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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CENTRAL EXCISE APPEAL NO.168 OF 2006**

The Commissioner of Central Excise )  
& Customs, Raigad Commissionerate, )  
4<sup>th</sup> Floor, Kendriya Utpad )  
Shulk Bhawan, Plot No.1, Sector-17 )  
Khandeshwar, New Pancel-410 206. . )..Appellant

Vs.

M/s.Fibre Foils Ltd., )  
Vilage Dhaku, Tah. Khalapur, )  
District Raigad. ).....Respondent

Mr. P.S. Jetly with Mr. J.B. Mishra, for the Appellant.  
Mr. M.H. Patil, for the Respondent.

**CORAM : FERDINO I. REBELLO &  
J.H. BHATIA, JJ.**

**DATED : 23TH JUNE, 2009**

**ORAL JUDGMENT (PER FERDINO I. REBELLO, J.)**

1. Appeal was admitted on the following question:-

“Whether the mandatory penalty imposable under Rule 57(1)(4) can be reduced by the Hon’ble CESTAT?”

2. A few facts may be set out:-

A show cause notice was issued to the petitioner company for recovery of duty and imposition of penalty by notice dated 8<sup>th</sup> June, 1999. One of the penalties sought to be imposed on the respondent herein was under Rule 57-I(4) of the Central Excise Rules 1944. Respondents showed cause. The Assessing Officer thereafter by his order was pleased to confirm the duty in the sum of Rs.1,30,510/- on raw materials and some other finished goods and also ordered for appropriation of Rs.2,950/-. The A.O. Has imposed penalty of Rs.1,30,510/- on the assessee under Rule 57-I(4) of the Rules.

3. The Respondent aggrieved preferred an appeal before the Commissioner (Appeals) of Central Excise and Customs. By order dated 20<sup>th</sup> March, 2001 the learned Appellate Authority in para.6 was pleased to hold that the A.O. Was right in confirming the demand of duty and imposition of penalty for such shortages in raw materials. The respondent aggrieved preferred an appeal before CESTAT. The learned CESTAT held that the monetary penalty under Rule 57-I(4) equivalent to duty made cannot be upheld since no reasons to maintain the same at the level of mandatory 100% have been arrived by the authorities. The learned Tribunal, therefore, found that the penalty of Rs.25,000/- to be sufficient. It is this order which is the subject matter

4. Considering the question of law as framed let us consider the language of Rule 57-I(4) which reads as under:-

“57-I.(4) Where the credit of duty paid on inputs has been taken wrongly by reason of fraud, wilful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payable of duty, the person who is liable to pay the amount equivalent to the credit disallowed as determined under clause (iii) of sub-rule (1) shall also be liable to pay a penalty equal to the credit so disallowed.

Explanation I. Where the credit disallowed is reduced by the Commissioner of Central Excise (Appeals), the Appellate Tribunal or, as the case may be, a court of law, the penalty shall be payable on such reduced amount of credit disallowed.

Explanation II. Where the credit disallowed is increased or further increased by the Commissioner of Central Excise (Appeals), the Appellate Tribunal or, as the case may be, a court of law, the penalty shall be payable on such increased or further increased, amount of credit disallowed.”

From the plain or literal reading of the said sub-rule it would be clear that the language used is "shall". Apart from that if we consider the two explanations to the said sub-rule in the event credit is disallowed or reduced the penalty payable is on such reduced amount of credit disallowed. In other words by operation of law itself the amount of penalty has to be equivalent to the amount of duty. If we construe these two explanations and mandatory language used in sub-rule (4) there is no manner of doubt that the language is mandatory and there is no discretion in the authorities in the matter of imposition of penalty. The penalty has to be equal to the amount of duty which is payable. Considering the similar language in Rule 11AC of the Central Excise Act the Supreme Court in the case of **Union of India Vs. Dharmendra Textile Processors, 2008 (231) E.L.T. 3 (S.C.)**, has taken a view that there is no scope for discretion under Section 11AC and the levy of penalty is mandatory in terms of the Section itself. Once that be the case the learned Tribunal misdirected itself in law in reducing the penalty. Even otherwise the test applied by the learned Tribunal to our mind is again a misdirection.. The penalty has to be imposed by the A.O. based on the material available and not on the defence which the assessee may have taken. Further the amount of penalty could never have been proportionate to what defence is available and/or that the mandatory penalty of 100% can be reduced depending upon the reasons given.

5.. The issue, however, cannot rest there. Subsequent to the judgment in Dharmendra Textile Processors (Supra) it appears that the Union of India's contention was in all such cases that penalty has to be mandatory. The issue again came up for consideration before the Supreme Court in **Union of India vs. M/s.Rajasthan Spinning & Weaving Mills, 2009 (238) E.L.T. Page 3 (S.C.)**. The Hon'ble Supreme Court set out the ratio in **Dharmendra Textile Processors** (supra). Having so done it was set out that before penalty can be imposed, it was incumbent that the A.O., must record a finding, as to the ingredients of satisfaction of Section 11AC. In other words if the ingredients of Section 11AC are not satisfied

then no penalty can be imposed. Similarly Rule 57-I(4) must be so construed. In the instant case the learned Tribunal had not addressed itself, to this issue. On this finding itself ordinarily we ought to have remanded the matter back to the Tribunal for reconsideration. However, in our opinion, such an exercise would only result in waste of the judicial time. We had an occasion to peruse the findings of the Commissioner (Appeals). We find that the Commissioner (Appeals) has also not addressed the issue as to whether the penalty is imposable on account of fraud, willful misstatement, collusion or suppression of facts or contravention of any other provisions of the Act or Rules made thereunder with an intent to evade duty. It is, therefore, clear that not only there has to be fraud or willful misstatement or collusion or suppression of facts or contravention of any of the provisions of the Act or Rules, but that must be with an intent to evade the payment of duty.

6. In the instant case in so far as the Commissioner of Appeals is concerned, the only finding given is that the defence taken. We had also perused the order of the A.O. On perusal of the order of the A.O., in para.4 we find that the only reason given has been that the respondent herein had not maintained proper accounts of raw materials and finished goods in statutory records. This would not meet or satisfy the predicates of Rule 57-I (4) of the Rules. In our opinion, therefore, the penalty imposed was really without jurisdiction and consequently we set aside the order of the Tribunal, Commissioner (Appeal) and A.O., to the extent of only penalty imposed under Rule 57-I(4). The rest of the order stands confirmed. Appeal disposed off accordingly.

**(J.H. BHATIA,J.)**

**(FERDINO I. REBELLO,J.)**