

(2007) 07 SC CK 0086

In the Supreme Court Of India

Case No : Civil Appeals Nos. 10289-303 Of 2003 With Nos. 3397-99, 4094 Of 2003, 4096 Of 2004, 3388 Of 2006, Slps (C) Nos. 14027-29, 14574, 14576, 15362, 15778, 15912 Of 2006, Ca No. 5277 Of 2006, 675 Of 2007, Slps (C) Nos. 20492 Of 2006, 2038 Of 2007, (Cc No. 1827

Union of India (UOI)

APPELLANT

Vs

Dharamendra Textile Processors

RESPONDENT

Date of Decision : 19-07-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 3A
Income Tax Act, 1961 — Section 132, 139, 142, 143, 148

Citation : (2007) 07 SC CK 0086

Hon'ble Judges : S. H. Kapadia, J;B. Sudershan Reddy, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

1. Delay condoned.
2. Leave granted in special leave petitions.
3. In this batch of civil appeals, the question which arises for determination is whether Section 11AC of the Centra). Excise Act, inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evade payment of tax, should be read to contain mens rea as an essential requirement.
4. According to the department, the said section should be read as penalty for statutory offences; that the executing authority had no discretion in the matter of penalty and that the adjudicating authority in such cases was duty bound to impose penalty equal to the duty so determined. On the other hand, it is the case of the assessee that mens rea was an essential requirement of the said section particularly when the section refers to intention in the matter of evading payment of duty. The assessee has also invited our attention, in this connection, to the provisions of Section 271(I)(c) of the Income Tax Act which according to the assessee is identically worded to Section 11AC of the Central Excise Act. The

assessee has also placed reliance on a recent judgment of the Division Bench of this Court in the case of Dilip N. Shroff v. Jt. CIT 2007 (8) SCALE 304, decided on 18th May, 2007.

5. At this stage, we may mention that in the present cases, we are also concerned with interpretation of Section 3A of the Central Excise Act and Rule 96ZQ(5) of the Central Excise Rules which refers to failure on the part of an independent processor to pay duty by specified date. In this connection, it is the case of the department that Clause (5) of Rule 96ZQ specifically refers to payment of penalty equal to amount of duty outstanding from the assessee. It is the case of the department that penalty under the said rule is also for statutory offences; that it is not a case of imposition of penalty and that it is not a case where the adjudicating authority has any discretion in the matter of imposition of penalty. In this connection, reliance is placed by the department on the judgment of the Division Bench of this Court in the case of The Chairman, SEBI Vs. Shriram Mutual Fund and Another, . On the other hand, it is the case of the assessee that even Rule 96ZQ(5) should be read down so as to include the requirement of mens rea into Clause (5) of Rule 96ZQ particularly when the said clause begins with the expression "if any independent processor fails to pay the amount of duty". In this connection, the assessee once again placed reliance on the judgment of the Division Bench of this Court in the case of Dilip N. Shroff v. Jt. CIT (supra).

6. We quote hereinbelow the provisions of Rule 96ZQ(5):

96ZQ. Procedure to be Mowed by the independent processor textile fabrics,

(I) to (4)

(5) If an independent processor fails to pay the amount of duty or any part there of by the date specified in sub-r. (3), he shall be liable to.

(i) pay the outstanding amount of duty along with the interest at the rate of thirty-six per cent per annum calculated for the outstanding period on the outstanding amount; and

(ii) a penalty equal to an amount of duty outstanding from him or rupees five thousand, whichever is greater.

We also quote hereinbelow the provisions of Section 11AC of the Central Excise Act:

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 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 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.

We also quote hereinbelow Section 271(l)(c) of the Income Tax Act:

271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) If the assessing officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person

(a) and (b) *****

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,

(i) and (ii)

(iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits the furnishing of inaccurate particulars of such income or fringe benefits:

Explanation 1. Where in respect of any facts material to the computation of the total income of any person under this Act,

(A) Such person fails to offer an explanation or offers an explanation which is found by the assessing officer or the Commissioner (Appeals) or the CIT to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.

Explanation 2, Where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year or years but in respect of which no penalty under Clause (iii) of this sub-section had been levied, that part of the amount so added or deducted in such earlier assessment year immediately preceding the year in which the receipt, deposit, outgoing or investment appears (such earlier assessment year hereafter in this Explanation referred to as the first preceding year) which is sufficient to cover the amount

represented by such receipt, deposit or outgoing or value of such investment (such amount or value hereafter in this Explanation referred to as the utilised amount) shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the first preceding year; and where the amount so added or deducted in the first preceding year is not sufficient to cover the utilised amount, that part of the amount so added or deducted in the year immediately preceding the first preceding year which is sufficient to cover such part of the utilised amount as is not so covered shall be treated to be the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the year immediately preceding the first preceding year and so on, until the entire utilised amount is covered by the amounts so added or deducted in such earlier assessment years.

