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IN THE HIGH COURT OF DELHI AT NEW DELHI

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DECIDED ON: 24.03.2014

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W.P. (C) 210/2014
CM APPL.388/2014

KOMAL JAIN

..... Petitioner

Through: Mr. C. Hari Shankar with Mr. S.
Sunil, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Sachin Datta, CGSC with
Ms. Niti Arora, Advocate and Mr. Gopaljee,
Sr. Intelligence Officer, DRI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. This writ petition concerns the manner of application of Section 127B of the Customs Act, 1962 (*"the Act"*). The petitioner, was served a show cause notice dated 6th September, 2013, under Section 124 of the Act which alleged that he admitted to smuggling, into India, 36565.33 grams of gold jewellery and coins (*"the articles"*) valued at Rs.9,79,77,154/- and involving customs duty at the applicable baggage rate of 36.50%, which had, consequently, become liable to confiscation under Clause (d), (i), G), (1) and (m) of Section 111 of the Act. Consequently,

the said show cause notice called upon him to show cause against confiscation of the articles as well as the packing material and two bags in which they were alleged to be contained. The notice further proposed penalty under Sections 112 and 114AA of the Act.

2. The petitioner claims that he is desirous of approaching the Customs and Central Excise Settlement Commission (“*Settlement Commission*”) under Section 127C of the Act. It is however argued that he is handicapped from doing so on account of clause (c) of the first *proviso* to Section 127B, which prohibits making of any settlement application unless the applicant has paid the additional amount of customs duty accepted by him along with interest due under Section 28AB of the Act. It is argued that in this case, the show cause notice does not propose any duty liability, and thus, in the absence of any demand having been made at this juncture, the application to the Settlement Commission need not be supported by any payment. While the petitioner admits duty liability for the gold sought to be brought into India, it is argued that the said duty is payable only if redemption of the gold jewelry and coins is allowed by the Settlement Commission.
3. In support of this proposition, learned counsel for the petitioners places reliance on *Jagdish Cancer and Research Centre*, 2001 (132) ELT 257 (SC). Since the show cause notice does not propose any duty demand, argues counsel, no liability has yet arisen. Therefore, any precondition for payment to approach the

Settlement Commission is not justified under law. It is argued that such a deposit would lead to an absurdity, in that the money is paid by an assessee even before it is due in law, and if the Settlement Commission were not to allow the redemption of goods, the duty would stand deposited and become practically irrecoverable, even if there was no liability ultimately. Such an interpretation, which results in an arbitrary extraction of property of a citizen, must be avoided, argues learned counsel. In the peculiar circumstances presented in this case, it is argued that the requirement to deposit must be excluded, so as to provide Section 127B a workable meaning.

4. In response, learned counsel for the Revenue argues that the jurisdiction of the Settlement Commission is barred under the terms of Section 127B itself, which undercuts the arguments made in the writ petition. It is argued that Section 127B only covers cases of misclassification, and excludes mis-declaration, which involves situations of suppression, distortion and misrepresentation. In this case, it is argued that there the gold was not declared at all by the petitioner, and sought to be smuggled into India. In such cases, the jurisdiction of the Settlement Commission – which must remain within the four corners of Section 127B – is excluded.
5. Before addressing the issues arising in this case, it is useful to extract the relevant provisions of Section 127B of the Act:

“SECTION 127B. Application for settlement of cases. -
(1) Any importer, exporter or any other person

(hereinafter referred to as the applicant in this Chapter) 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 specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification or otherwise and 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 a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer;*
- (b) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and*
- (c) the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB :*

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

***Provided** also that no application under this sub-section shall be made in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed :*

***Provided** also that no application under this sub-section shall be made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975 (51 of 1975).*

(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 127C has not been made before the said date, 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 dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under section 110, the applicant 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 specified by rules.

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

6. Two issues are sought to be agitated in the present case. The first is whether Section 127B of the Act bars the jurisdiction of the Settlement Commission for cases of mis-declaration, and secondly, whether the petitioner is required to deposit any amount as a pre-condition to approaching the Settlement Commission, although no demand has yet been raised. However, the court notes that at the outset, the main issue which requires decision is whether the Petitioner's contention that its application can be entertained without having to pay duty.
7. As to the jurisdiction of the Settlement Commission, there can be no doubt that it is bound by the confines of Section 127B. It cannot travel beyond that provision. The text of Section 127B extends the jurisdiction of the Settlement Commission to cases in "*which [the assessee] admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification or otherwise.*" (emphasis supplied). In this context, it is important to notice that provisions of Chapter-XIVA of the Act were introduced for settlement of cases involving misclassification to facilitate disputes resolution expeditiously without going through hierarchy of appellate provisions as under the Act. Settlement of cases is an exception to the normal procedure of adjudication of duty liability and other deterrent provisions i.e. levy of penalty and prosecution. The provisions of Chapter-XIVA indicate that immunity given is only in respect of levy of penalty and prosecution and not in respect of duty liability. For the purpose of determination of

duty liability, the Commission acts as an adjudicating authority and can determine the duty liability and the applicant is liable to pay such duty within 30 days from the date of receipt of a copy of the Commission's order subject to its power to extend time subject to payment of interest beyond the initial period of 30 days. The Commission can also levy penalty or interest in respect of the amount duty quantified. The provisions of Section 127C indicate that the settlement directed by the Commission will be rendered void if it is subsequently found that such orders had been obtained by fraud or mis-representation of facts by the applicant.

