

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP(C) 4410/2007, CM 8248/2007, CM 11752/2007 & CM 11105/2008

Reserved on: 15th January, 2010

% Date of Decision: 17th September, 2010

DIRECTOR GENERAL OF CENTRAL EXCISE INTELLIGENCE

..... Appellant

Through: Mr Mohan Prasaran, ASG with
Mr Satish Aggarwala and Ms Hrishika
Pandit.

versus

MURARILAL HARISHCHANDRA JAISWAL PVT LTD AND ORS

..... Respondents

Through: Mr Dushyant Dave, Sr Advocate with
Ms Vibha Datta Makhija and
Mr Yashvardhan for R-1 to R-6.
Mr Philemon Nongbri for R-7 to R-14.
Mr D.D. Singh for R-15 & R-16.

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

- | | | |
|----|---|------|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

SIDDHARTH MRIDUL, J.

1. The present writ petition under Articles 226 and 227 of the Constitution of India seeks quashing of the final order no. F-492-494/CE/07-SC(PB) dated 15th February, 2007 passed by the Settlement Commission,

Customs & Central Excise, Principal Bench, Delhi (hereinafter referred to as 'the Settlement Commission') whereby the applications filed by the respondents herein for settlement were disposed of by the Settlement Commission.

2. The facts as are necessary for the adjudication of the present petition are as follows:-

- (a) The petitioner is an investigating agency under the Ministry of Finance empowered to, *inter alia*, investigate into commission of offences under the Central Excise Act, 1944 (hereinafter referred to as 'the said Act').
- (b) The main respondent manufactures "Hans" branded chewing tobacco falling under Sub-heading No. 2404.41 of the First Schedule to the Central Excise Tariff Act, 1985. They are registered with the Central Excise Department and have their factories at Mukherjee Nagar, North Delhi; Holambi Kalan, Laldora, Delhi; Patparganj Industrial Area, East Delhi and Rejender Nagar Industrial Area, Mohan Nagar, Ghaziabad.
- (c) On the basis of intelligence inputs that respondent no.1 was indulging in evasion of Central Excise duties by clandestinely removing Hans brand Khaini without payment of duty, a case was booked by the petitioner-Department against the

respondent no. 1 to 16.

- (d) On 3rd November, 2004 during search operation on the premises of the respondent no.1 and its directors, the petitioner found, apart from other incriminating goods/documents, Indian currency amounting to ₹20,42,61,000/- and 15 kilograms of foreign marked gold biscuits purportedly the sale proceeds of non-duty paid excisable goods. All of the above were seized by the petitioner. On the same day, unaccounted cash amounting to ₹3,13,18,500/- was also seized from respondent no. 15, a Bangalore based dealer of respondent no.1, as sale proceed of non-duty paid excisable goods.
- (e) During the initial stage of investigation, out of the cash seized from respondent no. 1 to 16, the latter volunteered to deposit duty amounting to ₹15,30,56,842/-, which was subsequently adjusted by the petitioner-Department as per the latter's request made on 8th November, 2004, 30th December, 2004 and 25th February, 2005.
- (f) On 19th April, 2005 a show cause notice was issued for extension of time to complete the investigation regarding cash, gold and other excisable goods seized from respondent no. 1 to 16. On 28th April, 2005 an order was passed by the competent

authority extending period to issue show cause notice to the said respondents by another six months.

(g) On 20th October, 2005 the respondent no. 1 to 6 filed applications under Section 32E of the said Act before the Settlement Commission, admitting duty liability of ₹3,84,17,138/- and further disclosing that actual proportion of raw tobacco in their product i.e. Hans branded Khaini, is 70% and not 95% as shown in their records. On 26th October, 2005 a demand-cum-show cause notice, demanding duty of ₹34,50,57,409/- and proposing confiscation of seized Indian currency of ₹20.42 crores and ₹3.13 crores, 15 kilograms of foreign marked gold and finished goods worth ₹1.52 crores, was issued by the petitioner-Department to the respondent no.1 to 16. On 23rd November, 2005 the petitioner filed reply to the applications for settlement filed by respondent no. 1 to 6.

(h) On 2nd January, 2006 the respondent no.1 to 6 filed revised applications under Section 32E of the said Act, before the Settlement Commission admitting an enhanced duty liability of ₹5,79,02,915/-. The respondent no. 1 to 6 quantified the duty evasion on the basis of data regarding consumption of raw tobacco, which had been discussed in the show cause notice for corroboration purposes. The amount admitted by the respondent

no. 1 to 6 included the time barred duty for the period beyond five years from the date of issue of show cause notice.

