filed the present appeal.

9. Mr. Jetly, learned counsel appearing on behalf of the revenue submitted that once the demand raised by invoking the larger period of limitation is confirmed, then, penalty u/s 11AC is mandatorily leviable equal to the duty determined u/s 11A(2). Relying on the Board Circular No. 898 dated 15th September, 2009, Mr. Jetly submitted that the benefit of paying 25% of the penalty instead of paying 100% penalty is available only when duty confirmed u/s 11A(2) with interest payable thereon u/s 11AB and 25% of the total penalty imposed u/s 11AC is paid within 30 days from the date of communication of the order passed by the Central Excise Officer. In the present case, admittedly the assessee has not paid 25% of the penalty imposed u/s 11AC within 30 days from the date of communication of the order passed by the Central Excise Officer and, therefore, the assessee is liable to pay penalty at 100%.

10. Relying on a decision of this Court in the case of The Commissioner of Central Excise V/s. M/s. Viraj Alloys Ltd. (Central Excise Appeal No.64 of 2005) decided on 13th October, 2010, counsel for the revenue submitted that if the demand confirmed u/s 11A(2) with interest and penalty at 25% of the total penalty imposed is not paid within 30 days from the date of receipt of the Order in Original, then, the benefit of reduced penalty under the first proviso to Section 11AC would not be available to the assessee. Where the assessee fails to pay 25% of the penalty imposed u/s 11AC along with duty and interest within 30 days of communicating the order determining the duty, it is not open to the CESTAT to enlarge the scope of Section 11AC and direct the assessee to pay

25% of the penalty within 30 days from the date of communication of the order passed by the CESTAT. Accordingly, the counsel for the revenue submitted that the order of CESTAT which is contrary to the provisions contained in Section 11AC of the 1944 Act must be held to be bad in law.

11. Mr. Patil, appearing as Amicus Curiae and Mr. Dighe, learned counsel for the assessee submitted that although this Court in the case of Viraj Alloys Ltd. (supra) has held that the benefit of paying the reduced penalty is available only if the duty with interest and reduced penalty is paid within 30 days from the date of receipt of the quantified demand based on the order in original, the said decision is based on the concession made by the counsel for the assessee therein and, therefore, the said decision cannot be said to lay down any binding precedent. In any event, it is submitted, that as per the aforesaid decision it was obligatory on the part of the adjudicating authority to make it explicitly clear in the operative part of the order that the quantified duty liability along with interest u/s 11AB, if paid within 30 days from the date of receipt of quantified demand, then, penalty payable would be 25% of the duty liability confirmed in the order passed u/s 11A(2). In the present case, the adjudication order passed on 12th November, 2003 does not comply with the aforesaid direction of this Court and, therefore, no fault can be found with the decision of the CESTAT in directing the assessee to pay 25% of the penalty within 30 days from the date of communication of the order of CESTAT.

12. Tracing the history of Section 11AC as introduced with effect from 28th September, 1996 up to its substitution by Finance Act, 2011 with effect from 8th April, 2011 and tracing the history of Section 11A(2B) and (2C) introduced with effect from 11th May, 2001 as amended from time to time, it is stated in the written submissions filed on behalf of the assessee as follows:

(a) the four provisos to Section 11AC inserted from 12/5/2000 indicate that prompt payment of duty and interest was beneficial to both, the revenue as well as the assessee, and, the same has to be read liberally;

(b) the amendment from 11/5/2001, by inserting sub-sections (2B) and (2C) read with further amendment thereto from 14/05/2003 would substantiate that even if duty is not paid or short paid, dispensation with issuance of show cause notices and adjudication proceedings, was extended to cases where the department detects such short levy / non levy, if such short levy or non levy is paid along with interest u/s 11A(2B) of the 1944 Act within 30 days;

(c) Although said sub-sections (2B) & (2C) of Section 11A were applicable to cases not involving fraud, collusion, suppression of facts, etc. a provision has been made for payment of duty along with interest, without levying penalty, even after detection by the Central Excise Officers;

(d) payment of duty (entire amount or part of the admitted amount) along with interest, and 25% penalty within 30 days from the receipt of show cause notice was brought into effect from 13/7/2006 which substantiates the intention of

Government not to levy 100% penalty but levy 25% penalty.