8. The above scheme reveals that while the Commission is empowered to grant immunity from penalty and prosecution, duty liability has to be enforced. The Commission can also levy not only interest but also penalty. Chapter XIVA is exception to the normal procedure under the Act. Being part of a fiscal statute, its provisions have to be construed strictly. In this context, it would be useful to remember that misclassification of goods only results in duty liability being at a different rate in terms of entry (of classification). Mis-declaration however comprehends situations of suppression, and misrepresentation. In misclassification, goods are disclosed or declared but are not properly classified for the purposes of determination of rate of duty, whereas in a case of mis-declaration, goods might not be declared correctly at all, in the sense description is not of the actual goods, the quantity may also vary, with the mischief

being deliberate and designed to avoid payment of duty. Misclassification often involves *bona fide* cases of wrong classification as the importer or the consignee on account of lack of familiarity with the schedule to the Act. In instances where there is no deliberate desire on the part of the importer to evade or avoid payment of any customs duty, Chapter XIVA enables the Commission to provide immunity and protection to such class of people. Having regard to these considerations, the Madras High Court (in *Collector of Customs v. Customs & Central Excise Settlement Commission*, 2002 (139) ELT 512 (Mad.) *Commissioner of Customs v. A. Mahesh Raj*, 2006 (195) ELT 261 (Kar)) were of the opinion that Chapter XIVA cannot be extended to cases of mis-declaration. The Karnataka High Court held that the third proviso to Section 127B expressly excludes from the purview of the Settlement Commission applications in respect of goods to which Section 123 applies i.e. goods notified for the purpose of raising initial presumption against the possessor that they (such goods) are smuggled, unless the person in possession is in a position to establish the proper import of the goods into the country.

9. On the other hand, the Bombay High Court, in *Union of India vs. Hогanas India Ltd & Ors* 2006 (199) ELT 8 (Bom) held that a restrictive interpretation cannot be given to Section 127B. The Revenue advanced the argument that the words “*or otherwise*” which appear in Section 127B after the words “*short levy on account of misclassification*” would mean similar acts like

misclassification. In other words, it was argued that the principle of *ejusdem generis* would apply. The Bombay High Court rejected the argument, holding that there was no mandate to limit the jurisdiction of the Settlement Commission in such a manner. The Court stated as follows:

“40. Over and above, again going back to the main section, it is very clear as indicated therein, that the application should contain full and true disclosure of the duty liability which has not been disclosed before the proper officer, the manner in which such a liability has been incurred, the additional amount of customs duty accepted to be payable by him. The above section lays down that all the above details have to be furnished in such an application. Over and above, as referred to hereinabove, as per the provisions of above section, “such other particulars as may be specified by the rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification or otherwise of the goods”, should also be mentioned by the Applicant in his application. As we have mentioned earlier, the learned Counsel for both sides, viz. for the Customs Department and for the private parties have clearly stated that till date there are no specified rules with regard to such particulars regarding the dutiable goods in respect of which the Applicant admits short levy or misclassification or otherwise. A bare reading of the above section does not in any manner indicate that the jurisdiction is restricted only to cases of a short levy of misclassification or otherwise.

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41. One cannot forget that since the disputes take longer time to get it resolved, the revenue of the Government

suffers. The very object of introducing Chapter XIV-A regarding "Settlement of Cases" in the Act was to enable the Custom Authorities to recover dues in all the cases as clearly indicated in the object when the amendment was introduced, and to resolve all the disputes. Relying on the similar provisions provided under the Income Tax Act, the Parliament felt it necessary to introduce such a remedial measure by way of a Settlement Commission and accordingly Chapter XIV-A was provided. Another aspect to be noted is that the entire scheme under Chapter XIV-A as enumerated hereinabove clearly indicate that the Settlement Commission has been given very wide powers to settle the matter. It has also been given the widest discretion including the power to declare the settlement to be void with a power to direct de novo adjudication. Ample power is given to the Settlement Commission to protect the interests of the revenue and even with regard to the grant of immunity from prosecution and penalty. However, as indicated hereinabove, the Settlement commission does not grant immunity as a matter of course. It has discretion to grant immunity in a given case. Even if it were to grant immunity, the Settlement Commission can always impose conditions while doing so. The Settlement Commission has power even to attach the properties of the Applicant to secure the interest of the Revenue during the pendency of the proceedings before him, which power even the adjudicating authority does not have. As rightly pointed out by the learned Counsel appearing for the private parties, the Settlement Commission has power to grant Immunity with regard to all kinds of prosecution under the Customs Act and any other law including the Indian Penal Code, which obviously would necessitate the Applicant being involved in a serious fraud wherein he is likely to be prosecuted under the Indian Penal Code or any other penal law. If that be so, one cannot say that the Settlement Commission has jurisdiction only to deal with

the bonafide case of misclassification or at the most wilful case of misclassification.