- (i) The petitioner-Department filed its reply to the revised application on 10th January, 2006. The Settlement Commission after hearing arguments of the parties admitted the application of respondent no. 1 to 6 on 23rd January, 2006. Thereafter, on 16th February 2006 respondent no.7 to 13 filed application before the Settlement Commission. The Department filed its reply to the applications on behalf of respondent no. 7 to 13 on 3rd April, 2006. The Settlement Commission admitted the application of respondent no.7 to 13, after hearing arguments of the parties, on 2nd May, 2006.
- (j) On 17th March 2006 respondent no. 14 to 16 filed application for settlement before the Settlement Commission. The reply thereto on behalf of the petitioner-Department was filed on 2nd May, 2006. The Settlement Commission admitted the application of respondent no. 14 to 16 after hearing parties on 16th May, 2006.
- (k) In the meantime, vide its order dated 9th May, 2006 the Settlement Commission directed the Commissioner (Investigation), Settlement Commission, to conduct

investigation on certain points. On 21st July, 2006 the respondent no.1 to 16 filed their comments on the points raised by the Settlement Commission wherein, they alleged that the duty calculation chart prepared by the petitioner in the show cause notice was not reliable for quantification, because the information therein did not constitute direct evidence of clandestine manufacture and removal; and that there was duplication and also that it was based on various sources like transporters, sub-transporters, dealers, sub-dealers, commercial tax department etc.

- (l) On 24th July, 2006 the petitioner-Department also filed elaborate counter comments wherein all the allegations raised by respondent no. 1 to 16 purportedly seeking relief on unsubstantiated grounds were rebutted point-wise.
- (m) On 15th November, 2006 the Commissioner (Investigation) submitted its investigation report, wherein, the view of the petitioner-Department was broadly supported in respect of duty quantification chart, manufacturing capacity of respondent no. 1 to 16 etc. However, it was mentioned in the investigation report that demand of duty amounting to ₹3,13,38,000/- made on the basis of transportation of goods by one specific transporter, M/s Shree Govinda Roadways was not duly corroborated.

- (n) On 23rd January, 2007 after hearing the parties, the Settlement Commission directed the other respondents to file amended application. The respondent no.6 filed amended application as per the directions of the Settlement Commission on 31st January, 2007.
- (o) On 9th February, 2007 during the initial hearing, the respondent no. 1 to 16 admitted further additional duty liability, thereby enhancing their total admission to ₹8,33,88,511/- for the period from 1st April, 1998 to 3rd November, 2004, by disclosing the fact that the quantity of raw tobacco shown as 'sold' to three specific dealers may be included in the computation of use of raw tobacco.
- (p) Thereafter, vide the impugned order dated 15th February, 2007 the Settlement Commission settled the total duty at ₹16,70,76,824/- including Education Cess, with interest, to be adjusted out of cash seized from respondent no. 1 to 6. Further, 15 kilograms of seized gold was confiscated with an option to redeem the same on payment of fine in lieu of confiscation amounting to ₹30 lakhs. The currency seized from respondent no. 15 amounting to ₹3,13,18,500/- and other seized excisable goods were not considered appropriate for confiscation. Apart

from the above relief, the Settlement Commission granted immunity from penalty and prosecution to the respondent no. 1 to 16.

(q) Aggrieved by the said impugned order dated 15th February, 2007 the petitioner-Department challenges its correctness by way of the present petition.

3. Mr Mohan Parasaran, the learned Additional Solicitor General, appearing on behalf of the petitioner-Department, urged that the Settlement Commission should not have gone into the complex facts and issues that arose as a result of the subject show cause notice. Counsel also argued that the Settlement Commission did not go into the question of full and true disclosure at the stage of admission of the application filed by the respondents herein. It was further submitted that the impugned order is invalid as there is no recording therein of satisfaction of true and full disclosure on behalf of the respondents herein. Furthermore, it was urged on behalf of the petitioner-Department that the impugned order settled issues which were anterior to the issuance of the show cause notice and that the application under Section 32E was filed by the respondents before the issuance of the show cause notice and was, thus, not maintainable.

