

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 02.06.2010

+

WP(C) 3223/2010

QUALIMAX ELECTRONICS PVT LTD

... Petitioner

- versus -

U.O.I & ORS

... Respondents

AND

+

WP(C) 3220/2010

PRADEEP GUPTA

... Petitioner

- versus -

U.O.I & ORS

... Respondents

AND

+

WP(C) 3222/2010

MANJU GUPTA

... Petitioner

- versus -

U.O.I & ORS

... Respondents

AND

+

WP(C) 3224/2010

MOHIT GUPTA

... Petitioner

- versus -

U.O.I & ORS

... Respondents

Advocates who appeared in this case:-

For the Petitioner : Mr C. Hari Shankar with Mr Ravindra

For the Respondent No.1 : Mr Jatan Singh with Mr Ashok Singh and Mr Sudeep Sudan

For the Respondent Nos. 2 -3 : Mr Mukesh Anand with Mr Shailesh Tiwari, Mr Sumit Batra
And Mr R. C. S. Bhadoria

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

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 Digest ? Yes

BADAR DURREZ AHMED, J

1. The petitioners in this group of four writ petitions are aggrieved by the communication dated 04.05.2010 received from the Customs and Central Excise Settlement Commission (hereinafter referred to as 'the Settlement Commission'), whereby they were informed of the rejection of their settlement applications filed under Section 32E of the Central Excise Act, 1944 (hereinafter referred to as 'the said Act'). The order of the Settlement Commission, which was communicated to the petitioners was as follows:-

“Now that the writ petition has been withdrawn by the applicant and as the case already stands adjudicated even before filing the settlement applications, no case before the Commission exists.”

2. Section 32E, to the extent relevant, is as under:-

“32E. Application for settlement of cases: – (1) An assessee may, at any stage of a case relating to him make an application 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 or otherwise of such excisable goods, to the Settlement Commission to have the case settled 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; and
- (c) the additional amount of duty accepted by the applicant in his application exceeds two lakh rupees:

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.

XXXX	XXXX	XXXX	XXXX	XXXX
XXXX	XXXX	XXXX	XXXX	XXXX”

3. The common question which calls for a decision in these writ petitions is whether the “case” of the petitioners had been “adjudicated” prior to the filing of their settlement applications under Section 32E of the said Act. Normally, such a question would appear to require a straightforward determination of the factual position. However, in these writ petitions, it so happens that the order-in-original passed by the adjudicating authority was dated 24.12.2009 though it was received by the petitioners after 08.01.2010, which was the date on which the petitioners had filed their settlement applications under Section 32E of the said Act.

4. On behalf of the petitioners, it was contended that the mere passing of the order-in-original was not sufficient and unless and until the order was received by them, it could not be said that their case had been adjudicated in the context of the provisions of Section 32E of the said Act. Section 32 E(1) of the said Act enables an assessee, in respect of a “case” relating to him, to make an application, “before adjudication”, to the Settlement Commission to have the case settled. On behalf of the petitioners, it was submitted that since the settlement applications under Section 32E were filed on 08.01.2010, which was prior in time to the petitioners receiving copies of the order-in-original dated 24.12.2009, the said settlement applications could not have been rejected on the ground that the case had already been adjudicated even before the filing of the settlement applications. The learned counsel for the petitioners also submitted that the Settlement Commission, itself, has been taken the stand in cases before it that unless the order is communicated to the assessee prior to the filing of the settlement application, it cannot be said that the case had been adjudicated. Consequently, in such cases, where, though the order-in-original is passed prior to the filing of the settlement application, but it is communicated to the assessee after such filing, the Settlement Commission proceeds with applications and does not reject them outright as has been done in the present writ petitions. To establish this proposition, the learned counsel for the petitioners placed a copy of the Settlement Commission’s order in the case of – ***In Re: Emjay Creations: (2007) 219 E.L.T 776 (Sett. Comm.)***. Reliance was also placed by the learned counsel for the

petitioners on a decision of the High Court of Kerala in the case of **Government Wood Works v. State of Kerala: (1988) 69 STC 62.**

5. On the other hand, the learned counsel for the respondents submitted that the provisions of Section 32E of the said Act do not lend themselves to any ambiguity and, therefore, the same should be construed literally. In other words, according to the learned counsel, it does not matter as to whether the assessee has been communicated or has received the order-in-original prior to the making of an application under Section 32E and all that is relevant for proceeding with a settlement application is that the order-in-original must not have been passed or made before the application is filed by the assessee to have his case settled. The learned counsel for the respondents also placed reliance on the definition of the word “case” as provided in Section 31(c) of the said Act. In the said provision, “case” has been defined to mean any proceeding under the said 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 Section 32E(1) is made. It was contended by the learned counsel for the respondents that inasmuch as the order-in-original had been made and/ or passed by the adjudicating authority on 24.12.2009, there was nothing pending before such adjudicating authority on 08.01.2010 when the petitioners had filed their applications under Section 32E of the said Act. Therefore, on 08.01.2010, there was no “case” which was pending adjudication and, thus, nothing was left for the Settlement Commission to settle.