42. One cannot minimise the scope of jurisdiction of the Settlement Commission without any express provisions found in the said Chapter, whereas on the contrary, the provisions as indicated hereinabove clearly show that the Settlement Commission has a very wide jurisdiction to entertain all kinds of settlement claim applications with the liberty to reject the same even at the preliminary stage, depending upon the nature and circumstances of the case and the complexity of the case. Therefore, it is not the case that the Settlement Commission is forced to entertain and accept all settlement applications. After the scrutiny, it may or may not entertain the same. It is one thing to say that the Settlement Commission does not have the jurisdiction at all to look at the claim which is not pertaining to the short levy due to misclassification or otherwise, whereas it is another thing to say that the Settlement Commission has jurisdiction to entertain all kinds of applications and it has jurisdiction to reject the same even at the preliminary stage.

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45. In any event, having regard to the entire structure of Chapter XXV-A we are very clear in our mind that the Settlement Commission has jurisdiction to entertain all kinds of applications for settlement, provided they satisfy the mandatory requirements of filing the Bill of Entry/Shipping Bill, and issuance of a show cause notice in relation to such a Bill of Entry/Shipping Bill and by making a full and true disclosure of a duty liability which was not disclosed earlier before the proper officer and the manner in which such liability has been incurred and the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such

dutiable goods in respect of which he admits short levy on account of misclassification or otherwise of goods. These are the essential requirements for making an application under Section 127B of the Customs Act, which are also clear from the wording of the very section as well as from the particulars to be given in the Form prescribed by the Department, as we have indicated herein above.”

10. The Bombay view is echoed by a decision of this Court in *Commissioner of Customs v. Ashok Kumar Jain*, 2013 (292) ELT 32 (Del), where the Revenue contended that the applicant's case before the Settlement Commission was not maintainable, as he had not filed a bill of entry for the import of those goods into India, but rather, carried them in his baggage. Rejecting the argument, this Court held as follows:

“7. It appears from the reading of the impugned order that the Commission took a broad view of its jurisdiction under Sections [127 \(A\)](#) and [127 \(B\)](#) of Act. This Court is conscious of the fact that being a Tribunal of limited jurisdiction the Commission could not have forayed that amounts so demanded do not fall within the jurisdiction of “case”. However, a plain reading of the provisions of Section [127 \(A\)](#) and [127 \(B\)](#) would reveal that there is no bar/express or implied-in respect of entertaining applications by the passengers which bring in goods through their baggage.

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10. For the foregoing reasons, this Court is of the opinion that on a careful reading of Section [127\(A\)](#) and [127\(B\)](#) the Revenue's contention that

since the applicant had not filed bill of entry or that the case was one relating to baggage and therefore did not involve short levy or non-levy is without force. The provisions that confer jurisdiction on the Settlement Commission cannot, in the opinion of the Court, be construed as narrowly as it sought to be urged by the Revenue. If parliamentary intention is to exclude adjudication by Customs Authorities in respect of baggage claim, from the purview of the Commission's jurisdiction, surely such intention would have been more clearly manifested like in the case of 3 proviso of Section [127 \(B\)\(i\)](#).”

11. As is evident, this Court has expressed a view similar to that of the Bombay High Court. Both the open-ended text of Section 127B, and purpose for its inclusion in the Act, i.e. to create incentives for assessee to disclose revenue which has escaped tax, supports a broad jurisdiction of the Settlement Commission. This however does not mean that those who violate evade tax may escape penalty, or the rigours of adjudication which occur in the normal course, but rather, their fate is to be determined, in accordance with law, by the Settlement Commission, which considers this violation in coming to its decision, whilst also ensuring quicker recovery of revenue. Equally, drawing arbitrary lines between ‘outright smuggling’ (as the Revenue puts it) and others ‘lesser’ forms of mis-description that may be condoned by way of a Section 127B settlement is uncalled for. If such of reasoning were to be followed, it would open a Pandora’s Box– at an early stage of the proceedings – and each case would have been judged on the basis of whether an active

misrepresentation/fraud, passive misrepresentation, negligent misdescription or *bona fide* misclassification has occurred, and how each category must be proceeded with. This impinges on the mandate of the Settlement Commission, which is enjoined to consider such facts, and render a composite order that settles all aspects of the matter finally, keeping in mind the gravity of the violation, and the interests of the Revenue. Furthermore, once a case is presented to the Settlement Commission, it may reject the application and relegate the assessee to the usual course of adjudication, if the Commission is of the view that the violation is brazen, and the exclusion of prosecution under the Act cannot be countenanced. Alternatively, it may impose an additional burden on the assessee in its final order, if it chooses to admit the application. In either instance, providing an unduly narrow interpretation to Section 127B to nip its jurisdiction at the bud does not cohere with the text or context of the provision.