4. Per contra, it is urged on behalf of the respondents by Sh Dushyant Dave, Senior Advocate, that the issue of full and true disclosure at the time

of admission of the application filed by the respondents was never urged before the Settlement Commission itself at any stage and that the petitioner-Department accepted the order of admission without demur when the same was passed by the Settlement Commission. On behalf of the respondents it was further urged that Section 32E is a self-contained code and that its principal purpose is settlement and not adjudication and as such the present petition is not maintainable. It was also urged on behalf of the respondents that Section 32E(2) states that the application before the Settlement Commission may be made 180 days after the seizure and as such the application filed on behalf of the respondents was maintainable. It was further argued on behalf of the respondents that the Settlement Commission has power under Section 32F(7) to consider issues apart from the application. It was lastly argued on behalf of the respondents that the decision of the Settlement Commission is not justiciable under Articles 226 and 227 of the Constitution of India and that a pragmatic/practical view should govern the proceedings before the Settlement Commission.

5. Before dealing with the merits of the contentions made on behalf of the parties it would be necessary to consider the relevant provisions of the said Act.

(a) Section 31(c) of the said Act reads as under:

*“**Section 31(c):** ”case” means any proceeding under this Act or any other Act 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:

Provided that when any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause;”

(b) Section 32E of the said Act reads as under:

“Section 32E: Application for settlement of cases. — (1) *An assessee may, in respect of a case relating to him, make an application, before adjudication, to the Settlement Commission to have the case settled, in such form and in such manner as may be prescribed and containing a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction, the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by him and such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification, under-valuation, inapplicability of exemption notification or Cenvat credit but excluding the goods in respect of which no proper record has been maintained by the assessee in his daily stock register and any such application shall be disposed of in the manner hereinafter provided:*

Provided that no such application shall be made unless,—
(a) *the applicant has filed returns showing production, clearance and Central excise duty paid in the prescribed manner;*

(b) *a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant;*

(c) *the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and*

(d) *the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AB:*

Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending with the Appellate Tribunal or any court:

Provided also that no application under this sub-section shall be made for the interpretation of the classification of excisable goods under the Central Excise Tariff Act, 1985 (5 of 1986).

(1A) *Notwithstanding anything contained in sub-section (1), where an application was made under sub-section (1), before the 1st day of June, 2007 but an order under sub-section (1) of section 32F has not been made before the said date or payment of amount so ordered by the Settlement Commission under sub-section (1) of section 32F has not been made, the applicant shall within a period of thirty days from the 1st day of June, 2007, pay the accepted duty liability failing which his application shall be liable to be rejected.*

(2) *Where any excisable goods, books of accounts, other documents have been seized under the provisions of this Act or rules made thereunder, the assessee shall not be entitled to make an application under sub-section (1), before the expiry of one hundred and eighty days from the date of the seizure.*

(3) *Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.*

(4) *An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.”*

(c) Section 32F of the said Act reads as under:

“Section 32F: Procedure on receipt of an application under section 32E. — (1) *On receipt of an application under sub-section (1) of section 32E, the Settlement Commission shall, within seven days from the date of receipt of the application, issue a notice to the applicant to explain in writing as to why the application made by him should be allowed to be proceeded with, and after taking into consideration the explanation provided by the applicant, the Settlement Commission, shall, within a period of fourteen days from the date of the notice, by an order, allow the application to be proceeded with, or reject the application as the case may be, and the proceedings before the Settlement Commission shall abate on the date of rejection:*

Provided that where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

(2) *A copy of every order under sub-section (1), shall be sent to the applicant and to the Commissioner of Central Excise having jurisdiction.*

(3) *Where an application is allowed or deemed to have been allowed to be proceeded with under sub-section (1), the Settlement Commission shall, within seven days from the date of order under sub-section (1), call for a report along with the relevant records from the Commissioner of Central Excise*

having jurisdiction and the Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission:

Provided that where the Commissioner does not furnish the report within the aforesaid period of thirty days, the Settlement Commission shall proceed further in the matter without the report of the Commissioner.

(4) Where a report of the Commissioner called for under sub-section (3) has been furnished within the period specified in that sub-section, the Settlement Commission may, after examination of such report, if it is of the opinion that any further enquiry or investigation in the matter is necessary, direct, for reasons to be recorded in writing, the Commissioner (Investigation) within fifteen days of the receipt of the report, to make or cause to be made such further enquiry or investigation and furnish a report within a period of ninety days of the receipt of the communication from the Settlement Commission, on the matters covered by the application and any other matter relating to the case:

Provided that where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under sub-section (5) without such report.

(5) After examination of the records and the report of the Commissioner of Central Excise received under sub-section (3), and the report, if any, of the Commissioner (Investigation) of the Settlement Commission under sub-section (4), and after giving an opportunity to the applicant and to the Commissioner of Central Excise having jurisdiction to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner of Central Excise and Commissioner (Investigation) under sub-section (3) or sub-section (4).

