

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP(C) 9104/2009

Reserved on: 2nd December, 2009

% Date of Decision: 29th January, 2010

ASHWANI TOBACCO CO. PVT. LTD.

..... Petitioner

Through: Mr. Rupesh Kumar and
Mr. Harpreet Singh, Advocates

versus

UNION OF INDIA AND OTHERS

..... Respondents

Through: Mr. A.S. Chandiok, ASG with
Mr. Mukesh Anand, Mr. Shailesh
Tiwari, Mr. Sumit Batra, Mr. Ritesh
Kumar, Mr. R.C.S. Bandana and
Mr. Vaibhav Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

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.

JUDGMENT

SIDDHARTH MRIDUL, J.

- 1.** By way of the present writ petition, the Petitioner seeks to challenge the miscellaneous order no. 142/CE/09-SC(PB) dated 29th April, 2009 and prays for the following relief:-

- “(i) Quash and set aside the impugned miscellaneous order dated 29.4.2009 and received by the petitioner on 8.5.2009 to the extent it denies the benefit of payment of penalty @ 25% as provided under Section 11AC of the Excise Act;
- (ii) Consequent to (i) above, direct the Settlement

Commission to grant to the petitioner, complete immunity from penalty or in the alternative, extend the benefit of reduced payment of penalty @ 25% under Section 11AC.”

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

- (a) The Petitioner is a manufacturer of readymade Khaini under the brand name ‘Madhu’ falling under Chapter 24 of the 1st Schedule to the Central Excise Tariff Act, 1985 and is registered with the concerned Central Excise Authorities.
- (b) Based on information that the Petitioner was involved in the clandestine clearance of goods without payment of central excise duty, the factory premises of the Petitioner, offices/godowns of certain transporters, railway booking agents, raw material suppliers and some of the dealers of the Petitioner situated in Karnataka/Kerala were searched by the Directorate General Central Excise Intelligence (hereinafter referred to as ‘the DGCEI’).
- (c) During the follow up action various records/documents were resumed from different places and seizures of unaccounted finished goods along with unaccounted raw material took place. The Petitioner was issued with a demand cum show cause notice (in short ‘the SCN’) by the Additional Director General, DGCEI, New Delhi on 12th October, 2006. The SCN proposed a demand of duty of

Rs.17,65,95,521/- on 80863 bags of Madhu Khaini alleged to be clandestinely removed during the period from 1st January, 2002 to 31st July, 2005 and from 1st August, 2005 to 13th December, 2005 along with payment of interest. The SCN also proposed to appropriate Rs.30 lacs voluntarily deposited by the Petitioner and Rs.4 crores voluntarily deposited by one Sh. Anup Kumar Sahu who was alleged to be the main person of the Petitioner looking after production, marketing, sales and other financial matters. Various other provisions regarding confiscation of seized goods from various premises and other persons along with invocation of penalty were invoked against the Petitioner. Insofar as imposition of penalty is concerned the SCN invoked Section 11AC of the Central Excise Act, 1944 (hereinafter referred to as 'the Excise Act').

- (d) The Petitioner, on being served with the aforesaid SCN approached the Settlement Commission under Section 32E of the Excise Act, admitting therein a duty liability amounting to Rs.1,60,63,534/- which was later on revised to Rs.1,67,44,637/- at the time of admission of the settlement application. Thereafter, the settlement application of the Petitioner was finally heard on 9th October, 2007 and final order bearing no. F-779-780/CE/08-SC(PB) dated 29th February, 2008 was passed by the Settlement Commission on the following terms and conditions:-

“Central Excise Duty: Central Excise Duty is settled at Rs.4,74,09,053/-. As an amount of Rs.4,30,00,000/- is already deposited, the same shall be appropriated. For the balance amount of Rs.16,29,436.00, the main applicants are directed to pay the said amount within 15 days of the receipt of this order and report compliance to the Revenue and the Commission.

Interest: Main applicants have resorted to clandestine removal over a very long period. They did not pay the duty on the dates it was due and, therefore, taken financial accommodation at the cost of exchequer. The Bench is therefore, not inclined to grant immunity to them from interest. The Bench orders payment of interest as applicable under the relevant provisions during the period from the dates when the duty was due till the dates it was paid. The Revenue shall accordingly calculate and intimate to the applicants the amount of interest as ordered above within 15 days of receipt of this order who thereupon shall pay the same within the next 15 days under intimation both to the Commissioner and the Revenue.

Penalty: The Bench imposes penalty of Rs.3,00,00,000/- under the provisions invoked in the SCN on applicant No.1. Full immunity from penalty is granted to applicant No.2 and other co-applicants.

