

## **THE GODS MUST BE CRAZY – PART III**

(S. Jaikumar, Advocate, Swamy Associates)

### **YOURS WILFULLY...**

*"Willful innocence or woeful ignorance leads to awful consequence"*

#### **- Indian Tax Testament**

Mr. Jamal had already won Rs. 50 lakhs and was about to take the last one, which would make him a crorepathi! Mr. Anil Kapoor clears his throat and nervously asks the final question...

**Which one of the following cases would attract mandatory penalty under Section 11AC of the Central Excise Act, 1944?**

- A. Cenvat credit taken on the triplicate copy of the invoice
- B. Duty amount deposited under a wrong heading
- c. Duty collected from the customer but not paid by forging invoices
- D. Lorry number not mentioned in the invoice

Clueless Jamal preferred his last lifeline – "Phone a friend".

Mr. Kapoor connected the wire and Jamal anxiously conveyed the poser to his friend.

In no time the reply came... **"ALL THE ABOVE"**

Astonished Anil bhai asked for his pal's name and the husky voice said, **"Sir, I am Assistant Commissioner Munnabhai**

## **I.R.S”**

Since the day of the judgement of the larger bench of the Hon'ble Supreme Court in the case of UOI vs Dharamendra Textile Processors **{2008 (231) ELT 3}**, there had been absolute rejoice in the revenue camp!

The genesis goes thus...

In 2007, in the civil appeals in the case of UOI & Others vs Dharamendra Textile Processors **{2007 (215) ELT 0321}** a question arose before the Apex Court for determination as to whether Section 11AC of the Central 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 or not?

Observing that there is a conflict of opinion between the judgments of the Division Bench of the Apex Court in the case of Dilip N.Shroff Vs. Joint Commissioner of Income Tax, Mumbai and another judgment of the Apex Court in the case of Chairman, SEBI Vs. Shriram Mutual Fund & Anr, the issue was referred to the larger bench.

In the landmark decision in the Dharamendra case *supra*, the larger bench of the Apex Court held that the penalty under Section 11AC of the Central Excise Act, 1944 (CEA) is mandatory and there is no discretion available in imposing any reduced penalty. Though the judgement declared that there is no discretion for the officer available under Section 11AC of

CEA, the question framed by the referral bench as to the requirement of the "*mens rea*" was not expressly decided in respect of Section 11AC penalty!

Unleashed Revenue went berserk and started proposing and imposing 100% penalties, right, left and center, irrespective of the fact that there is *mens rea* or not. In other words, even in absence of the conditions stated in the said Section, namely, suppression of facts, wilful misstatement, etc, the Revenue proposed and imposed penalties under Section 11AC of CEA.

In another landmark judgement in the case of UOI vs Rajasthan Spinning & Weaving Mills {**2009 (238) ELT 3**}the Apex Court clarified as:

*"The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of section 11A. That is what Dharamendra Textile decides."*

Thus it had been clarified that, to invoke Section 11AC of CEA and impose the penalty, there shall be the existence of the conditions stated therein, namely, suppression of facts, willful misstatement etc.

While clarifying so, the Apex Court in the above judgement also observed as:

*"It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be willful."* (emphasis added)

To me, this observation of the Apex Court will have far reaching effect. Today, mere non – production of information, albeit *bonafide*, is sucked inside the "suppression of facts" nebula. Further the self- assessment scheme has given our Rip Van Winkles an edge to wake up from their slumber and allege "suppression of facts" against the assesseees, right left and center and invoke the larger period under proviso to Section 11 A of CEA. To me, the above ratio will now give a reprieve to the assesseees to defend themselves on the grounds of absence of **"MENS REA"**.

Now to the crux of this piece. When we summarise the ratio of the above decisions, the following emerge:

1. The issue as to whether ***mens rea*** is required to invoke Section 11AC was referred to the larger bench of the Apex Court - **UOI & Others vs Dharamendra Textile Processors {2007 (215) ELT 0321}**
2. The larger bench of the Apex Court decided that ***mens rea*** is not an essential element for imposing penalty for

breach of civil obligations or liabilities - **UOI vs Dharamendra Textile Processors {2008 (231) ELT 3}**

3. In a clarificatory judgement, the Apex Court held that to invoke Section 11AC, it is not only enough that there is a "suppression of fact or a misstatement" but the same has to be **wilful**. In other words, there shall be "**MENS – REA.**"

C ya at Tilak Marg...

**Epilogue:**

*I look upon thee, for every other cause,*

*Where shall I flee, if lotus feet curse?*