REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APEPAL NOS. 10289-10303 OF 2003

Union of India and Ors. .....Appellants

versus

M/s Dharamendra Textile
Processors and Ors. .....
Respondents

Civil Appeal No. /08 @ SLP (C) No. 11431 of 2006
Civil Appeal No. /08 @ SLP (C) No. 12881 of 2006
Civil Appeal No. /08 @ SLP (C) No. 13123 of 2006
Civil Appeal No. /08 @ SLP (C) No. 13146 of 2006
Civil Appeal No. /08 @ SLP (C) No. 13766 of 2007
Civil Appeal No. /08 @ SLP (C) No. 14001 of 2006
Civil Appeal No. /08 @ SLP (C) No. 14164 of 2006
Civil Appeal No.1420 of 2007
Civil Appeal No. /08 @ SLP (C) No. 15485 of 2007
Civil Appeal No. 1643/2008
Civil Appeal No. /08 @ SLP (C) No. 16940 of 2006
Civil Appeal No. /08 @ SLP (C) No. 17105 of 2007
Civil Appeal No. /08 @ SLP (C) No. 17121 of 2007
Civil Appeal No. /08 @ SLP (C) No. 17130 of 2007

Civil Appeal No.1901/2008

Civil Appeal No. /08 @ SLP (C) No. 19704 of 2007

Civil Appeal No. /08 @ SLP (C) No. 21751 of 2007

Civil Appeal No. /08 @ SLP (C) No. 21829 of 2007

Civil Appeal No. /08 @ SLP (C) No. 23274 of 2004

Civil Appeal No. /08 @ SLP (C) No. 23593 of 2007

Civil Appeal No. /08 @ SLP (C) No. 23801 of 2007

Civil Appeal No. /08 @ SLP (C) No. 25122 of 2007

Civil Appeal No. /08 @ SLP (C) No. 25123 of 2007

Civil Appeal No. /08 @ SLP (C) No. 2730 of 2006

Civil Appeal No. 2793 of 2007

Civil Appeal No. /08 @ SLP (C) No. 3329 of 2007

Civil Appeal No.3388 of 2006

Civil Appeal No. 3397 of 2003

Civil Appeal Nos. 3398-3399 of 2003

Civil Appeal No. 4096 of 2004

Civil Appeal No. 4311 of 2007

Civil Appeal No. 4316 of 2007

Civil Appeal No. 4317 of 2007

Civil Appeal No. 4320 of 2007

Civil Appeal No. 4321 of 2007

Civil Appeal No. 4322 of 2007

Civil Appeal No. 4323 of 2007

Civil Appeal No. 4324 of 2007

Civil Appeal No. 4331 of 2007

Civil Appeal No. 4332 of 2007

Civil Appeal No. 4333 of 2007

Civil Appeal No. /08 @ SLP (C) No. 5171 of 2007

Civil Appeal No. /08 @ SLP (C) No. 5172 of 2007

Civil Appeal No. /08@ SLP (C) No. 5177 of 2007

Civil Appeal No. 5272 of 2006

Civil Appeal No. 5277 of 2006

Civil Appeal No. 6001 of 2007

Civil Appeal No. /08 @ SLP (C) No. 6297/2007

Civil Appeal No. /08 @ SLP (C) No. 6315/2007

Civil Appeal No. 675 of 2007

Civil Appeal No. /08 @ SLP (C) No. 6879/2007

Civil Appeal No. /08 @ SLP (C) No. 7427/2006

Civil Appeal No. /08 @ SLP (C) No. 809/2008

Civil Appeal No. /08 @ SLP (C) No. 9529/2006

Civil Appeal No. /08 @ SLP (C) No. 9531/2006

Civil Appeal No. /08 @ SLP (C) No. 9532/2006

Civil Appeal No. /08 @ SLP (C) No. 9533/2006

Civil Appeal No. /08 @ SLP (C) No. 9534/2006

Civil Appeal No. /08 @ SLP (C) No. 6300/2007

Civil Appeal No. /08 @ SLP (C) No. 6303/2007

Civil Appeal No. /08 @ SLP (C) No. 4663/2007

Civil Appeal No. /08 @ SLP (C) No. 6304/2007

Civil Appeal No. 372 of 2007

Civil Appeal No.2146/2008

Civil Appeal No.1823 of 2008

Civil Appeal No. /08 @ SLP (C) No. 3734 of 2007

Civil Appeal No. /08 @ SLP (C) No. 19789 of 2007

Civil Appeal No. /08 @ SLP (C) No. 14067/2007
Civil Appeal No. /08 @ SLP (C) No. 3880/2007
Civil Appeal No.4094/2004

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Leave granted in the special leave petitions.

2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. (2007 (8) SCALE 304). The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the 'Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read

to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the 'IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the 'Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund and Anr. (2006 (5) SCC 361) and was of the view that the basic scheme for imposition of penalty under Section 271 (1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's

case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench.