6. In order to answer the issue at hand and to appreciate the contentions of the parties, it would be necessary for us to look at the facts leading to the passing of the impugned order. A show cause notice dated 30.09.2008 was issued by the Additional Director General, Directorate General of Central Excise Intelligence, New Delhi, *inter alia*, requiring Qualimax Electronics Private Limited (one of the petitioners herein) to show cause to the Commissioner of Central Excise, Ghaziabad as to why:

- “(i) Rs 5,78,11,047/- (Five crore seventy eight lac eleven thousand and forty seven only) being the Central Excise duty including Special Excise Duty, Education & Higher Education Cess should not be demanded from them under Section 11A of the Central Excise Act, 1944.
- (ii) Penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944, should not be imposed upon them.
- (iii) Interest under Section 11AB of the Central Excise Act, 1944 should not be demanded from them.”

The other petitioners as well as some other persons, who are not before us, were also required to show cause to the said Commissioner of Central Excise, Ghaziabad as to why penalty under Rule 26 of the Central Excise Rules, 2002 should not be imposed upon them. Qualimax Electronics Private Limited submitted its reply which it termed as an interim reply on 21.12.2009. The order-in-original was passed on 24.12.2009 by the Commissioner of Customs and Central Excise, Ghaziabad. By virtue of the said order, the demand of central excise duty of Rs 5,78,11,047/- upon Qualimax Electronics Private Limited was confirmed under the proviso to Section 11A (1) of the said Act. Interest at the appropriate rate was also

demand on the said amount from Qualimax Electronics Private Limited under Section 11AB of the said Act. The said Commissioner also imposed a penalty of Rs 5,78,11,047/- upon Qualimax Electronics Private Limited under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the said Act. By virtue of the order dated 24.12.2009, the said Commissioner also imposed a penalty of Rs 1,00,00,000/- on Mr Pradeep Gupta, Director of Qualimax Electronics Private Limited under Rule 26 of the Central Excise Rules, 2002. A penalty of Rs 50 lacs was also imposed on Mr Mohit Gupta, who was looking after the work of Qualimax Electronics Private Limited, under the said Rule 26. A penalty of Rs 10 lacs was imposed on Mrs Manju Gupta (proprietor of M/s Vikram Tyre) under the said Rule 26.

7. According to the petitioners, they were unaware of the making / passing of the said order-in-original dated 24.12.2009 when they filed their settlement applications before the Settlement Commission on 08.01.2010. However, according to the respondents, the petitioners were well aware of the making of the said order-in-original and in order to thwart the process of recovery of the demand and penalties along with interest, the petitioners avoided service of copies of the said order-in-original on them and rushed to the Settlement Commission by way of their applications under Section 32E filed on 08.01.2010. We shall point out the circumstances of the making of the order-in-original and the mode and manner in which copies of the same were served upon the petitioners a little later. For the present, we continue with the sequence of events, which are not in controversy. After the

settlement applications were filed on 08.01.2010, the Settlement Commission issued a notice under Section 32F(1) of the said Act requiring the petitioners to explain in writing to the Commission as to why the applications filed by them should be allowed to be proceeded with. At this juncture, it would be pertinent to point out that Section 32F prescribes the procedure to be followed by the Settlement Commission on receipt of an application under Section 32E. Sub-section (1) of Section 32F stipulates that on receipt of an application under Section 32E(1), 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. The said provision further stipulates that after taking into consideration the explanation provided by the applicant, the Settlement Commission, shall, within a period of fourteen days from the date of notice, by an order, allow the application to be proceeded with, or reject the application, as the case may be, and in the latter eventuality, the proceedings before the Settlement Commission shall abate on the date of rejection. The proviso to Section 32F(1) prescribes 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 be allowed to be proceeded with.

8. Coming back to the factual situation, the settlement Commission issued the notice prescribed under Section 32F(1) on 11.01.2010, that is, within the stipulated period of seven days. By virtue of the said notice, the petitioners were also required to explain the following:-

“3. The written explanation should, among other things, contain whether the applications fulfill the criteria as laid under 32E of Central Excise Act and also inform the Commission whether, the bar applicable under Section 32O of the Central Excise Act, 1944 is applicable in their case.