13. Regarding the scope of the first and the second proviso to Section 11AC, it is stated in the written submissions filed on behalf of the assessee as follows:

the first proviso gives a concession in payment of 100% penalty, which is determined u/s 11AC, if the noticee pays the duty as determined and interest thereon within 30 days of communication of the order. The said proviso reduces the penalty to 25%. The second proviso inter alia requires the noticee to pay the amount of penalty so determined within a period of 30 days to avail the benefit of reduced penalty. On plain reading it makes clear that it is the responsibility of the adjudicating officer to (i) determine 100% penalty u/s 11AC and mention the same in the order (ii) determine the availability of 25% penalty to the noticee for 30 days in the event the payment as contemplated under first proviso and 25% penalty, as determined, is paid within 30 days. In the absence of the second stage determination of the 25% penalty for 30 days, the only determined penalty would be 100% penalty u/s 11AC without giving benefit of mandatory proviso to Section 11AC. In which case, based on the plain reading of the second proviso, it will become necessary for the noticee to pay 100% determined penalty to avail the benefit of reduced penalty of 25% (which is not determined in the order). This could not be the legislature's intent as it will give not only absurd result but also give undue hardship when the noticee desires to make the payment. In view of what is stated above, it is submitted that it is mandatory on the part of the adjudicating authority to determine the 2 stage penalty as stated above in the order and communicate the same to the noticee.

Accordingly, it is contended that in the absence of determination of 25% penalty, 100% of penalty could not be demanded from the assessee.

14. It is further contended on behalf of the assessee that u/s 35C of the 1944 Act, the Appellate Tribunal has the power to modify and / or remand back to the original authority and / or to give directions as it may deem fit. In the present case, in the absence of determining the second stage penalty by the adjudicating authority, the Tribunal was entitled to cure the irregularity in the order of the adjudicating authority by determining the second stage penalty contemplated u/s 11AC and on such determination and its communication to the assessee, the assessee was entitled to pay the same within 30 days of the communication of the said order of the Tribunal. In support of the above contention reliance is placed on the decision of the Delhi High court in the case of K.P. Pouches (P) Ltd. (supra), decision of the Punjab & Haryana High court in the case of Commissioner of Central Excise V/s. J.R. Fabrics (P) Ltd. reported in (2009) 238 ELT 209 (P&H), decision of the Gujarat High court in the case of Commissioner - Central Excise and Customs Vs. Bhagyoday Silk Industries, and also other decisions of Punjab & Haryana High Court and Gujarat High Court wherein similar view has been taken.

15. We have carefully considered the rival submissions.

16. Before dealing with the merits of the rival submissions, it would be appropriate to quote Section 11AC as originally introduced as well as Section 11AC as amended from time to time.

Section 11AC as inserted by the Finance (No.2) Act 1996 with effect from 28th September, 1996

11AC - Penalty for short-levy or non-levy of duty in certain cases. Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined.

Provided that where 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.

Section 11AC as amended by the Finance Act, 2000 with effect from 12th May, 2000.

Section 11AC - Penalty for short-levy or non-levy of duty in certain cases -Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intention to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of Section 11A, shall also be liable to pay a penalty equal to the duty so determined :

Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon u/s 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be,

the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation -For the removal of doubts, it is hereby declared that

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President.

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

Section 11AC as substituted by Finance Act, 2011 with effect from 8th April, 2011.

Section 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 short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful mis statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined.

(b) where details of any transaction available in the specified records, reveal that any duty of excise has not been levied or paid or short-levied or short-paid or erroneously refunded as referred to in sub-section (5) of section 11A, 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 fifty per cent of the duty so determined.