(6) An order under sub-section (5) shall not be passed in respect of an application filed on or before the 31st day of May, 2007, later than the 29th day of February, 2008 and in respect of an application made on or after the 1st day of June, 2007, after nine months from the last day of the month in which the application was made, failing which the settlement proceedings shall abate, and the adjudicating authority before whom the proceeding at the time of making the

application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

(7) Subject to the provisions of section 32A, the materials brought on record before the Settlement Commission shall be considered by the Members of the concerned Bench before passing any order under sub-section (5) and, in relation to the passing of such order, the provisions of section 32D shall apply.

(8) The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective and in case of rejection contain the reasons therefor and it shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts:

Provided that the amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant under section 32E.

(9) Where any duty, interest, fine and penalty payable in pursuance of an order under sub-section (5) is not paid by the assessee within thirty days of receipt of a copy of the order by him, the amount which remains unpaid, shall be recovered along with interest due thereon, as the sums due to the Central Government by the Central Excise Officer having jurisdiction over the assessee in accordance with the provisions of section 11.

(10) Where a settlement becomes void as provided under sub-section (8), the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the Central Excise Officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the date of the receipt of communication that the settlement became void.”

(d) Section 32H of the said Act reads as under:

“Section 32H: Power of Settlement Commission to reopen completed proceedings. — If the Settlement Commission is of the opinion (the reasons for such opinion to be recorded by it in writing) that, for the proper disposal of the case pending

before it, it is necessary or expedient to reopen any proceeding connected with the case but which has been completed under this Act before application for settlement under section 32E was made, it may, with the concurrence of the applicant, reopen such proceeding and pass such order thereon as it thinks fit, as if the case in relation to which the application for settlement had been made by the applicant under that section covered such proceeding also:

Provided that no proceeding shall be reopened by the Settlement Commission under this section after the expiry of five years from the date of application.

Provided further that no proceeding shall be reopened by the Settlement Commission under this section in a case where an application under section 32E is made on or after the 1st day of June, 2007.”

- (e) Section 32-I of the said Act reads as under:

“Section 32-I: Powers and procedure of Settlement Commissions.— (1) *In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in a Central Excise Officer under this Act or the rules made thereunder.*

(2) *Where an application made under section 32E has been allowed to be proceeded with under section 32F, the Settlement Commission shall, until an order is passed under sub-section (5) of section 32F, have, subject to the provisions of sub-section (4) of that section, exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise Officer, under this Act in relation to the case.*

(3) *In the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission.*

(4) *The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings.”*

- (f) Section 32L of the said Act reads as under:

“Section 32L: Power of Settlement Commission to send a case back to the Central Excise Officer. – (1) *The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E*

has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

(2) For purpose of sub-section (1), the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the result of the inquiry held or evidence recorded by the Settlement commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him.

(3) For the purpose of the time limit under section 11A and for the purpose of interest under section 11BB, in a case referred to in sub-section (1), the period commencing on and from the date of the application to the Settlement Commission under section 32E and ending with the date of receipt by the Central Excise Officer of the order of the Settlement Commission sending the case back to the Central Excise Officer shall be excluded.”

(g) Section 32-O of the said Act reads as under:

“Section 32-O: Bar on subsequent application for settlement in certain cases. – (1) Where, before the 1st day of June, 2007 –

- (i) an order of settlement passed under sub-section (7) of section 32F provides for the imposition of a penalty on the person who made the application under section 32E for settlement, on the ground of concealment of particulars of his duty liability; or*
- (ii) after the passing of an order of settlement under the said sub-section (7) in relation to a case, such person is convicted of any offence under this Act in relation to that case; or*
- (iii) the case of such person is sent back to the Central Excise Officer having jurisdiction by the Settlement Commission under section 32L,*

then, he shall not be entitled to apply for settlement under section 32E in relation to any other matter.

(2) Where an assessee has made an application under sub-section (1) of section 32E, on or after the 1st day of

June, 2007 and if such application has been allowed to be proceeded with under sub-section (1) of section 32F, such assessee shall not be entitled to apply for settlement under section 32E in relation to any other matter:

Provided that such assessee shall not be prevented from filing an application for settlement if the issue in the subsequent application is, but for the period of dispute and amount, identical to the issue in respect of which the earlier application is pending before the Settlement Commission.”