3. It was noted that in some cases the assessee had challenged the vires of Rule 96ZQ(5) and the Gujarat High Court held that the said rule incorporated the requirement of mens rea. The Division Bench clarified that if the larger bench takes a view to say that the penalty leviable under the said clause is mandatory, it is still open to the assessee to challenge the vires of Rule 96ZQ(5).

4. During the course of hearing, learned counsel for the parties agreed that a similar issue is involved in respect of Rule 96ZO.

5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in Section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in

essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the

statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here.

6. It was pointed out that Rule 96ZO refers to manufacturer of ingots and billets while Rule 96ZQ relates to independent processor of textile fabrics. They belong to the same category and failure to pay duty attracts penal consequences. In the other category in cases of fraud etc. penalty is for statutory offence. It is pointed out that in Dilip Shroff's case (supra) the question relating to discretion was not the basic issue. In fact, Section 271(1)(c) of the I.T. Act provides for some discretion and, therefore, that decision has no relevance. So far as the present dispute is concerned, whether discretion has been properly exercised is a question of fact. It is submitted that Chairman SEBI's case (supra) has full application to the facts of the present case.

7. In reply, learned counsel for the respondent submitted that the factual scenario in each case has to be examined. In

cases relatable to Section 11AC of the Act, the Appellate Tribunal in some of the cases has come to a finding that there was no wilful disregard involved and the assessee's conduct was bona fide. It is pointed out that Section 11A relates to the expression "assessee shall be liable" and, therefore, there is discretion to reduce the penalty. With reference to Sections 271C and 271B of the I.T. Act, it is pointed out that in the case of former it is "liable" while in the latter it is "shall pay". Reference is also made to Sections 271F and 272A of the said I.T. Act. Reliance is placed on a decision of this Court in State of M.P. and Ors. v. Bharat Heavy Electricals (1997 (7) SCC 1) to contend that even if this Court held that it appears to give the expression that the imposition of penalty is mandatory, yet there was a scope for exercise of discretion.

8. It is submitted that various degrees of culpability cannot be placed on the same pedestal. Section 11AC can be construed in a manner by reading into it the discretion. That would be the proper way to give effect to the statutory

intention. The relevant provisions i.e. Section 11AC, Rule 96ZQ and Rule 96ZO read as follows:

> "**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 such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 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 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.

RULE 96ZO. Procedure to be followed by the manufacturer of ingots and billets

(1) A manufacturer of non-alloy steel ingots

and billets falling under sub- heading Nos. 7206.90 and 7207.90 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), shall debit an amount calculated at the rate of Rs. 750 per metric tone at the time of clearance of ingots and billets of non-alloy steel from his factory in the account-current maintained by him under sub-rule (1) of rule 173G of the Central Excise Rules, 1944, subject to the condition that the total amount of duty liability shall be calculated and paid in the following manner :-

I. Total amount of duty liability for the period from the 1st day of 1 September, 1997 to the 31st day of March, 1998

(a) a manufacturer shall pay a total amount calculated at the rate of Rs. 750 per metric tonne on capacity of production of his factory for the period from 1st day of September, 1997 to the 31stday of March, 1998, as determined under the Induction Furnace Annual Capacity Determination Rules, 1997. This amount shall be paid by 31st day of March, 1998;