(c) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon u/s 11AA in respect of transactions referred to in clause (b) is paid within thirty days of the date of communication of 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.

(d) 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 penalties and interest payable 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 or interest so modified.

Explanation -For the removal of doubts, it is hereby declared that in a case where a notice has been served under sub-section (4) of section 11A and subsequent to issue of such notice, the Central Excise Officer is of the opinion that the transactions in respect of which notice was issued have been recorded in specified records and the case falls under sub-section (5), penalty equal to fifty per cent of the duty shall be leviable.

(2) Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined under sub-section (10) of section 11A by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount.

17. The dispute in the present case relates to the liability to pay penalty imposed u/s 11AC as per the Order in Original passed by the adjudicating authority on 12th November, 2003 and hence we are required to construe the provisions of Section 11AC as it stood on 12th November, 2003 i.e. prior to the substitution of Section 11AC by Finance Act, 2011.

18. Section 11AC as amended by Finance Act, 2000 with effect from 12th May, 2000, which is applicable to the facts of the present case, inter alia provides that where a person contravenes any of the provisions of the 1944 Act or the rules made thereunder with an intention to evade payment of duty, then, such person who is liable to pay duty determined u/s 11A(2) shall also be liable to pay a penalty equal to the duty so determined. The question as to whether the penalty leviable u/s 11AC is mandatory or discretionary has been considered by the Apex Court in the case of Union of India V/s. Dharmendra Textile Processors reported in 231 ELT 3 (SC) as also in the case of Union of India V/s. Rajasthan Spg. & Wg Mills reported in 238 ELT 3 (SC). The dictum laid down by the Apex Court in the aforesaid cases is that once it is held that Section 11AC is attracted, then, the concerned authority would not have any discretion and penalty must be imposed equal to the duty determined u/s 11A(2) of the 1944 Act. In other words, in cases where Section 11AC applies, the penalty equal to 100% of the duty determined u/s 11A(2) has to be mandatorily imposed and there is no discretion left with the adjudicating authority to impose penalty, less than 100% of the duty confirmed u/s 11A(2) of the 1944 Act.

19. The first proviso inserted to Section 11AC with effect from 12/5/2000, however, provides that where the duty determined u/s 11A(2) and interest payable thereon u/s 11AB is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, then the amount of penalty liable to be paid by such person u/s 11AC shall be 25% of the duty so determined. The second proviso inserted to Section 11AC along with the first proviso with effect from 12/5/2000 further provides that the

benefit of paying the reduced penalty under the first proviso shall be available if the amount of reduced penalty so determined has also been paid within the period of thirty days referred to in the first proviso.

20. Reading Section 11AC together with the first and the second proviso inserted thereto, it becomes clear that where Section 11AC is attracted, the liability to pay penalty is 100% of the duty determined u/s 11A(2), however, if the duty determined u/s 11A(2) together with interest payable thereon u/s 11AB is paid within thirty days from the date of communication of the order of the Central Excise Officer determining the duty u/s 11A(2), then, the penalty liable to be paid u/s 11AC shall be twenty-five per cent of the duty determined u/s 11A(2), provided, the penalty at twenty-five per cent of the duty determined u/s 11A(2) is also paid within thirty days from the date of communicating the order determining the duty u/s 11A(2). In other words, where Section 11AC is attracted, the liability to pay penalty is 100% of the duty determined u/s 11A(2), but if the duty determined u/s 11A(2) together with interest payable thereon and penalty at twenty-five per cent of the duty determined is paid within thirty days from the date of the communication of the order of the Central Excise Officer determining duty u/s 11A(2), then, the assessee is not required to pay the balance penalty of 75%.

21. Thus, the legislature while mandatorily imposing penalty u/s 11AC equal to 100% of the duty determined u/s 11A(2), provides an incentive to the assessee covered u/s 11AC by providing that if the duty determined u/s 11A(2) together with interest payable u/s 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 u/s 11AC. Once the duty is determined u/s 11A(2) and 100% penalty is imposed u/s 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 u/s 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.

