

Settlement of Cases by the Settlement Commission

Vikas Nanda*

In this Article, the author has delved on the substantive and procedural aspects pertaining to settlement of excise and customs cases, by the settlement commission. The powers and limitations of the settlement commission have also been touched upon in the article. The subject has been dealt with in the light of various judicial pronouncements made by the Hon'ble Supreme Court of India and the High Courts.

The statutory scheme for the purpose of approaching the Settlement Commission and the mode and manner in which appropriate order is to be passed thereupon, are governed by Chapter XIVA of the Customs Act. In order to enable the Settlement Commission to pass an order, an Applicant is required to make a full and true disclosure of his liability. The settlement commission has power to grant immunity to an Applicant from prosecution of any offence under the Customs Act and the imposition of penalty and fine, with respect to the case covered by the settlement.

Settlement Commission was constituted with the aim and objective of settling the tax evasion issues and by virtue of disclosure by tax offender; they gain immunity from fine/penalty which is otherwise mandatory. Though the settlement commission is vested with ample powers they are certainly not without limitations. Unlike Civil Court, the waiver either of full or of partial interest in contractual bargain cannot be granted by the Commission without consent of both the parties.

The settlement commission has the power to reject or dismiss the application for settlement, if it is of the opinion that a full and true disclosure is not made by the Applicant before it. This power of dismissal, normally, should not be interfered with unless the conclusion arrived at is perverse or contrary to law. Interference with any such finding may, therefore, be permissible only if the finding is perverse in that the conclusion of the Commission is such as, no prudent person reasonably instructed in law would have arrived at. The finding ought to be in such outrageous defiance of logic that a Writ Court may find it difficult to countenance the same.

Both, the Customs Act and the Central Excise Act provide for settlement of cases by reference to the settlement commission. The Assessee or the importer, as the case may be, can make an application before the settlement commission to have its case settled by the commission. An Assessee can make an application under Section 32E of the Central Excise Act, 1944 and an importer can make an application under Section 127B of the Customs Act, 1965 before the Customs and Central Excise Settlement Commission for settlement of disputes provided they fulfill the criterion laid down therein. The Applications cannot be made if the matter is pending with the Appellate Tribunal or with the Court. The proviso to Section 32 E further provides that no such application can be made unless, the Applicant has filed returns showing production, clearance and Central excise duty paid in the prescribed manner, a Show Cause Notice for recovery of duty issued by the Central Excise Officer has been received by the Applicant, the additional amount of duty accepted by the Applicant in his application exceeds Rs. 3 lac, and the Applicant has paid the additional amount of excise duty accepted by him along with interest due under Section 11AB. In similar words, Section 127 B provides that no such

* LL.B, Delhi University. Advocate practicing in various Courts (Supreme Court of India, High Court & subordinate Courts) and Tribunals in the field of Real estate, Civil And Arbitration Laws, Company Matters, Foreign Exchange, Excise And Customs Matters

application shall be made unless, the Applicant has filed a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a Show Cause Notice has been issued to him by the proper officer, the additional amount of duty accepted by the Applicant in his application exceeds Rs. 3 las, and the Applicant has paid the additional amount of customs duty accepted by him along with interest due under Section 28AB. The statutory scheme for the purpose of approaching the Settlement Commission and the mode and manner in which appropriate order is to be passed thereupon, are governed by Chapter XIVA of the Customs Act. In order to enable the Settlement Commission to pass an order, an Applicant is required to make a full and true disclosure of his liability. The settlement commission has power to grant immunity to an Applicant from prosecution of any offence under the Customs Act and the imposition of penalty and fine, with respect to the case covered by the settlement. The immunity can however, be granted in cases where the proceedings for the prosecution have been instituted before the date of receipt of the application for settlement. It appears that the power of the settlement commission was narrowed down subsequent to the amendment made to the Customs Act, 1962 by Act 22 of 2007. Prior to the said amendment, the settlement commission had wider powers, in the sense that it could grant immunity from prosecution for any offence under the Customs Act or under the Indian Penal Code or other central acts as well. In *Alpesh Navinchandra Shah v. State of Maharashtra and Ors.*¹ (2007) 2 SCC 777, the Hon'ble Supreme Court has observed that the Settlement Commission was constituted with the aim and objective of settling the tax evasion issues and by virtue of disclosure by tax offender; they gain immunity from fine/penalty which is otherwise mandatory under the provisions of tax laws. But, such opportunity is only extended to one tax offender but not available to habitual smugglers.