(b) the amount of duty already paid, together with on-account amount paid by the manufacturer, if any, during the period from 1st day of September,1997 to the 31st day of March, 1998, shall be adjusted towards the total amount of duty liability payable under clause (a);

(c) if a manufacturer fails to pay the total amount of duty payable under clause (a) by the 31st day of March, 1998, he shall be liable to pay the outstanding amount (that is the amount of duty which has not been (paid by the 31st day of March, 1998) along with interest at the rate of eighteen percent per annum on such outstanding amount calculated for the period from the 1st day of April, 1998 till the date of actual payment of the outstanding amount :

Provided that if the manufacturer fails to pay the total amount of duty payable under clause (a) by the 30th day of April, 1998, he shall also be liable to pay a penalty equal to the outstanding amount of duty as on 30th day of April, 1998 or five thousand rupees, whichever is greater.

II. Total amount of duty liability for a financial year subsequent to 1997-98 (a) a manufacturer shall pay a total amount calculated at the rate of Rs. 750/- per metric tonne on the annual capacity of production of his factory as determined under the Induction Furnace Annual Capacity Determination Rules, 1997. This amount shall be paid by the 31st day of March of the financial year;

(b) the amount of duty already paid, together with on-account amount paid by the manufacturer, if any, during the financial year shall be adjusted towards the total amount of duty liability;

(c) if a manufacturer fails to pay the total amount of duty payable under clause (a) by the 31st day of March, of the relevant financial year, he shall be liable to, -

(i) pay the outstanding amount of duty (that is the amount of duty which has not been paid by the 31st day of March of the relevant financial year) along with interest at the rate of eighteen per cent. per annum on such outstanding amount, calculated for the period from the 1st day of April of the immediately succeeding financial year till the date of actual payment of the whole of outstanding amount; and

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

(lA) If any manufacturer removes any of the non-alloy steel ingots and billets specified in sub-rule (I) without complying with the requirements of the provisions of that sub-rule, then all such goods shall be liable to confiscation and the manufacturer shall be liable to a penalty not exceeding three times the value of such goods, or five thousand rupees, whichever is greater

(2) Where a manufacturer does not produce the ingots and billets of non- alloy steel during any continuous period of not less than seven

days and wishes to claim abatement under sub-section (3) of section 3A of the Central Excise Act, 1944, the abatement will be allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order, subject to the fulfillment of the following conditions, namely-

(a) the manufacturer shall inform in writing about the closure to the 1Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise 1, with a copy to the Superintendent of Central Excise, either prior to the date of closure or on the date of closure;

(b) the manufacturer shall intimate the reading of the electricity meter to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise1, with a copy to the Superintendent of Central Excise, immediately after the production in his factory is stopped along with the closing balance of stock of the ingots and billets of non-alloy steel;

(c) the manufacturer, when he starts production again, shall inform in writing about the starting of production to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise1, with a copy to the Superintendent of Central Excise, either prior to the date of starting production or on the date of starting production;

(d) the manufacturer shall on start of

production again along with the closing balance of stock on restarting the factory, intimate the reading of the electricity meter to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise1, with a copy to the Superintendent of Central Excise;

(e) the manufacturer shall while sending intimation under clause (c), declare that his factory remained closed for a continuous period starting from --hours on -(date) to --hours on -(date).