6. Before proceeding further it would be necessary to extract the relevant portions of the decision cited by the parties.

(i) In *M/s Picasso Overseas and Others vs. The Director General of Revenue Intelligence and Another, WP(C) 1495/2007*, a Division Bench of this Court held:

“4. The Senior counsel for the petitioners has contended before us that the Settlement Commission cannot make adjudication of highly contested and disputed question of facts. He has argued that the basic purpose of the Settlement Commission is to settle the matter and not to decide the questions of fact on which there is a wide variance between the parties.....

6. and the second issue is, can the Settlement Commission substitute itself for the Adjudicating Officer and arrive at a decision on highly contentious issues requiring detailed and complex investigation for arriving at an adjudication of such facts.

8. That is however not the end of the matter in as much as the scope of the powers of the Settlement Commission have to be decided by this Court in view of the contentions of the counsel for the petitioner and also the fact that the Settlement Commission may on remand once again seek to adjudicate the matter like an Adjudicating Officer and thus depriving the petitioner of his right to appeal if the adjudication would have been done by the Adjudicating Officer in the first instance.

9. We find from the reading of the relevant Sections of Chapter XVA of the Customs Act that the Settlement Commission cannot substitute itself for the Adjudicating Officer by deciding complicated and highly disputed/ contentions question and issues of facts. That this is not the purpose of the Settlement Commission, is clear from the following:

(i) The expression “settlement” is in contradistinction to “adjudication”. The very scheme of the provisions of Chapter XVA is settlement and not adjudication.

(ii) Various provisions such as Section 127B (1) uses the expression “accepted to be payable by him”, meaning thereby that an applicant before the Commission is bound basically only to the duty approximately in an around the amount accepted to be payable by the applicant and not the duty amount which may be considerably or vastly different from the amount which he thought would be one at which he seeks to get the matter settled by making a full and complete disclosure. This very sub section of Section 127 B again uses the expression “ to have the case settled”, again indicating that the scope of the Settlement Commission is to have the case settled on a duty which an applicant accepts to be payable by him. In the form it has been prescribed under these Chapter of settlement, in para 12 it is stated “additional amount of duty disclosed and accepted as payable”. In fact, Annexure 11 to such form in para 4 states “ full and true disclosure of the facts regarding the issues to be settled, including the terms of settlement sought for by the applicant”.

10. All the abovesaid provisions and the paragraphs of the forms make it abundantly clear that what is required is a decision when there are terms of settlement which are agreed to by an applicant and a liability of duty which is accepted by him. Thus, it cannot be said that when an applicant comes for settlement he can be fastened with a liability which he never intended as accepted to be payable by him. We may further hold from sub-section (1) of Section 127 C which uses the expression “complexity of the investigation” meaning thereby a Settlement Commission would not in cases of complexity of the investigation have jurisdiction to decide and admit such an application. Therefore, when there are highly complex and contentious questions of fact, a Settlement Commission would not ordinarily even admit the application in as much as the scope and object of scheme of Sections of Chapter XVA is settlement and not adjudication of highly complex questions of facts. Section 127 I also throws further light by entitling Settlement Commission to refer the case back to the proper officer who shall dispose of the case in accordance

with the provisions of the Act as if no application for settlement has been made under Section 127B.

11. We now refer to provision of Section 127F sub-section (2) which has been relied upon by the counsel for the respondents. This provision states that Settlement Commission has the power to perform the functions of an officer of customs under the Act in relation to the case. We feel that these words as found in sub section must be read in accordance with the scheme of the Chapter XV A and its object and on so reading the aforesaid words used in sub-section (2) we find that they are basically to give finality to the order of the Settlement Commission as an order under the provisions of the Act and similar to what an Adjudicating Officer does. In fact, the expression “exclusive jurisdiction to exercise the power and perform the functions of any officer of customs” is basically to look at the evidence and call for such evidence in order to determine whether the Settlement Commission should or should not accept the additional customs duty which the petitioner says is acceptable to him. The aforesaid expression, therefore, appearing in Section 127F (2) has to be read in the context of the scope and the object of the Settlement Commission being to settle the matter by accepting the duty amount in and around the figure which the petitioner feels is acceptable to him. There cannot be a detailed adjudication and enquiry on the basis of Section 127 F(2) when the applicant refuses to accept the higher amount of additional customs duty which is sought to be fastened upon him. We may lastly note the provision of sub-section (9) of Section 127 (C) and according to which a settlement is void even if it is found by the Settlement Commission subsequently that the settlement has been obtained by fraud or misrepresentation of facts. This expression “obtained by fraud or misrepresentation of facts” again shows that the Settlement Commission is confined to the facts as accepted and stated by an applicant to the Settlement Commission and such statement of facts including the duty accepted as payable cannot be altered by making the huge variations upward to the same.