4. It is also required to be explained that in view of the fact that the applicant has admitted the entire duty demand however, they have deposited only an amount of Rs 5.15 crores hence, the remaining amount of Rs 63,11,047/- is not deposited by the applicant till the filing of settlement application, hence not fulfilling the requirement of Section 32E of the Central Excise Act 1944 and moreover, the settlement applications have also been filed in the old format which is discontinued and replaced by the new format since 01/03/07, why the said applications shall be allowed to be proceeded with.”

Immediately on receipt of the said notice under Section 32F(1), instead of replying to the same and offering the explanation sought for by the Settlement Commission, one of the petitioners (Qualimax Electronics Private Limited) for the reasons best known to it, filed a writ petition [WP(C) 283/2010] before this Court challenging the said notice dated 11.01.2010. In the said writ petition a prayer was made for the setting aside of the said notice dated 11.01.2010 issued by the Settlement Commission. Interestingly, a direction was also sought requiring the Settlement Commission to decide the petitioners' settlement applications in terms of the provisions of Chapter V of the said Act as they existed prior to 01.03.2007. This prayer was apparently made because the settlement applications had been filed in the old format which had been discontinued and had been replaced by the new format with effect from 01.03.2007 as would be apparent from the relevant portion of the notice dated 11.01.2010 which has been extracted above. In the said writ petition, a prayer was also

made for a direction that the respondents be prohibited from effecting service on the petitioner of the order dated 31.12.2009 (presumably the reference is to the order-in-original dated 24.12.2009).

9. Anyhow, the said writ petition was withdrawn on 18.01.2010 in the following manner indicated in the order of the court:-

“The learned counsel for the petitioner seeks permission to withdraw this petition with liberty to take recourse to such remedies which may be available to the petitioner after the Settlement Commission determines the issue contained in the show cause notice dated 11th January, 2010. The learned counsel for the petitioner states that the reply to the show cause notice has been filed this morning itself. It is obvious that the Settlement Commission would dispose of the said show cause notice in accordance with law.

The writ petition is dismissed as withdrawn with the aforesaid liberty.”

As mentioned in the order of this Court dated 18.01.2010, the petitioners had filed their replies to the notice under Section 32F(1) on 18.01.2010 itself. Thereafter, the Settlement Commission was informed of the withdrawal of the writ petition and the impugned communication dated 04.05.2010 was issued by the Settlement Commission.

10. We may now refer to the controversy with regard to the making of the order-in-original, its communication to the petitioners and receipt of copies of the said order by the petitioners. As pointed out above, the order-in-original was passed / made on 24.12.2009. There is no controversy with regard to this. There is also no controversy with regard to the fact that copies of the said order-in-original were received by the petitioners much

after 08.01.2010, that is, after the date on which the settlement applications had been filed under Section 32E(1) of the said Act.

11. In the course of hearing of these writ petitions, we had directed the counsel for the respondents to verify as to on which date the order-in-original was despatched and on which date the service was effected on the petitioners. The learned counsel for the respondents placed before us a copy of the letter dated 15.02.2010 issued by the Superintendent, Central Excise, R-I D-III, Ghaziabad to the Superintendent (Adj.), Customs & Central Excise, Commissionerate, Ghaziabad. From the said letter dated 15.02.2010, it is clear that the copies of the order-in-original dated 24.12.2009 had been sent individually to noticee Nos. 2-4 (Mr Pradeep Gupta, Mrs Manju Gupta and Mr Mohit Gupta) at their address — 83, Anand Lok, New Delhi-49 through speed post on 09.02.2010. The letter also indicates that a copy of the order-in-original dated 24.12.2009 had also been sent to Qualimax Electronics Private Limited at the said address — 83, Anand Lok, New Delhi-49 on 02.02.2010 through speed post.

12. The learned counsel for the respondents had also placed on record a letter dated 19.05.2010 written to him by the Assistant Commissioner, Central Excise, Div-III, Ghaziabad. In the said letter dated 19.05.2010, it is stated that the order-in-original dated 24.12.2009 was despatched on 31.12.2009. In the said letter, no particulars are given as to who despatched the said order-in-original on 31.12.2009 and to whom it was despatched. However, the learned counsel for the parties stated that on