(3) Notwithstanding anything contained elsewhere in these rules, if a manufacturer having a total furnace capacity of 3 metric tonnes installed in his factory so desires, he may, from the first day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, pay a sum of rupees five lakhs per month in two equal installments, the first installment latest by the 15thday of each month, and the second installment latest by the last day of each month, and the amounts so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998, or any other financial year, as the case may be, subject to the condition that the manufacturer shall not avail of the benefit, if any, under sub-section (4) of the section 3A of the Central Excise Act, 1944 (1 of 1944) :

Provided that for the month of September, 1997 the Commissioner may allow a

manufacturer to pay the sum of rupees five lakhs by the 30th day of September, 1997:

Provided further that if the capacity of the furnaces installed in a factory is more than or less than 3 metric tonnes, or there is any change in the total capacity, the manufacturer shall pay the amount, calculated pro rata:

provided also that where a manufacturer fails to pay the whole of the amount payable for any month by the 15th day or the last day of such month, as the case may be, he shall be liable to,-

(i) pay the outstanding amount of duty along with interest thereon at the rate of eighteen per cent per annum, calculated for the period from the 16th day of such month or the 1st day of next month, as the case may be, till the date of actual payment of the outstanding amount; and

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

Provided that if the manufacturer fails to pay the total amount of the duty payable for each of the months from September, 1997 to March, 1998 by the 30th day of April, 1998, he shall also be liable to pay a penalty equal to the outstanding amount of duty as on 30th day of April, 1998 or five thousand rupees, whichever is greater.

Explanation - For removal of doubts it is hereby clarified that sub-rule (3) does not apply to an induction furnace unit which ordinarily produces castings or stainless steel products but may also incidentally produce non-alloy steel ingots and billets.

(4) In case a manufacturer wishes to avail of discharging his duty liability in terms of sub-rule (3), he shall inform the Commissioner of Central Excise, with a copy to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, in the following proforma:

"We (name of the factory), located at (address) hereby wish to avail of the scheme described in sub-rule (3) of rule 9620, for full and final discharge of our duty liability for the manufacture of ingots and billets of non-alloy steel undersection3A of the Central Excise Act, 1944 (l of 1944).

Dated

Sd

Name and Designation

(With stamp)

RULE 96ZQ. Procedure to be followed by an Independent processor of textile fabrics

(1) An independent processor of textile fabrics falling under heading Nos. 52.07,52.08,52.09,54.06,54.07, 55.11,55.12,55.13 or 55.14, or processed textile fabrics of cotton or man-made fibers, falling under heading Nos. or sub-heading Nos. 58.01, 58.02, 5806.10, 5806.40. 6001.12, 6001.22, 6001.92, 6002.20, 6002.30, 6002.43 or 6002.93, of the First Schedule to Central Excise Tariff Act, 1985 (5 of 1986), shall debit an amount of duty of Rs.2.0 lakhs per chamber per month, Rs.2.5lakhs per chamber per month, Rs.3.0 lakhs per chamber per month or Rs.3.5 lakhs per chamber per month, as the case may be, on the annual capacity of production as determined under the Hot-air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998.

(2) The amount of duty payable under sub-rule (1) shall be debited by the independent processor in the account current maintained by him sub-rule (1) of rule 173G of the Central Excise Rules, 1944.

(3) Fifty per cent. of the amount of duty payable for a calendar month under sub-rule (1) shall be paid by the 15th of the month and the remaining amount shall be paid by the end of that month.

Provided that the amount of duty payable for the period from 16th December, 1998 to 31st December, 1998 shall be deposited on or before the 31st day of December, 1998.

(4) The independent processor shall continue to maintain records, and file returns, pertaining to production, clearance, manufacturing, storage, delivery or disposal of goods, including the materials received for or consumed in the manufacture of excisable goods or other goods, the goods and materials in stock with him and the duty paid by him, as prescribed under the Central Excise Rules, 1944 and the notifications issued there under.

(5) If an independent processor fails to pay the amount 0£ duty or any part thereof by the date specified in sub-rule (3), he shall be liable to, -

(i) pay the outstanding amount of duty along with interest at the rate of twenty-four percent per annum calculated for the outstanding period on the outstanding amount; and

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

(6) If an independent processor, removes the processed textile fabrics referred to in sub-rule (1) without complying with any of the requirements contained in sub-rule (4), then, all such goods shall be liable to confiscation and the independent processor shall be liable

to a penalty not exceeding rupees ten thousand.