Redemption Fine: The Bench fixes redemption fine of Rs.3,00,000/- in respect of all the goods seized in this case which the applicant is directed to pay within 15 days of the receipt of this order and report compliance to the Revenue and the Commission.

Prosecution: Subject of the deposit of duty, fine, interest and penalty as ordered above the Bench grants immunity from prosecution to the applicant/co-applicants under the Act and the Rules framed there under as applicable in so far as this case is concerned. Immunity from prosecution is further subject to the condition that it shall further stand withdrawn if the applicant No.1 & 2 are charged with similar offence within a period of two years from the date of the order.”

- (e) That, according to the Petitioner, since the aforesaid penalty order contained some inadvertent errors relating to the calculation of the remaining amount of duty to be

paid, and also additionally praying for seeking immunity from penalty and interest, a miscellaneous application was filed before the Settlement Commission on 20th March, 2008. Apart from seeking rectification of the inadvertent errors committed by the Settlement Commission with respect to the calculation of the duty liability of the Petitioner, the following prayers were made in the miscellaneous application:-

- “(i) That, the Final Order No. E/779-780/CE/08-SC(PB) dated 29.2.2008 be rectified and the duty demand settled may be reduced.
- (ii) That, the Applicant No.1 be allowed complete immunity from penalty or in the alternative the amount of penalty may be reduced.
- (iii) That the applicant be granted immunity from payment of interest or the interest rate @ 10% per annum.
- (iv) In case his application is not acceptable, the period of deposit of disputed amount be extended suitably.
- (v) Any other relief as deemed fit be granted.
- (vi) The applicant be granted opportunity of personal hearing.”

(f) Thereafter, another miscellaneous application seeking to amend the aforesaid miscellaneous application was also filed by the Petitioner before the Settlement Commission.

(g) The aforesaid miscellaneous applications were heard by the Settlement Commission on 17th February, 2009 and the impugned order was passed on 29th April, 2009 which was received by the Petitioner on 8th May, 2009. Aggrieved

by the said impugned order dated 29th April, 2009, the Petitioner, as aforesaid, has filed the present writ petition.

3. On behalf of the Petitioner, it has been strenuously urged that the benefit of proviso to Section 11AC was admissible in the case of the Petitioner and, therefore, the amount of penalty was liable to be reduced to 25% of the total amount of penalty payable. In other words, it was urged that the Settlement Commission performed the function of a Central Excise Officer while exercising its jurisdiction and that in the exercise of such powers the Settlement Commission ought to have applied the provisions of Section 11AC in their entirety to the adjudication of the penalty imposed on the Petitioner including the benefit of payment of penalty @ 25% only when the duty had been deposited within 30 days from the communication of the order.

4. Per contra, it was argued on behalf of the Respondents that the scheme of settlement as contained in Chapter-V of the Excise Act is distinct from an adjudication under taken by a Central Excise Officer and is in the form of a package under which all aspects of the case are taken into account in a holistic manner while deciding the issues of penalty and interest and the extent of immunity therefrom. In other words, the benefit of the proviso to Section 11AC has no application in the case of the Petitioner, who has adopted the course of the settlement under Chapter 5 of the Excise Act, since the same does not amount to an adjudication by a Central Excise Officer.

5. Before proceeding to consider the relative merits of the contentions raised on behalf of the parties, it would be necessary to

extract the relevant provisions of the Excise Act:

- (a) Section 2(b) of the Excise Act reads as under:

“Section 2(b): *“Central Excise Officer” means the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Deputy Commissioner of Central Excise, Assistant Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act;”*

- (b) Section 11AC of the Excise Act reads as under:

“Section 11AC: Penalty for short-levy or non-levy of duty in certain cases.— *Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:*

Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section be twenty-five per cent of the duty so determined:

.....
.....

- (c) Section 32A of the Excise Act reads as under:

“Section 32A: Jurisdiction and powers of Settlement Commission. — *(1) Subject to the other provisions of this Chapter, the jurisdiction, powers and authority of the Settlement Commission may be exercised by Benches thereof.*

(2) Subject to the other provisions of this section, a

Bench shall be presided over by the Chairman or a Vice-Chairman and shall consist of two other Members.

(3) The Bench for which the Chairman is the presiding officer shall be the principal Bench and other Benches shall be known as additional Benches.

(4) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Chairman may authorise the Vice-Chairman or other Member appointed to one Bench to discharge also the functions of the Vice-Chairman or, as the case may be, other Member of another Bench.

(5) The principal Bench shall sit at Delhi and the Central Government shall, by notification in the Official Gazette, establish additional Benches at such places as it considers necessary.