Adjudication

The term "Adjudication" refers to deciding the lis or the subject matter of dispute between the parties. It is also referred to as a process for determining a case judicially. An adjudication of a dispute by judiciary or for that matter even a quasi judicial body requires adherence to certain basic norms such as principle of giving a fair hearing to the parties, not being a Judge in one's own cause etc. Then there are procedural adherences also such as adherence to the provisions laid down under various acts like the Code of Civil Procedure, 1908, the Evidence Act etc. In *Ashwani Tobacco Co. Pvt. Ltd. v. Union of India (UOI) and Ors.*² 2010 (173) ECR 1 (Delhi), the Hon'ble High observed that an order of settlement is obviously distinct from an adjudication order of a Central Excise Officer, who has no power to accord immunity from prosecution while determining duty liability under the Excise Act. The order of settlement is in the form of a package and takes into consideration all the aspects of the case in a holistic manner before determining the issues of penalty and interest as well as the extent of immunity there from. It is in this context that Sub-section 5 of Section 32F confers on the Settlement Commission the powers to "pass such order as it thinks fit on the matters covered by the application....". It is, therefore, observed that the scheme of settlement as contained in Chapter-V of the Excise Act is distinct from the adjudication undertaken by a Central Excise Officer under the other Chapters of the Excise Act. Therefore, once the Petitioner has adopted the course of settlement he has to be governed by the provisions of the said Chapter. Resultantly, the benefit under the proviso to Section 11AC of the said act which could have been availed when the matter of determination of duty was before a Central Excise Officer is not attracted to the cases of a settlement undertaken under the provisions of Chapter - V of the Excise Act. In the case of *Qualimax Electronics Pvt. Ltd. v. Union of India (UOI) and Ors.*³ (2010) 27 STT 231, the Hon'ble High Court of Delhi at New Delhi was asked to decided as to whether the "case" of the petitioners had been "adjudicated" prior to the filing of their settlement applications under Section 32E of the said Act. The Petitioner contended that since it had not received the copy of the order, prior to approaching the settlement commission, it could not be said that that the matter had been adjudicated and consequently their applications for settlement could not have been said to be barred. The Hon'ble High Court observed that adjudication order signals the

end of the case pending before the adjudicating authority. It is the end-point insofar as the petitioners' right to seek a settlement under Section 32E is concerned. Would it really matter if the petitioners were aware that the case has been adjudicated or not on the date they made the settlement applications under Section 32E. It is not as if the passing of the order triggers the starting point of limitation for them to seek recourse to a remedy such as an appeal or review or revision. In that case, unless otherwise expressly provided by the Statute, it would be the date of receipt of the order that would be material. But, here we need to determine the date on which the petitioners' case could be said to have been adjudicated in the context of Section 32E of the said Act. The adjudication of the case by the adjudicating authority closes the window of opportunity, which the petitioners hitherto had, for seeking a settlement of the case. That opportunity was available to the petitioners right from the issuance of the Show Cause Notice. It is only a "case" as defined in Section 31(c) which could be the subject matter of settlement. Section 31 (c) defines "case" to mean any proceeding for the levy, assessment and collection of excise duty, "pending before an adjudicating authority on the date on which an application under Sub-section (1) of Section 32E is made". Once, the order leaves the hands of the adjudicating authority in the sense explained above, the "case" can no longer be said to be pending before him.