(7) Where an independent processor does not produce or manufacture the processed textile fabrics specified in sub-rule (1) during any continuous period of not less than fifteen days and wishes to claim abatement under sub-section (3) of section 3A of the Act, the abatement shall be allowed by an order passed by the Joint Commissioner of Central Excise of such amount as may be specified in such order, subject to fulfillment of the following conditions, namely: -

(a) abatement shall be applicable only on the complete closure of the hot air stenter containing the chambers and not in case of closure of anyone or more chambers contained in such stenter;

(aa) the independent processor shall not clear any non-stentered fabrics during the period for which abatement is claimed, and any clearance by him of non-stentered fabrics during such period shall be liable to confiscation;

(b) the independent processor shall inform, in writing, about such closure to the Deputy Commissioner of Central Excise or the Assistant Com- missioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three days prior to the date of such closure, giving the following details, namely: -

(i) the name of the manufacturer of the stenter;

(ii) the date of purchase of the stenter;

(iii) the number of chambers as determined under the Hot-air Stenter Independent Textile Processors Annual Capacity Determination Rules, 2000;

(iv) the serial number or identification no. of the stenter; (v) reason for closure of the stenter;

(vi) approximate number of days for which the stenter shall remain closed;

(vii) date and time from which the closure is intended; (c) the stenter or stenters shall be sealed in such manner as may be pre- scribed by the Commissioner of Central Excise;

(d) the independent processor, when he starts production again, shall in- form in writing about the date of starting of production to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three days prior to the date of starting production, and get the seal opened in such manner as may be specified by the Commissioner of Central Excise before recommencing the production;

(e) When the claim for abatement by the independent processor is for a period less than one month, he shall be required to pay the duty, as applicable, for the entire period of one month and may subsequently seek such claim after payment of such duty;

(f) when the claim for abatement by the independent processor is for a period of less than one month or more, he shall not be required to pay the duty for that period in advance;

(g) If the claim for abatement by the independent processor has been disallowed by the Joint Commissioner of Central Excise, by a written order made in this regard, the independent processor shall pay the duty , and interest if any applicable, prior to getting the stenter or stenters sealed under condition (c) re-opened for resuming production :

Provided that the Commissioner of Central Excise may condone, for reasons to be recorded in writing, the delay in giving prior information under clause (b), if he is satisfied that such delay in giving information was caused due to unavoidable circumstances.

Explanation. -For the purposes of these rules, an "independent processor" means a manufacturer who is engaged primarily in the processing of fabrics with the aid of power and

who also has the facility in his factory (including plant and equipment) for carrying out heat-setting or drying, with the aid of power or steam in a hot-air stenter and who has no proprietary interest in any factory primarily and substantially engaged in the spinning of yarn or weaving or knitting of fabrics, on or after the 10th December, 1998.

It would also be necessary to take note of Section 271(1)

(c) and Section 271C of the IT Act:

"Section 271-FAILURE TO FURNISH RETURNS, COMPLY WITH NOTICES, CONCEALMENT OF INCOME, ETC.

(1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -

(a) Omitted

(b) Has failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142; or

(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) Omitted

(ii) In the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than one thousand rupees but which may extend to twenty-five thousand rupees for each such failure;

(iii) In the cases referred to in clause (c), in addition to any tax 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 the furnishing of inaccurate particulars of such income :

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) 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 who has not previously been assessed under this Act, 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 under section 139 in respect of any assessment year commencing on or after the 1st day of April, 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 under section 148.

Explanation 4 : For the purpose 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 exceeds the total income assessed, 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 Explanation 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 under section 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 Commissioner or Commissioner 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.

Section 271C

PENALTY FOR FAILURE TO DEDUCT TAX AT SOURCE.

(1) If any person fails to - (a) Deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or

(b) Pay the whole or any part of the tax as required by or under, - (i) Sub-section (2) of section 115-O; or

(ii) Second proviso to section 194B, then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.

9. It is to be noted that in Chairman SEBI's case (supra) reference was made to the statutory scheme. It was noted that the penalty was mandatory. It was pointed out that there was

a scheme attracting imposition of penalty. With reference to a statute relating to breach of civil obligation, Section 9 of the Act in that case related to criminal proceedings.