31.12.2009, the order-in-original was despatched from the office of the adjudicating authority. It is on this date that the order-in-original went out of the control of the adjudicating authority. This date of 31.12.2009 would be of great significance as we shall see later in this judgment. The said letter dated 19.05.2010 also indicates that the order-in-original dated 24.12.2010 had been sent to the Range Office on 12.01.2010 for delivery to the party. Anyhow, the letter dated 19.05.2010 goes on to state that on 13.01.2010, one Inspector and one Sepoy had been deputed to visit the premises at 83, Anand Lok, New Delhi-49 to serve the order-in-original. However, service could not be effected inasmuch as the security guard at the premises informed that the directors /authorized signatories, namely, Mr Pradeep Gupta, Mr Mohit Gupta and Mrs Manju Gupta were not present at the house and they were out of station. The letter goes on to state that Mr Pradeep Gupta was contacted over the telephone but he replied that he will not receive any order. It is further indicated in the said letter dated 19.05.2010 that, thereafter, the Inspector and Sepoy went to the factory premises at D-12, Site-IV, Industrial Area, Sahibabad, Ghaziabad and there they found the premises to be locked. They were informed that the unit was closed for a long time. Consequently, in the presence of two *panchas*, the order-in-original dated 24.12.2009 was supposedly pasted on the gate of the said factory premises. The letter also indicates that copies of the order-in-original, in respect of the three persons referred to above, were also sent by speed post on 21.01.2010 in one envelope and again on 09.02.2010 separately to each party. From the above two letters dated 15.02.2010 and

19.05.2010, it is clear that the petitioners had not received the order-in-original dated 24.12.2009 when they filed their settlement applications under Section 32E(1) of the said Act before the Settlement Commission on 08.01.2010. In fact, even if whatever is stated in the two letters is taken to be true, the copies of the order-in-original had not even been sent by post to the petitioners by 08.01.2010. The service by pasting on the gate of the factory premises was also done only on 13.01.2010. However, it is also true that the order-in-original dated 24.12.2009 was despatched from the office of the adjudicating authority (i.e., Commissioner of Central Excise and Customs, Ghaziabad) on 31.12.2009. It is on this date that the order-in-original dated 24.12.2009 went out of the control of the adjudicating authority. This fact is of material significance and the reason for this would be clear from the discussion below.

13. With the facts out of the way, we shall now examine the precedents in law. As pointed out above, the learned counsel for the petitioners referred to a decision of the Settlement Commission in the case of ***Emjay Creations*** (*supra*) to submit that it has been the practice of the Settlement Commission that unless the adjudication order had been communicated to the assessee prior to the date of filing of the settlement application, it could not be said that the case had been adjudicated and that the case was not pending before the adjudicating authority. We find that the decision in ***Emjay Creations*** (*supra*) does indicate that the Settlement Commission took the view that till the order is pronounced or published or

the party affected has means of knowing it, the order could not be said to have been passed. However, for our purposes, the practice of the Settlement Commission is not what is relevant. The question is whether that practice is in accord with the legal principles. Of course, the Settlement Commission in the said decision in *Emjay Creations (supra)*, had placed reliance on two decisions of the Kerala High Court which were also referred to by the learned counsel for the petitioners. One decision was in the case of *Vasudevan v. Assistant Collector of Central Excise & Customs: (1994) 72 ELT 533 (Ker.)*. That decision was with reference to the provisions of Section 153 of the Customs Act, 1962 and the Kerala High Court, in connection therewith, had concluded that the normal rule is to tender the order, decision, summons or notice or to send it by registered post to the person for whom it is intended or to his agent. We find that a similar provision is contained in Section 37C of the said Act, which reads as under:-

“37C Service of decisions, orders, summons, etc. — (1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, —

- (a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due, to the person for whom it is intended or his authorised agent, if any;
- (b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;
- (c) if the decision, order, summons or notice cannot be

served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1).”

It is clear that the above provision deals with the manner in which any decision or order or summons or notice is to be served. In the first instance, the decision, order etc. is to be served by tendering the same to the person for whom it is intended or his authorized agent, if any. It may also be served by sending it through registered post with acknowledgement due to the said person or his authorized agent. If these modes of service, that is, either by tendering or by sending through registered post are not successful, then the decision, order etc. could be served by affixation as provided in clauses (b) and (c) of Section 37C(1). In the present case, we find that the order-in-original dated 24.12.2009 was admittedly not tendered to the petitioners or their agents. It is also clear that the said order-in-original was sent by registered post only subsequent to the petitioners having made their settlement applications on 08.01.2010. Thus, by virtue of the provisions of Section 37C(2), the order-in-original dated 24.12.2009, shall be deemed to have been served on the petitioners after 08.01.2010, that is, after the date on which the petitioners had filed their settlement applications.