(6) Notwithstanding anything contained in the foregoing provisions of this section, and subject to any rules that may be made in this behalf, when one of the persons constituting a Bench (whether such person be the presiding officer or other Member of the Bench) is unable to discharge his functions owing to absence, illness or any other cause or in the event of the occurrence of any vacancy either in the office of the presiding officer or in the office of one or the other Members of the Bench, the remaining Members may function as the Bench and if the presiding officer of the Bench is not one of the remaining Members, the senior among the remaining Members shall act as the presiding officer of the Bench:

Provided that if at any stage of the hearing of any such case or matter, it appears to the presiding officer that the case or matter is of such a nature that it ought to be heard of by a Bench consisting of three Members, the case or matter may be referred by the presiding officer of such Bench to the Chairman for transfer to such Bench as the Chairman may deem fit:

Provided further that at any stage of the hearing of any such case or matter, referred to in the first proviso, the Chairman may, if he thinks that the case or matter is of such a nature that it ought to be heard by a Bench consisting of three Members, constitute such Bench and if Vice-Chairman is not one of the Members, the senior among the Members shall act as the presiding officer of such Bench.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the Chairman may, for the disposal of any particular case, constitute a special Bench consisting of more than three Members.

(8) Subject to the other provisions of this Chapter, the special Bench shall sit at a place to be fixed by the Chairman."

- (d) Section 32E of the Excise 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, undervaluation, 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."

(e) Section 32F of the Excise 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."

(f) Section 32H of the Excise 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."

(g) Section 32-I of the Excise 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."

(h) Section 32K of the Excise Act reads as under:

"Section 32K: Power of Settlement Commission to grant immunity from prosecution and penalty. —

(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 32E has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act and also either wholly or in part from the imposition of any penalty and fine under this Act, with respect to the case covered by the settlement:

Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section 32E.

Explanation. — For the removal of doubts, it is hereby declared that applications filed before the Settlement Commission on or before the 31st day of May, 2007 shall be disposed of as if the amendment in this section had not come into force.

(2) An immunity granted to a person under sub-section (1) shall stand withdrawn if such person fails to pay any sum specified in the order of the settlement passed under sub-section (5) of section 32F within the time specified in such order or fails to comply with any other condition subject to which the immunity was granted and

thereupon the provisions of this Act shall apply as if such immunity had not been granted.

(3) An immunity granted to a person under subsection (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person had, in the course of the settlement proceedings, concealed any particular material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had no such immunity been granted."

6. From a plain reading of the provisions reproduced hereinabove the following position, insofar as the present case is concerned, emerges. Section 2(b) of the Excise Act defines a Central Excise Officer as all the Officers of the Central Excise Department or other persons invested by the Central Board of Excise and Customs with any of the powers of a Central Excise Officer under the Excise Act. Section 11AC of the Excise Act provides that where duty, as determined under Section 11A and interest payable thereon under Section 11AB, is paid within 30 days from the date of communication of the order of the Central Excise Officer, the amount of penalty liable to be paid will be 25% of the duty determined. It further provides that the benefit of reduced penalty will be available only if the amount of penalty so determined has also been paid within the said period of 30 days. Section 32A of the Excise Act provides for the jurisdiction and powers of Settlement Commission. Insofar as Section 32E of the Excise Act is concerned, it indicates that an assessee can make an application for settlement of his case to the Settlement Commission before adjudication and also provides for the form and manner in which such an application can be made. Section 32F of the Excise Act prescribes

the procedure to be followed by the Settlement Commission on receipt of an application. It, *inter alia*, provides that the Settlement Commission may make an order on the application after examination of the records, the report of the Commissioner of Central Excise, and after affording an opportunity to the applicant and the Commissioner of Central Excise to be heard, and after examining evidence as may be placed before it or obtained by it. Sub-section (8) of Section 32F specifically provides that the order passed by the Settlement Commission shall provide for the terms of settlement including any demand by way of duty, penalty or interest, and the manner in which the sums due under the settlement will be paid in order to make the settlement effective. Sub-section (9) of Section 32F provides that if the duty, penalty, interest or fine as provided for in an order under Sub-section (5) made by the Settlement Commission is not paid by the assessee within a period of 30 days from the receipt of the copy of the order by him, the amount that has not been paid will be recovered along with interest thereon as sums due to the Central Government. Section 32H provides for the power of the Settlement Commission to re-open completed proceedings. Section 32-I stipulates that the Settlement Commission shall, in addition to the powers conferred under Chapter-V, have all the powers of a Central Excise Officer under the Excise Act or the rules made thereunder. It further stipulates that the Settlement Commission will have the exclusive jurisdiction to exercise the powers and perform the functions of the Central Excise Officer from the time that the application has been allowed to be proceeded with under Section 32F until an order is

passed under Sub-section (5) thereof. The provisions of Section 32K stipulate that if the Settlement Commission is satisfied that an applicant has co-operated with it in the proceedings and has made full and true disclosure of his duty liability, it may grant to such an applicant, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under the Excise Act and also either wholly or in part from the imposition of any penalty or fine under the Excise Act.