10. In Chairman, SEBI's case (supra) it was noted as follows:

> **14.** Mr Rao advanced elaborate arguments and took us through the pleadings, the reply received to the show-cause notice, the orders of the adjudicating authority and of the Appellate Tribunal. He drew our specific attention to Regulation 25(7)(*a*) of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 and Sections 15-D(*b*), 15-E, 15-I, 15-J and 12-B of the SEBI Act, 1992 which are extracted hereunder:
>
> "25. *Asset management company and its obligations*.—(1)-(6) * * *
>
> 7. (*a*) An asset management company shall not through any broker associated with the sponsor, purchase or sell securities, which is average of 5% or more of the aggregate purchases and sale of securities made by the mutual fund in all its schemes:
>
> Provided that for the purpose of this sub-regulation, aggregate purchase and sale of security shall exclude sale and distribution of units issued by the mutual fund:

Provided further that the aforesaid limit of 5% shall apply for a block of any three months."

"15-D. *Penalty for certain defaults in case of mutual funds*.—If any person, who is—

(*a*)* * *

(*b*) registered with the Board as a collective investment scheme, including mutual funds, for sponsoring or carrying on any investment scheme, fails to comply with the terms and conditions of certificate of registration, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;

* * *

15-E. *Penalty for failure to observe rules and regulations by an asset management company*. —Where any asset management company of a mutual fund registered under this Act fails to comply with any of the regulations providing for restrictions on the activities of the asset management companies, such asset management company shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

* * *

15-I. *Power to adjudicate*.—(1) For the purpose of adjudging under Sections 15-A, 15-B, 15-C, 15-D, 15-E, 15-F, 15-G and 15-H, the Board shall appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a

reasonable opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.

15-J. *Factors to be taken into account by the adjudicating officer*.—While adjudging the quantum of penalty under Section 15-I, the adjudicating officer shall have due regard to the following factors, namely—

(*a*) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(*b*) the amount of loss caused to an investor or group of investors as a result of the default;

(*c*) the repetitive nature of the default."

xxx xxx xxx

19. The scheme of the SEBI Act of imposing penalty is very clear. Chapter VI-A nowhere deals with criminal offences. These defaults for failures are nothing but failure or default of

statutory civil obligations provided under the Act and the Regulations made thereunder. It is pertinent to note that Section 24 of the SEBI Act deals with the criminal offences under the Act and its punishment. Therefore, the proceedings under Chapter VI-A are neither criminal nor quasi-criminal. The penalty leviable under this chapter or under these sections is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation. In the provisions and scheme of penalty under Chapter VI-A of the SEBI Act, there is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of intention or any *mens rea* by the appellants and it is not an essential element for imposing penalty under the SEBI Act and the Regulations.

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33. This Court in a catena of decisions has held that *mens rea* is not an essential element for imposing penalty for breach of civil obligations:

(*a*) *Director of Enforcement* v. *MCTM Corpn. (P) Ltd.*: (SCC pp. 478 & 480-81, paras 8 & 12-13)

"*8*. It is thus the breach of a 'civil obligation' which attracts 'penalty' under Section 23(1)(*a*), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of 'penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with

any 'guilty intention' or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary *guilty intention* or in other words the requisite 'mens rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the 'blameworthy conduct' of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the *delinquency* of the *defaulter* itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1)(*a*) of FERA, 1947 without any further proof of the existence of 'mens rea'. Even after an adjudication by the authorities and levy of penalty under Section 23(1)(*a*) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law.....

xx xx xx

12. In *Corpus Juris Secundum*, Vol. 85, at p. 580, para 1023, it is stated thus:

'A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.'

13. We are in agreement with the aforesaid view and in our opinion, what applies to 'tax delinquency' equally holds good for the 'blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(*a*) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(*a*) as soon as contravention of the statutory obligation contemplated by Section 10(1)(*a*) is established. The High Court apparently fell in error in treating the 'blameworthy conduct' under the Act as equivalent to the commission of a 'criminal offence', overlooking the position that the 'blameworthy conduct' in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(*a*) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention."