14. Moving on to the next decision relied upon by the learned counsel for the petitioners, we find that the Kerala High Court in the case of ***Government Wood Works (supra)***, in turn, had placed reliance on an unreported decision of a Division Bench of the said High Court in the case of ***Malayil Mills v. State of Kerala : (TRC Nos. 15 and 16 of 1981 decided on 07.06.1982)***. The case involved in ***Government Wood Works (supra)*** as also in ***Malayil Mills (supra)*** related to the question of limitation. In ***Government Wood Works (supra)***, the point raised by the assessee under the Kerala General Sales Tax Act, 1963 was that the order under Section 35 of the Kerala General Sales Tax Act, 1963 was not valid or legally sustainable as it had been communicated to the petitioner after the expiry of the period four years specified in Section 35 of that Act. The Kerala High Court in ***Government Wood Works (supra)***, after noting its earlier decision in the case of ***Malayil Mills (supra)***, which, in turn, had placed reliance on several decisions of the Supreme Court including:-

- (i) ***Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Officer: (1962) 1 SCR 676;***
- (ii) ***Bachhittar Singh v. State of Punjab: AIR 1963 SC 395;* and**
- (iii) ***State of Punjab v. Khemi Ram: AIR 1970 SC 214,***

came to the conclusion that the order of any authority cannot be said to be passed unless it is in some way pronounced or published or the party affected has the means of knowing it. It was further observed that it is not enough if the order is made, signed, and kept in the file, because such order may be liable to change at the hands of the authority who may modify it or

even destroy it, before it is made known, based on subsequent information, thinking or change of opinion. The Court further held that to make the order complete and effective, it should be issued, so as to be beyond the control of the authority concerned, for any possible change or modification therein. In the context of the facts before it, the Kerala High Court further observed that this should be done within the prescribed period, though the actual service of the order may be beyond that period. The decision of the Court ultimately was that unless the order of the Deputy Commissioner in exercise of its power under Section 35 of the Kerala General Sales Tax Act had been issued from his office within the period of four years, it had to be held that the proceedings were barred by limitation. It observed that the said question of whether it had been issued prior to the period of limitation or not had not been considered by the Tribunal and, therefore, the matter was remanded to the Tribunal for an examination of the records to ascertain whether the order of the Deputy Commissioner had been issued from his office within the period of four years prescribed in Section 35(2) of the Kerala General Sales Tax Act.

15. The decision in ***Government Wood Works (supra)*** does not really advance the case of the petitioners. The ratio of the decision in ***Government Wood Works (supra)*** is that an order of an authority would be regarded as having been made or passed if the order is issued in the sense that it goes beyond the control of the authority concerned so that there is no possibility of the said authority changing, modifying or cancelling the said order. The said decision makes it clear that what is relevant is the date on

which the order goes out of the hands of the adjudicating authority and the date of actual service may not be relevant.

16. It would be fruitful to consider the decisions of the Supreme Court which were referred to in ***Government Wood Works*** (*supra*) and which have been mentioned above. ***Raja Harish Chandra Raj Singh*** (*supra*) was a case in which, *inter alia*, the provisions of Section 18 of the Land Acquisition Act, 1894 came up for interpretation before the Supreme Court. Section 18(1) provided that any person interested, who has not accepted the Collector's award, may, by a written application to the Collector require the matter to be referred by him for determination of the Court, *inter alia*, as to whether the amount of compensation was adequate or not. The proviso to Section 18 provides the period of limitation for such an application under Section 18. It deals with two situations. The first being where the person making the application was present and was represented before the Collector at the time when he made his Award. The other situation deals with all other cases and the period of limitation that is prescribed is six weeks of the receipt of the notice from the Collector under Section 12(2) or within six months from the date of the Collector's Award whichever expires first. In the case before the Supreme Court, the Award was signed by the Collector on 25.03.1951 and the application under Section 18 had been filed on 24.02.1953. On a plain reading of proviso to Section 18, the application made by the applicant therein was clearly beyond six months. The question which arose before the Supreme Court was whether such a literal and mechanical way of construing the relevant

clause was justified in law. In answering the question, the Supreme Court examined the nature of the Collector's award and came to the conclusion that the Award could not be treated as a decision inasmuch as in law it was an offer or a tender of compensation determined by the Collector to the owner of the property under acquisition. If the owner accepted the offer, no further proceeding was required to be taken and the amount was to be paid and the compensation proceedings would stand concluded. On the other hand, if the owner did not accept the offer, Section 18 gave him a statutory right of having the question determined by a Court. Consequently, the acquisition proceedings would stand concluded only upon such judicial determination.

17. The Supreme Court, after noting that the Award is nothing but an offer, concluded that the normal requirement under contract law is that an offer must involve a communication of the same to the party concerned. It is in this context that the Supreme Court held that the date of the Award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office but it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. Consequently, the Supreme Court held that the literal and mechanical construction of the words "the date of the award" occurring in Section 18 would not be appropriate.