22. The fact that this Court in the case of Viraj Alloys Limited (*supra*) as also various High Courts and even the CBDT have directed the adjudicating authorities to make it explicitly clear in the operative part of the adjudication order regarding the availability of paying 25% penalty in the circumstances set

out in the first and the second proviso to Section 11AC, does not mean that the statute casts such an obligation on the adjudicating authorities. Therefore, if the adjudicating authority fails to make a reference in its order regarding the availability of paying 25% penalty, the assessee cannot agitate that there is violation of the statutory provisions contained in Section 11AC and it will not be open to the appellate authorities or the Courts to permit the assessee to pay 25% penalty beyond the time prescribed u/s 11AC.

23. The argument advanced on behalf of the assessee that the provisions of Section 11AC have to be read liberally cannot be accepted, because, Section 11AC imposes punishment to an assessee who has intended to evade duty by adopting any of the means mentioned therein. While punishing the persons who have sought to evade payment of duty, the legislature gives an incentive to pay lesser penalty provided the duty sought to be evaded with interest and 25% of the penalty is also paid within the time stipulated therein. The incentive in Section 11AC is intended to encourage payment of tax due to the revenue at the earliest without resorting to unwarranted litigation and it is not an incentive for violating the provisions of law. Therefore, the incentive in Section 11AC given to the persons who have violated the provisions of the 1944 Act cannot be treated as if an incentive given to persons who have complied with the provisions of law. Therefore, the provisions contained in Section 11AC have to be construed strictly and if the assessee fails to comply with the conditions set out in the proviso to Section 11AC, the benefit of paying lesser penalty cannot be extended to the assessee.

24. If the contention of the assessee that even the appellate authority can direct the assessee covered u/s 11AC to pay 25% of the penalty within thirty days from the date of communication of the order passed by the appellate authority is accepted, then it would defeat the very object with which the incentive u/s 11AC is allowed. The basic object of granting incentive u/s 11AC is to encourage payment of duty sought to be evaded with interest and penalty at 25% within the time stipulated therein. When the legislature specifically fixes the time limit within which the duty with interest and penalty at 25% is to be paid for availing the incentive, it would neither be open to the appellate authority nor any other authority to permit the assessee to pay 25% penalty at any time other than the time prescribed u/s 11AC.

25. By comparing Section 11AB with Section 11A(2B) and (2C) cexa22-12 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 u/s 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, u/s 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 u/s 11AC is the penalty equal to the duty determined u/s 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, u/s 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.

26. Moreover, the third and the fourth proviso to Section 11AC make it further clear that, it is only when the duty determined as payable u/s 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 u/s 11AC only in respect of the increased penalty required to be paid on account of the increase in the duty determined as payable u/s 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 u/s 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.

27. In the present case, the applicability of Section 11AC is not in dispute. It is also not in dispute that the assessee has paid the duty sought to be evaded as also the interest payable thereon u/s 11AB before the passing of the adjudication order. Admittedly, the assessee has not paid 25% of the penalty imposed u/s 11AC within thirty days from the date of the communication of the order of Central Excise Officer determining the duty sought to be evaded u/s 11A(2) of the Act which is the mandatory requirement u/s 11AC. Instead of paying 25% of the penalty within the stipulated time, the assessee has chosen to file an appeal against imposition of penalty u/s 11AC and the Tribunal has permitted the assessee to pay 25% penalty beyond the time prescribed under the proviso to Section 11AC which is not permissible in law.

28. In the result, the substantial question of law framed in this appeal is

answered in the negative i.e. in favour of the revenue and against the assessee. Before parting, we would like to place on record that Mr. Patil has rendered valuable assistance to the Court as amicus curiae. The appeal is disposed of in the above terms with no order as to costs.