(*b*) *J.K. Industries Ltd.* v. *Chief Inspector of Factories and Boilers*: (SCC p. 692, para 42)

"*42*. The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof of any mens rea. The offences are strict statutory offences for which establishment of mens rea is not an essential ingredient. The

omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mens rea, exist in many statutes relating to economic crimes as well as in laws concerning the industry, food adulteration, prevention of pollution, etc. in India and abroad. 'Absolute offences' are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty."

c) *R.S. Joshi* v. *Ajit Mills Ltd.*: (SCC p. 110, para 19)

"Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

(*d*) *Gujarat Travancore Agency* v. *CIT*: (SCC p. 55, para 4)

"It is sufficient for us to refer to Section 271 (1)(*a*), which provides that a penalty may be

imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139 (1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(*a*), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(*a*) which requires

that mens rea must be proved before penalty can be levied under that provision

Swedish Match AB v. *SEBI*: (SCC p. 671, para 113)

"The provisions of Section 15-H of the Act mandate that a penalty of rupees twenty-five crores may be imposed. The Board does not have any discretion in the matter and, thus, the adjudication proceeding is a mere formality. Imposition of penalty upon the appellant would, thus, be a forgone conclusion. Only in the criminal proceedings initiated against the appellants, existence of mens rea on the part of the appellants will come up for consideration."

(*f*) *SEBI* v. *Cabot International Capital Corpn*: (Comp Cas pp. 862 & 864-65, paras 47, 52 & 54)

"*47*. Thus, the following extracted principles are summarised:

(*A*) Mens rea is an essential or sine qua non for criminal offence.

(*B*) A straitjacket formula of mens rea cannot be blindly followed in each and every case. The scheme of a particular statute may be diluted in a given case.

(*C*) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contradistinction to

criminal or quasi-criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word 'penalty' by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.

(*D*) Mens rea is not essential element for imposing penalty for breach of civil obligations or liabilities.

(There can be two distinct liabilities, civil and criminal under the same Act.

xx xx xx

52. The SEBI Act and the Regulations, are intended to regulate the securities market and the related aspects, the imposition of penalty, in the given facts and circumstances of the case, cannot be tested on the ground of 'no mens rea, no penalty'. For breaches of provisions of the SEBI Act and Regulations, according to us, which are civil in nature, mens rea is not essential. On particular facts and circumstances of the case, proper exercise of judicial discretion is a must, but not on foundation that mens rea is essential to impose penalty in each and every breach of provisions of the SEBI Act.

* * *

> *54*. However, we are not in agreement with the Appellate Authority in respect of the reasoning given in regard to the necessity of mens rea being essential for imposing the penalty. According to us, mens rea is not essential for imposing civil penalties under the SEBI Act and Regulations." (emphasis in original)

11. The decision in Bharat Heavy Electricals's case (supra) cannot be of any assistance to the assessee because the same proceeded on the basis of concession. Even otherwise, it was not open to the Bench to read, into a statute which was specific and clear, something which is not specifically provided for in the statute.

12. The stand of learned counsel for the assessee is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assessee is accepted that the use of the expression "assessee shall be liable" proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an

expression used i.e. “liability to pay duty”. It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable. Most of cases relied upon by learned counsel for the assessee had their foundation on Bharat Heavy Electrical’s case (supra). As noted above, the same is based on concession and in any event did not indicate the correct position in law.