Disclosure and Dismissal

The settlement commission has the power to reject or dismiss the application for settlement, if it is of the opinion that a full and true disclosure is not made by the Applicant before it. The power to decide and dismiss the application can be made by the settlement commission at any stage of the proceedings before it. In *Commissioner of Central Excise v. True Woods P. Ltd. and Ors.* MANU/DE/2271(C)/2005, the Hon'ble High Court of Delhi held that it is true that the foundation for settlement is an application from the assessed in which the assessed must make a full and true disclosure as required under the provision of Section 245C of the Income Tax Act or Section 32E of the Central Excise Act, but it is equally true that the requirement of a full and true disclosure need not be examined and authoritatively determined at the threshold of any proceedings initiated before the Commission under Chapter V. There may be cases where it is possible for the Commission to record a finding that the disclosure made in the application is "full and true". There may however, be situations in which the Commission may not be able to, at the stage of admission of the application, record a finding with any amount of certainty. In any such situation, it will not be legally impermissible for the Commission to keep the question open, as it has done in the instant case to be examined at a later stage or at the stage of final disposal of the application. The Commission may consequently be justified in throwing out the application at any stage if it comes to the conclusion that the disclosure made by the assessed is either incomplete or untrue. This power of dismissal, normally, should not be interfered with unless the conclusion arrived at is perverse or contrary to law. In *Metalex Pipes Ltd. v. Commissioner of Central Excise* MANU/DE/0383/2006, the Hon'ble High Court has held that it is evident from a conjoint reading of provisions of Sections 32E and 32F that the Settlement Commission is empowered to reject an application inter alia on the ground that the Applicant before it has not made a full and true disclosure of his duty or liability or the manner in which such duty has been derived. It is also manifest that the Settlement Commission has to formulate its opinion on the basis of the material contained in the report submitted by the Commissioner of Central Excise and the nature of the circumstances of the case. Suffice it to say that the finding which the Settlement Commission may record, as regards the full and true disclosure of the duty or liability of the Applicant in the application filed before it, would be a finding of fact based on the material contained in the report submitted before it, and the facts and circumstances of the case. Interference with any such finding may, therefore, be permissible only if the finding is perverse in that the conclusion of the Commission is such as no prudent person reasonably instructed in law would have arrived at. The finding ought to be in such outrageous defiance of logic that a Writ Court may find it difficult to countenance the same.

Limitations

Though the settlement commission is vested with ample powers they are certainly not without limitations. The power of the Settlement Commission is relatable to waiver of partial or full amount of interest only under the Act. The Hon'ble Calcutta High Court in *Commissioner of Customs (Port) v. Settlement Commission, Customs & Central Excise*⁴ 2005 (179) ELT 386 (Cal), while dealing with a case in which the importer was under obligation to pay interest not under the provision of the Act, but under the bond at the rate of 24 per cent in terms of exemption notification observed that though Bond furnished in terms of statutory decision, but then contractual character is not destroyed. It cannot be comprehended as to how the learned Commission could overlook the implication of bond in relation to payment of interest thereunder. It seems to have wrongly equated payability of interest under the bond with the expressed provision of the said Act. Unlike Civil Court the waiver either of full or of partial interest in contractual bargain cannot be granted by the Commission without consent of both the parties. To clarify the position had it been a case of chargeability or payability of interest under expressed provision of the Act the Commission would have jurisdiction. In *Rexnord Electronics and Controls Ltd. v. Union of India (UOI) and Ors.*⁵ 2008 (3) SCALE 507, the Hon'ble Supreme Court has also held that the Settlement Commission, did not have any jurisdiction to waive the amount of interest payable under a bond and that no jurisdictional error can be said to have been committed by Settlement commission in directing the payment of the said amount which is otherwise payable.

Endnote

- 1 Ed.: MANU/SC/7160/2007: JT 2007 (3) SC 630: 2007 (3) SCALE 598
- 2 Ed.: MANU/DE/0221/2010: 2010 (251) ELT 162 (Del)
- 3 Ed.: MANU/DE/1324/2010
- 4 Ed.: MANU/WB/0373/2004: 2005 (101) ECC 87
- 5 Ed.: MANU/SC/0976/2008: 2008 (126) ECC 95, 2008 (152) ECR 95(SC), 2008 (224) ELT 184 (SC), JT 2008 (3) SC 572, (2008) 3 MLJ 960(SC), (2008) 12 SCC 156