Explanation 3. Where any person fails, without reasonable cause, to furnish within the period specified in Sub-section (1) of Section 153 a return of his income which he is required to furnish u/s 139 in respect of any assessment year commencing on or after the 1-4-1989, and until the expiry of the period aforesaid, no notice has been issued to him under Clause (i) of Sub-section (1) of Section 142 or Section 148 and the assessing officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of Clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice u/s 148.

Explanation 4 For the purposes of Clause (iii) of this sub-section, the expression 'the amount of tax sought to be evaded',

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

(b) in any case to which Expln. 3 applies, means the tax on the total income assessed;

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.

Explanation 5. Where in the course of a search u/s 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that

such assets have been acquired by him by utilising (wholly or in part) his income,
(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under Clause (c) of Sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless,

(1) such income is, or the transactions resulting in such income are recorded,

(i) in a case falling Under Clause (a), before the date of the search; and

(ii) in a case falling under Clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief CIT or CIT before the said date; or

(2) he, in the course of the search, makes a statement under Sub-section (4) of Section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in Sub-section (1) of Section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

Explanation 6. Where any adjustment is made in the income or loss declared in the return under the proviso to Clause (a) of Sub-section (1) of Section 143 and additional tax charged under that section, the provisions of this sub-section shall not apply in relation to the adjustment so made,

Explanation 7. Where in the case of an assessee who has entered into an international transaction defined in Section 92B, any amount is added or disallowed in computing the total income under Sub-section (4) of Section 92C, then, the amount so added or disallowed shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the assessing officer or the Commissioner (Appeals) or the CIT that the price charged or paid in such transaction was computed in accordance with the provisions contained in Section 92C and in the manner prescribed under the it section, in good faith and with due diligence.

7. In our view, the basic scheme for imposition of penalty u/s 271(l)(c) of the Income Tax Act, Section 11AC of the Central Excise Act and Rule 96ZQ(5) of the

Central Excise Rules is common. We have gone through the judgment of the Division Bench dated 18-5-2007 in the case of Dilip N. Shroff v. Jt. CIT (supra).

8. We are of the view that there is a conflict of opinions between the judgments of the Division Bench of this Court in the case of Dilip N. Shroff v. Jt. CIT (supra) on one hand and on the other hand we have another judgment of this Court in the case of Chairman, SEBI v. Shriram Mutual Fund and Anr. (supra). Secondly, it may be pointed out that the object behind enactment of Section 271(l)(c) read with the Explanations quoted above indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under the said section is a civil liability. Wilful concealment is not an essential ingredient for attracting the civil liability as is the case in the matter of prosecution u/s 276C of the Act. While considering an appeal against an order made u/s 271(l)(c) what is required to be examined is the record which the officer imposing the penalty had before him and if that record can sustain the finding there had been concealment, that would be sufficient to sustain the penalty. Keeping in mind these two circumstances, we are of the view that the judgment of the Division Bench in the case Dilip N. Shroff v. Jt. CIT (supra) needs consideration. The Explanations added to Section 271(l)(c) in that entirety also indicate the element of strict Liability on the assessee for concealment or for giving inaccurate particulars while filing returns. The judgment in Dilip N. Shroff's case (supra) has also not considered the provisions of Section 276C of the Income Tax Act. Therefore, in our view, the judgment in the case of Dilip N. Shroff v. Jt. CIT (supra) needs consideration by the larger Bench of this Court particularly when it has ramifications not only regarding provisions of the Income Tax Act but also with regard to the provisions of Sections 3A and 11AC of the Central Excise Act and Rule 96ZQ(5) of the Central Excise Rules.

9. For the aforesaid reasons, we direct the Registry to place our order in this batch of civil appeals before the Hon'ble the Chief Justice of India for appropriate directions.

10. Before concluding, we may mention that in the present cases, the assessee had challenged the vires of Rule 96ZQ(5). By the impugned judgment, the Gujarat High court has read down the said rule incorporating the mens rea requirement. It is made clear that if the larger Bench takes a view to say that the penalty under the said clause is mandatory, then it would still be open to the assessee to challenge the vires of the said Rule 96ZQ(5) and, therefore, in that event, the matter has to be kept before the Division Bench for passing appropriate orders.