13. It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.

14. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See

Institute of Chartered Accountants of India v. *Price Waterhouse 1977 6 SCC 312*). The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in *Crawford* v. *Spooner (1846) 6 MOO PC1,* the courts cannot aid the legislature's defective phrasing of an Act, they cannot add or mend, and by construction make up deficiencies which are left there. (See *State of Gujarat* v. *Dilipbhai Nathjibhai Patel 1998 (3) SCC 234*). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [See *Stock* v. *Frank Jones (Tipton) Ltd 1978 (1) ALL ER 948.*] Rules of interpretation do not permit the courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. The courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in *Vickers Sons")*

15. The question is not what may be supposed and has been intended but what has been said. “Statutes should be construed not as theorems of Euclid”, Judge Learned Hand said, “but words must be construed with some imagination of the purposes which lie behind them”. (See *Lenigh Valley Coal Co.* v. *Yensavage 218 FR 547*) The view was reiterated in *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama* (1990) 1 SCC 277 (SCC p. 284, para 16).

16. In *D.R. Venkatachalam* v. *Dy. Transport Commr. (1977) 2 SCC 273,* it was observed that the courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

17. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *CST* v. *Popular Trading Co. (2000) 5 SCC 511*) The legislative casus omissus cannot be supplied by judicial interpretative process.

18. Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole, appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more

so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. “An intention to produce an unreasonable result”, said Danckwerts, L.J. in *Artemiou* v. *Procopiou* (1965) 3 ALL ER 539 (All ER p. 544 I) “is not to be imputed to a statute if there is some other construction available”. Where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result”, we must “do some violence to the words” and so achieve that obvious intention and produce a rational construction. [Per Lord Reid in *Luke* v. *IRC* (1963) AC 557 where at AC p. 577 he also observed: (All ER p.664 I) “This is not a new problem, though our standard of drafting is such.

19. It is then true that:

> “When the words of a law extend not to an inconvenience rarely happening, but due to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omissus, and that the law intended quae frequentius accidunt.”

"But", on the other hand,

> "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom". (See *Fenton* v. *Hampton (1858) 11 MOO PC 347)*.

20. A casus omissus ought not to be created by interpretation, save in some case of strong necessity. Where, however, a casus omissus does really occur, either through the inadvertence of the legislature, or on the principle quod enim semel aut bis existit praetereunt legislatores, the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute - casus omissus et oblivioni datus dispositioni communis juris relinquitur; "a casus omissus", observed Buller, J. in *Jones* v. *Smart* 1785 (1) TR 44:99 ER 963 (ER p. 967) "can in no case be supplied by a court of law, for that would be to make laws". The principles were examined in

detail in M*aulavi Hussein Haji Abraham Umarji* v. *State of Gujarat (2004 (6) SCC 672)*.

21. The golden rule for construing all written instruments has been thus stated:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." (See *Grey* v. *Pearson*.)

22. The latter part of this "golden rule" must, however, be applied with much caution. "If", remarked Jervis, C.J.,

> "the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely, because we see, or fancy we see, an absurdity or manifest injustice from an

adherence to their literal meaning". (See Abley v. Dale, ER p.525)

23. The above position was highlighted in Sangeeta Singh v. Union of India and Ors. (2005 (7) SCC 484).

24. It is of significance to note that the conceptual and contextual difference between Section 271(1) (c) and Section 276C of the IT Act was lost sight of in Dilip Shroff's case (supra).

25. The Explanations appended to Section 272(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilp N. Shroof's case (supra) has not considered the effect and relevance of Section 276C of the I.T. Act. Object behind enactment of Section 271 (1)(e) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful

concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I.T. Act.

26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered. The mater shall now be placed before the Division Bench to deal with the matter in the light of what has been stated above, only so far as the cases where challenge to vires of Rule 967Q(5). In all other cases the orders of the High

Court or the Tribunal, as the case may be, are quashed and the matter remitted to it for disposal in the light of present judgments. Appeals except Civil Appeal Nos. 3388 of 2006, 3397 of 2003, 3398-99 of 2003, 4096 of 2004, 4316 of 2007, 4317 of 2007, 5277 of 2006, 675 of 2007, 1420 of 2007 and appeal relating to SLP (C) No.21751 of 2007 are allowed and the excepted appeals shall now be placed before the Division Bench for disposal.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(P. SATHASIVAM)

.....J.
(AFTAB ALAM)

New Delhi,
September 29, 2008