12. In fact, we feel that in a case where at an admission stage under Section 127(C) (1) the case throws a high degree of variation between the facts and contentions of both the parties before the Settlement Commission, then in such a case the Settlement Commission should not even admit an application because it is clear that the Department of customs does not accept the duty which an applicant feels is payable by him and therefore is bound to enquire into highly disputed question of facts. Of course, we may hasten to add in certain

cases in spite of a huge variation and dispute which may be sought to be raised by the Department, it can be found that the disputes raised by the Department as to rates or other relevant facts may not be supported by other admitted facts which may appear from the records or the report which is called for by the Commission or such enquiry if the Commission may want to perform under Section 127F(2) and in such a case the Settlement Commission in spite of a contentious stand of the Department of Customs may still choose to go ahead and accept the figure of duty as acceptable by the applicant to the Commission as the said duty would be clearly born out from records of the Department of customs itself.

13. We feel that if we do not adopt the interpretation as stated above in favour of the petitioner and accept the interpretation as urged by the counsel for the customs, then it will discourage people from approaching the Settlement Commission as they will feel that a huge amount of duty not acceptable by them will be fastened upon them and to which their ordinary right of appeals will not be available.

14. In view of the above, though we are remanding the matter back to the Settlement Commission for considering the case of 68 imports which have been made according to the petitioner at the rate of Hongkong \$ 17, we would clarify that in case the Settlement Commission finds that there are highly complex and disputed questions of facts for which detailed enquiry is necessary, then in such a case it ought to refer the matter back to the Adjudicating Officer to be taken up from the stage from which the matter was before such Adjudicating Officer just before making of the application under Chapter XV A of the Settlement Commission and in accordance with the observations made in this regard while dealing with the second issue.”

(ii) In *Commissioner of Income Tax, Jalpaiguri vs. Om Prakash*

Mittal, (2005) 2 Supreme Court Cases 751, the Supreme Court

observed as follows:

“**6.** Mr Mohan Parasaran, learned Additional Solicitor General appearing for the appellant submitted that approach of the Commission is legally not tenable. The Commission has not kept the scope and ambit of the power exercisable under Section 245-D(6) of the Act in its proper perspective. The application filed by the appellant-revenue was not really

for review. There was no question of any review involved. There was also no question of the subsequent Bench sitting in appeal over the earlier Bench's decision. The jurisdiction under Section 245-D(6) is exercisable when it is subsequently found by the Commission that the settlement had been obtained by fraud or misrepresentation of facts. The Commission after having held that the case of the appellant was not covered by Section 245-D(6) of the Act had given clean chit to the assessee by abruptly concluding that the stand presented by the assessee's counsel was acceptable. It also lightly brushed aside the evidentiary value of the materials placed on record to justify the stand of the revenue that the settlement order had been obtained by fraud or misrepresentation of facts. The fraud and/or misrepresentation of facts are tell tale. The investigating officer had categorically stated that the alleged lenders categorically denied to have advanced any loan. There was inherent improbability in the assessee's stand that seven persons would keep huge sums of money and would give money on the same day by cash. Since there was no assessment, question of furnishing certificates about assessment from unconnected persons is sufficient to show misrepresentation of facts. No returns of income were filed by the lenders up to the relevant time. Therefore, it was submitted that the order of the Commission needs to be set aside.

13. Section 245-F dealing with powers and procedure of Settlement Commission provides that in addition to the powers conferred on the Settlement Commission under Chapter XIX-A, it has all the powers which are vested in the income-tax authority under the Act. Sub-section (2) is of vital importance and provides that where an application made under Section 245-C has been allowed to be proceeded with under Section 245-D, the Commission shall until an order is passed under Sub-section (4) of Section 245-D, subject to the provisions of Sub-section (3) of that section have exclusive jurisdiction to exercise the powers and perform the functions of the income-tax authority under the Act in relation to the case. In essence, the Commission assumes jurisdiction to deal with the matter after it decides to proceed with the application and continues to have the jurisdiction till it makes an order under Section 245-D. Section 245-D(4) is the charging section and Sub-section (6) prescribes the modalities to be adopted to give effect to the order. It has to be noted that the language used in Section 245-D is "order" and not "assessment". The order is not described as the original assessment or regular assessment or re-assessment. In that sense, the Commission exercises a plenary jurisdiction.