7. A similar issue had come up for consideration before this Court in Writ Petition(Civil) No. 1495/2007 and Writ Petition(Civil) No. 4401/2007 entitled ***M/s Picasso Overseas & Ors. vs. Director General of Revenue Intelligence and Anr.*** By a common judgment dated 3rd August, 2009 deciding both these writ petitions it was, *inter alia*, held as under:-

“The expression “power to perform the function of an office of Customs”, as stated in Section 127F(2) of the Act, has to be read in accordance with the scheme of Chapter XVA and its object. Thus, it would mean that the Settlement Commission is to basically look at the evidence and call for such evidence in order to determine whether the Settlement Commission should or should not accept the additional custom duty which the applicant says is acceptable to him.”

It was further observed in paragraph 9 of that judgment that:-

“9.

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

.....
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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 function 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 Chapter XVA 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 provision of the Act and similar to what an Adjudicating officer does. In fact, the expression "exclusive jurisdiction to exercise the power and perform the function 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 custom 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....."

8. In the present case it is observed that while seeking quashing of the impugned order dated 29th April, 2009 the petition also seeks complete immunity from penalty or in the alternative the benefit of reduced payment of penalty @ 25%. In this behalf it must be observed that there is no provision under Section 11AC which provides for waiver of total penalty. Insofar as the reduced payment of penalty @ 25% under the provision of Section 11AC of the Excise Act is concerned, it is noticed that the Petitioner had filed an application for settlement before the Settlement Commission under the provisions of Chapter-V of the Excise Act. The expression "settlement" before the Settlement Commission is in contradistinction to "adjudication" before a Central Excise Officer. The very scheme of the provisions of Chapter-V is settlement and not adjudication. Under the scheme of settlement as contained in Chapter-V of the Excise Act, the Settlement Commission makes an order on the application after examination of the records, the report of the Commissioner of the Central Excise and after affording an opportunity to the applicant and the Commissioner

of Central Excise to be heard, and after examining evidence as may be placed before it or obtained by it. The expression “powers which are vested in a Central Excise Officer under this Act” as stated in Section 32-I of the Excise Act has to be read in accordance with the scheme of Chapter-V and its objects. We find that they are basically to give finality to the order of the Settlement Commission as an order under the provision of the Act and similar to what an adjudicating officer does. In fact, the expression empowers the Settlement Commission to basically look at the evidence and call for such evidence in order to determine whether the Settlement Commission should or should not accept the application for settlement made by the applicant. Therefore, the Settlement Commission cannot be said to be a Central Excise Officer only by virtue of the powers provided in Section 32-I of the Excise Act. In this behalf it is observed that while settling a case a Settlement Commission has been empowered to grant immunity from interest and penalty. It was in this context that the Settlement Commission subject to the deposit of duty, fine, interest and penalty as ordered vide final order dated 29th February, 2008 granted immunity from prosecution to the applicants under the Excise Act.

9. An order of settlement is obviously distinct from an adjudication order of a Central Excise Officer, who has no power to accord immunity from prosecution while determining duty liability under the Excise Act. The order of settlement is in the form of a package and takes into consideration all the aspects of the case in a holistic manner before determining the issues of penalty and interest as well as the extent of immunity therefrom. It is in this context that Sub-

section 5 of Section 32F confers on the Settlement Commission the powers to “pass such order as it thinks fit on the matters covered by the application.....”. It is, therefore, observed that the scheme of settlement as contained in Chapter-V of the Excise Act is distinct from the adjudication undertaken by a Central Excise Officer under the other Chapters of the Excise Act. Therefore, once the Petitioner has adopted the course of settlement he has to be governed by the provisions of the said Chapter. Resultantly, the benefit under the proviso to Section 11AC of the said act which could have been availed when the matter of determination of duty was before a Central Excise Officer is not attracted to the cases of a settlement undertaken under the provisions of Chapter-V of the Excise Act.

10. In view of the foregoing observations, we are of the opinion that there is no infirmity in the impugned order dated 29th April, 2009 so as to warrant interference by this Court under the provisions of Article 226 and 227 of the Constitution of India. The petition is devoid of merit and is, resultantly, dismissed. No order as to costs.

SIDDHARTH MRIDUL, J.

A.K. SIKRI, J.

JANUARY 29, 2010

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