18. The Supreme Court also examined the matter from the standpoint of the award being an administrative decision taken by the Collector. The

Supreme Court observed that such a decision ultimately affects the rights of the owner of the property and in that sense it would be essentially fair and just that the said decision should be communicated to the affected party. The Supreme Court held that the knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fairplay and natural justice, the expression “the date of award” used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. The Supreme Court referred to various other decisions and concluded thus:-

“These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned.”

19. ***Bachhittar Singh***(*supra*) was a case which involved the remarks of a Minister of the erstwhile State of PEPSU regarding Bachhittar Singh’s removal from service. The said remarks had not been communicated to Bachhittar Singh. In the meanwhile, the State of PEPSU merged with the State of Punjab. Thereafter, the order of dismissal was communicated to Bachhittar Singh. We may point out that the remarks of the Minister of the State of PEPSU were that although the charges against Bachhittar Singh were serious and that they had been proved and that it warranted the punishment of dismissal, yet as he was a refugee and had a large family to support, the order of dismissal would be too hard and, instead of dismissing him outright, he should be reverted to his original post of *qanungo* and that

he should be warned that if he does not behave properly in future he will be dealt with severely. Bachhittar Singh wanted implementation of the said remarks of the Minister of the State of PEPSU as against the subsequent order of dismissal passed by the State of Punjab. It is in this context that the Supreme Court observed that the Minister's remarks, with regard to the award of lesser punishment were only provisional until they were communicated. The Supreme Court observed that it is possible that after expressing an opinion about a particular matter at a particular stage, a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Therefore, to make the opinion of a Minister amount to a decision of the Government, it must be communicated to the person concerned. It is in this sense and in this context that the Supreme Court observed that communication of a decision was necessary for it to take effect.

20. In *State of Punjab v. Khemi Ram* (*supra*), the Supreme Court was required to consider the question as to whether an order of suspension passed against a government servant would take effect when it is "made" or when it is actually served on or received by the government servant. Briefly stated, the facts in that case were that a suspension order had been passed /made against a government servant. However, before the said suspension order could be served upon him, he retired from service. Thereafter, departmental proceedings continued pursuant to the suspension order and ultimately led to an order of dismissal. The question for determination was

whether the order of suspension, which had admittedly been made before the date of the government servant's retirement, did not take effect by reason only that it was received by him after his retirement and which would render the ultimate dismissal order invalid, for there cannot be a dismissal after retirement. Another interesting and important fact in the said case before the Supreme Court was that the documents clearly showed that the order of suspension, which had been passed on 31.07.1958, that is, prior to the date of the government servant's retirement, had, in fact, passed from the hands of the Punjab Government as a result of the same being transmitted to the respondent. The Supreme Court observed that the position, therefore, was not as if the order passed by the government suspending government servant from service remained with the government or that it could have, therefore, changed its mind about it or modify it.

21. In ***Khemi Ram*** (*supra*), the Supreme Court noticed its earlier decisions in the case of ***Raja Harish Chandra Raj Singh*** (*supra*) and ***Bachhittar Singh***(*supra*) and observed that in all the decisions cited before the Supreme Court, it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned, the authority making such order would be in a position to change its mind and modify it, if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and, therefore, there would be no chance whatsoever of its changing its mind or modifying it. It is in this sense that the Supreme

Court held that once an order is issued and it is sent out to the concerned government servant, it must be held to have been communicated to him, no matter when he actually received it. Consequently, the Supreme Court held in the context of the facts of the case before it that it would be difficult to “persuade ourselves to accept the view that it is only from the date of the actual receipt by him that the order becomes effective. If that be the true meaning of communication, it would be possible for a government servant to effectively thwart an order by avoiding receipt of it by one method or the other till after the date of his retirement even though such an order is passed and despatched to him before such date”. The Supreme Court further observed that such a meaning of the word “communication” ought not to be given unless the provision in question expressly so provides. The Supreme Court also differentiated the case of suspension from that of an order of dismissal and held that in the case of an order of dismissal, actual knowledge of the government servant may perhaps become necessary because of the consequences of such a decision.

22. These decisions of the Supreme Court have been the subject matter of later decisions and we would like to allude to the same. The decisions, which we shall refer to, are:-

- (i) **Collector of Central Excise v. M. M. Rubber Co.:** (1991) 55 E.L.T. 289 (SC);
- (ii) **D. Saibaba v. Bar Council of India & Another:** (2003) 6 SCC 686; and
- (iii) **MCD v. Qimat Rai Gupta & Others:** (2007) 7 SCC 309.