16. The foundation for settlement is an application which assessee can file at any stage of a case relating to him in such form and in such manner as is prescribed. The statutory mandate is that the application shall contain "full and true disclosure" of the income which has not been disclosed before the assessing officer, the manner in which such income has been derived. The fundamental requirement of the application under Section 245-C is that full and true disclosure of the income has to be made, along with the manner in which such income was derived. On receipt of the application, the Commission calls for report from the Commissioner and on the basis of the material contained in the report and having regard to the nature and circumstances of the case or complexity of the investigation involved therein, it can either reject the application or allow the application to be proceeded with as provided in Section 245-D(1).

18. There is a purpose why the legislature has prescribed the condition relating to declaration of the order void when it is obtained by fraud or misrepresentation of facts. It cannot be said that there has been a true and fair declaration of income which is the pre-requisite for settlement by the Commission. If an order is obtained by fraud or misrepresentation of facts, it cannot be said that there was true and fair disclosure. It was noted here that unlike Section 139 of the Act which provides for filing of revised return, there is no provision for revision of an application made in terms of Section 245-C. That shows clear legislative intent that the applicant for settlement has to make a true and fair declaration from the threshold. It is on the basis of the application received that the Commissioner calls for report to decide whether the application is to be rejected or permitted to be continued. The declaration contemplated in Section 245-C is in the nature of voluntary disclosure of concealed income, but as noted above it must be true and fair disclosure. Voluntary disclosure and making a full and true disclosure of the income are necessary pre-conditions for invoking the Commission's jurisdiction."

(iii) In *Light Engg. Corporation vs. Union of India, 2007 (207)*

ELT 40 (P&H), the Division Bench of the High Court of

Punjab and Haryana observed as under:

“12. Thus, the Commission is justified in not entertaining an application where full and true disclosure is not made by an assessee, which is *sine qua non* for entertainment of application by the Commission.

13. In exercise of power of judicial review, this court does not act as an appellate court by substituting its own opinion for the opinion of Settlement Commission arrived at after following due procedure under the law.”

(iv) In *Commissioner of Central Excise, Visakhapatnam vs. True Woods Pvt. Ltd.*, 2006(199) ELT 388 (Del.), the court observed as follows:

“8. We regret our inability to accept that line of reasoning. It is true that the foundation for settlement is an application from the assessee in which the assessee 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. What is important is that there must be full and true disclosure to the satisfaction of the Commission before any relief can be granted to the applicants which implies that the requirement of such a full and true disclosure is a continuing requirement that needs to be satisfied from the beginning of the proceedings till the conclusion thereof. 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 assessee is either incomplete or untrue. The passage relied upon by the learned counsel for the petitioner simply emphasizes the significance of a full and true disclosure but stops short of making such a disclosure or a finding on the

satisfaction of that requirement as a condition precedent for the assumption of jurisdiction.”

- (v) In *Kihoto Hollohan vs. Zachillhu and Others*, 1992 Supp (2)

SCC 651, the Supreme Court observed as under:

“101. In the operative conclusions we pronounced on November 12, 1991 we indicated in clauses (G) and (H) therein that judicial review in the area is limited in the manner indicated. If the adjudicatory authority is a tribunal, as indeed we have held it to be, why, then, should its scope be so limited? The finality clause in Paragraph 6 does not completely exclude the jurisdiction of the courts under articles 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction. The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations. While exercising their certiorari jurisdiction, the courts have applied the test whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction. An ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action but precludes challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction. An ouster clause attaching finality to a determination, therefore, does oust certiorari to some extent and it will be effective in ousting the power of the court to review the decision of an inferior tribunal by certiorari if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice.”

(vi) In *Killick Nixon Ltd, Mumbai vs. Deputy Commissioner of Income Tax, Mumbai and Others*, (2003) 1 SCC 145, the Supreme Court observed as under:

“9. The scheme of KVSS is to cut short litigations pertaining to taxes which were frittering away the energy of the Revenue Department and to encourage litigants to come forward and pay up a reasonable amount of tax payable in accordance with the Scheme after declaration thereunder.”