23. In CCE v. M.M. Rubber and Co.: 1992 Supp (1) SCC 471, the short question of law that arose for consideration before the Supreme Court was concerning the relevant date for the purpose of calculation of the period of one year provided under Section 35E(3) of the said Act. The said provision deals with the limitation for exercise of the powers under sub-sections (1) and (2) of section 35E by the Board or the Collector of Central Excise, respectively. Section 35E(3) reads as under:-

“No order shall be made under sub-section (1) or sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.”

24. The Supreme Court examined the meaning to be ascribed to the expression “date of the decision or order of the adjudicating authority”. In the case before the Supreme Court, the order-in-original was passed by the Collector of Central Excise on 28.11.1984. A copy of this order was attested by the Superintendent of the office on 21.12.1984 and despatched to the assessee and it was received by the assessee on 21.12.1984. The question was whether the relevant date of the order, for the purposes of Section 35E(3), should be taken as 28.11.1984 when it was passed or the relevant date should be taken as 21.12.1984 when it was received by the assessee.

25. The Supreme Court observed that:

“9. The words “from the date of decision or order” used with reference to the limitation for filing an appeal or revision under certain statutory provisions had come up for consideration in a number of cases. We may state that the ratio of the decisions uniformly is that in the case of a person aggrieved filing the appeal or revision, it shall mean the date of communication of the decision or order appealed against.”

26. After considering several other decisions including *Raja Harish Chandra (supra)*, the court held:

“12. It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made: that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any *locus paetentiae (sic)*¹. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time.

13. So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order. Therefore courts have uniformly laid down as a rule of law that for seeking the remedy the limitation starts from the date on which the order was communicated to him or the date on which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set aside.”

The court concluded that if the intention or design of the statutory provision is to protect the interest of the person adversely affected, by providing a remedy against the order or decision, any period of limitation prescribed

¹ Actually, *locus poenitentia*, which literally signifies a place of repentance. In law, however, it, inter alia, refers to the opportunity of withdrawing from a projected contract, before the parties are finally bound. In the above extract, it is used in the sense of the opportunity of the adjudicating authority to destroy or alter his order.

with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of *suo moto* power over the subordinate authorities' orders, the date on which such power was exercised by making an order are the relevant dates for determining the limitation. The Supreme Court held that section 35E comes under the latter category of an authority exercising its own powers under the Act and that it was not correct to equate the Board to one of the two parties to a quasi-judicial proceeding before the Collector and the Board's right under Section 35E to the exercise of the right of appeal by an aggrieved assessee from an order passed to its prejudice. The Supreme Court ultimately held that the period of one year fixed under Section 35E(3) of the said Act should be given its literal meaning meaning thereby that the expression "date of the decision or order of the adjudicating authority", in the context of the case before the Supreme Court, would be 28.11.1984, that is, the date of the order-in-original and not 21.12.1984, when it was received by the assessee.

27. ***D. Saibaba*** (*supra*) was a case where the Supreme Court was called upon to interpret the provisions of Section 48-AA of the Advocates Act, 1961. The said provision reads as under:-

“48-AA. *Review*.—The Bar Council of India or any of its committees, other than its disciplinary committee, may of its own motion or otherwise review any order, within sixty days of the date of that order, passed by it under this Act.”

The debate before the court was whether the expression “the date of that

order” should be construed literally as the date of the order or it should be construed as meaning the date of communication of the order. The court, so far as the commencement of the period of limitation for filing the review petition was concerned, was clearly of the opinion that the expression “the date of that order” as occurring in Section 48-AA has to be construed as meaning the date of communication or knowledge of the order to the review petitioner. It was also held that where the law provides a remedy to a person, the provision has to be so construed, in case of ambiguity, as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective and that a construction which would render the provision nugatory ought to be avoided.

28. Finally, we are left to consider the Supreme Court decision in *MCD v. Qimat Rai Gupta (supra)*. The meaning of the word “made” occurring in sub-section (4) of Section 126 of the Delhi Municipal Corporation Act, 1957 was in question. Section 126 of the DMC Act empowers the Commissioner to amend the assessment list in terms of one or the other modes provided for therein. Sub-section (2) thereof provides for giving an opportunity to the assessee of being heard before an order of amendment is made. Sub-section (3) of Section 126 obligates the Commissioner to consider the objections which may be made by such persons. Clause (b) of sub-section (4) of Section 126 reads as under:

“126. (4) No amendment under sub-section (1) shall be made in the assessment list in relation to—

* * *

(b) the year commencing on the 1st day of April, 1988 or any

other year thereafter, after the expiry of three years from the end of the year in which the notice is given under sub-section (2) or sub-section (3), as the case may be:

* * *

The Supreme Court pointed out that a distinction exists in the construction of the word “made” depending upon the question as to whether the power was required to be exercised within the prescribed period of limitation or in order to provide the person aggrieved to avail remedies if he is aggrieved thereby or dissatisfied therewith. After noting that an order passed by a competent authority dismissing a government servant from services requires communication thereof as has been held in *State of Punjab v. Amar Singh Harika*: AIR 1966 SC 1313 and that an order placing a government servant on suspension does not require communication of that order, the court held:-

“What is, therefore, necessary to be borne in mind is the knowledge leading to the making of the order. An order ordinarily would be presumed to have been made when it is signed. Once it is signed and an entry in that regard is made in the requisite register kept and maintained in terms of the provisions of a statute, the same cannot be changed or altered. It, subject to the other provisions contained in the Act, attains finality. Where, however, communication of an order is a necessary ingredient for bringing an end result to a status or to provide a person an opportunity to take recourse to law if he is aggrieved thereby, the order is required to be communicated.”

(emphasis supplied)

29. The thread of reasoning running through all these cases is that when viewed from the perspective of determining the starting point of limitation for an aggrieved party to seek a remedy, be it an appeal, revision or review, communication of the order is a necessary ingredient. Consequently, in such cases, the clock of limitation would not start to tick

till the order is communicated to the aggrieved party and, therefore, in construing provisions which use words like “date of the order”, the literal meaning may have to give way to a purposive and constructive meaning as in the ***Raja Harish Chandra*** (*supra*) genre of cases. Even in the category of cases where the orders “bring an end result to a status” such as an order of dismissal from government service, communication of the orders would be necessary to make such orders effective. Thus, in such cases also the date of the order would be construed as the date when it is communicated. But, as in ***Khemi Ram*** (*supra*), in the case of an order of suspension from service, the date of the order would be construed as the date on which it is made or issued and not the date on which it is received by the government servant.

30. In these writ petitions, the situation is entirely different to the cases where the starting point of limitation for invoking a statutory remedy is to be construed from the date of an order. Here, the circumstances seem to be quite the reverse. The 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 on 30.09.2008 upto the adjudication thereof. Hence, the date of receipt of the order-in-original is not of any significance for the purposes of Section 32E.

31. The real issue is whether on the date the settlement applications were made the "case" had already been adjudicated or not. It is also a jurisdictional issue for the Settlement Commission. Because, the Settlement Commission can only proceed to settle a case which is pending adjudication on the date the settlement application is received by it. The date of receipt of the order by the applicants is inconsequential.

32. Of course, there is the danger that to prevent an assessee from seeking a settlement of his case, the adjudicating authority may quickly pass the adjudication order the moment he gets an inkling that the assessee is about to approach the Settlement Commission. There is also the danger that the adjudicating authority may back date an order. Adjudicating authorities are not supposed to behave in this manner and are presumed to function within the boundaries of law but, these things can happen. Would not a literal construction of the provisions then come in aid of such errant officers and run counter to the legitimate hopes of assesses who want to come clean,

pay their taxes and have their cases settled by the Settlement Commission? The answer to this would lie in construing the date of adjudication to be the date on which the adjudicating authority loses his *locus poenitentia*, or opportunity to tear off, destroy or alter the adjudication order. In other words, when the order goes out of his control. And, that happens when the order is signed and the one-way process of sending it to the assessee is put in motion either directly or indirectly through some other agency.

33. Thus, the date of receipt of the order-in-original is not a relevant circumstance. What is of prime importance is the date on which the order-in-original was despatched from the office of the adjudicating authority (in this case, the Commissioner of Central Excise & Customs, Ghaziabad). As we have seen, the order-in-original dated 24.12.2009 had left the office of the said Commissioner on 31.12.2009 and was beyond his reach and control. Consequently, the adjudication becomes effective and complete on that date, i.e., 31.12.2009. That being so, the necessary pre-condition of a case pending adjudication on the date of the settlement application is not satisfied. As such, the Settlement Commission had no jurisdiction to entertain the plea of settlement. Because, 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.

Conversely, the proceeding would be regarded as pending before an adjudicating authority till the order does not go out of his control. In the present case, this happened on 31.12.2009. Thus, on 08.01.2010, when the settlement applications were filed by the petitioners, the matter before the adjudicating authority had already been adjudicated.

34. In the result, the impugned order cannot be faulted. The writ petitions are dismissed leaving the parties to bear their respective costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

**JUNE 02, 2010
SR**