7. In the present case the petitioner has firstly urged that the Settlement Commission should not have gone into the complex facts and issues that arose as a result of the subject show cause notice. In this respect the petitioner relied on the decision of this Court in *M/s Picasso Overseas (supra)*. However, in that case the High Court of Delhi itself stated as under, “Of course, we may hasten to add in certain cases in spite of a huge variation and dispute which may be sought to be raised by the Department, it can be found that the disputes raised by the Department as to rates or other relevant facts may not be supported by other admitted facts which may appear from the records or the report which is called for by the Commission or such enquiry if the Commission may want to perform under Section 127F(2) and in such a case the Settlement Commission in spite of a contentious stand of the Department of Customs may still choose to go ahead and accept the figure of duty as acceptable by the applicant to the Commission as the said duty would be clearly born out from records of the Department of customs itself.” Thus, this decision itself carved out an

exception where complex issues could be gone into by the Commission provided other admitted facts appear from the records or the report called for by the Commission or such enquiry. In fact in the instant case the Settlement Commission directed the Commissioner (Investigation) to conduct investigation and the Commissioner (Investigation) submitted its report to the Settlement Commission. It is only thereafter that the Settlement Commission settled the total duty at ₹16,70,76,824/- as against the total admission of ₹8,33,88,511/- made by the respondents herein. Therefore, if the respondents have not made a complaint against the amount settled by the Settlement Commission, which is twice the amount admitted by them before the Commission, it does not lie in the mouth of the petitioner to assail that amount.

8. It was next urged by the petitioner that the Settlement Commission did not go into the question of full and true disclosure at the stage of admission of the application filed by the respondents herein. It was also urged that the impugned order is invalid as there is no recording of satisfaction of true and full disclosure. In this behalf the petitioner relied on the decision of this Court in *Commissioner of Central Excise, Visakhapatnam (supra)*. However, that decision itself states that it is permissible for the Commission to keep the question of true and full disclosure open at the stage of admission of the application to be examined at a later stage or at the stage of final disposal of the application. That decision categorically states that,

“What is important is that there must be full and true disclosure to the satisfaction of the Commission before any relief can be granted to the applicants which implies that the requirement of such a full and true disclosure is a continuing requirement that needs to be satisfied from the beginning of the proceedings till the conclusion thereof. 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 assessee is either incomplete or untrue.” Therefore, it raises the question as to the satisfaction of the commission with regard to full and true disclosure and how it is to be expressed. In this behalf it is observed that the satisfaction regarding full and true disclosure itself has to be discerned from the terms of the settlement arrived at by the Settlement Commission in relation to the facts and circumstances of the case and need not necessarily be expressed in so many words. From the impugned settlement order itself, in para 31 thereof, it can be seen that the Settlement Commission observed that, “ Therefore, the provisions relating to the settlement make it incumbent on the applicant to make full and true disclosure to the duty liability which had not been disclosed before the jurisdictional Central Excise Officer” Thus, it can safely be inferred that the Settlement Commission was conscious of the requirement of true and full disclosure by the respondent and considered this requirement fulfilled before arriving at the impugned settlement. Thus, this contention of the petitioner is untenable.

9. It was lastly urged by the petitioner that the application under Section 32E of the Act was filed before the issuance of the show cause notice and was consequently not maintainable. In this respect it is seen that Section 32E(b) provides that no such application shall be made unless a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant. It is also seen that Section 32E(2) states that the assessee shall not be entitled to make an application under Sub-section (1) before the expiry of one hundred and eighty days from the date of the seizure, where any excisable goods, books of accounts, other documents have been seized. In the present case, the respondents have admittedly made the application for settlement after the expiry of one hundred and eighty days from the date of seizure. In this behalf it must be observed that both these provisions are directory in nature and need not be obeyed or fulfilled exactly. Secondly, if the aforesaid provisions are interpreted harmoniously, which is essential to ensure that neither one of them is rendered repugnant or otiose, it can be said that the application could have been made after one hundred and eighty days of the seizure or after receipt of show cause notice, whichever occurred earlier. Thus we find no infirmity in the Settlement Commission entertaining the application for settlement. There is another aspect of the matter that needs to be highlighted. We feel that if we accept the submissions made on behalf of the petitioner, then it will discourage people from approaching the Settlement Commission. It must be emphasized that the expression used in the relevant provisions is “settlement” in

contradiction to “adjudication” and therefore the very scheme of the relevant provisions is settlement and not adjudication. In these circumstances, a pragmatic and practical view should govern the proceedings before the Settlement Commission.

10. In the result, the petition is devoid of merit and is accordingly dismissed. No order as to costs.

SIDDHARTH MRIDUL, J.

BADAR DURREZ AHMED, J.

SEPTEMBER 17, 2010

mk