12. The Court also notices the Section 127A(b) defines a ‘case’, which may be settled by the Settlement Commission, as follows:

“... any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 127B is made.”

This offers further support to the reading of Section 127B preferred above. A ‘case’, for the purposes of settlement, refers to “*any proceeding*”, without any qualifying factor. Providing a narrow reading to the words “*or otherwise*” – by excluding cases of fraud or misrepresentation – seeks to import a restriction into Section 127A(b) through the backdoor, when nothing but a contrary intention is apparent from the words employed by Parliament. The Madras High Court had relied on the Supreme Court’s decision in *Commissioner of Income Tax, Madras v. Express Newspapers Limited*, 1994 (2) SCC 374 and *Kuldeep Industrial Corporation v. Income Tax Officer*, AIR 1991 SC 3631. Those two decisions of the Supreme Court, however, deal with the authority of the Settlement Commission under Section 245D of the Income Tax Act, 1961. The passage of *Express Newspapers* (supra) relied on by the Single Judge of the Madras High Court is as follows:

“19. The idea underlying the said words (in the main limb of Sub-section (1A)) is self-evident. The disclosure under Section 245-C must be of an income not disclosed before the assessing officer. If the assessing officer (or the Income Tax authority) has already discovered it and has either gathered the material to establish the particulars of such income or fraud fully or is at a stage of investigation/enquiries where the material gathered by him is likely to establish the particulars of such income or fraud, the assessee cannot be allowed to defeat or forestall, as the case may be, the entire exercise of the Income Tax authorities just by approaching the Commission. In such a case, it cannot be said that he is acting voluntarily or in good faith. He should not be

allowed to take advantage of the comparatively easy course of settlement. He must be allowed to face the normal channels of assessment/appeal etc. Section 245-C is meant for those assesseees who seek to disclose income not disclose before the officer including “the manner in which such income has been derived”. If the department already knows and has gathered particulars of such income and the manner in which it has been derived, there is no ‘disclosure’ by the assessee. Let it be remembered that the words in question (in Section 245-D(1A)) are not words of limitation nor are they meant to help unscrupulous assesseees. Chapter XIX is a part of the Income Tax Act and must be construed consistent with the over-all scheme and object. The Chapter is meant for those assesseees who want to disclose income not disclosed till then together with the manner in which the said income is derived. It is not meant for those who come after the event, i.e., after the discovery of the particulars of income and its source-or discovery of particulars of fraud perpetrated by the assessee, as the case may be-nor even to those who come to the Commission to forestall the investigation/enquiries which have reached a stage where the department is in possession of material which though not sufficient to establish such concealment or fraud, is such that it is likely to establish it-may be some more material is required to establish it fully.”

13.A similar *dictum* was recorded in *Kuldeep Industrial Corporation* (supra). These decisions, however, concern Section 245D of the Income Tax Act, 1961. Under the Income Tax Act, as the Supreme Court has noted, the application must be made before particulars of the income that has escaped assessment have been gathered by the Revenue, or before an investigation has been conducted, or a show cause notice issued to the

assessee on the basis of these exercises. The purpose of Section 245D is to enable voluntary disclosure of income that has escaped assessment, and of which the Revenue has not notice or knowledge. However, such a rationale cannot regulate Section 127B of the Customs Act. This is so because Section 127B itself envisages the filing of an application to the Settlement Commission after “*a show cause notice has been issued to him by the proper officer*”, in terms of clause (c) of the first proviso to Section 127B. Thus, Section 127B itself permits such applications to be filed, and indeed, *bars* applications where a show cause notice has *not* been issued. In such a case, it cannot be said that only those applications are permitted wherein the Revenue has no knowledge or notice of the concealment. Quite to the contrary, those are *precisely* the sort of cases that may be admitted under Section 127B. The rationale behind Section 245D of the Income Tax Act, i.e. voluntary disclosure, which animated the decisions in *Kuldeep Industrial Corporation* (supra) and *Express Newspapers* (supra) does not apply to the Customs Act. Those decisions, therefore, do not regulate this field. This view was also taken by the Bombay High Court in *Hoganas* (supra):

“Over and above, there is a clear distinction in the Income Tax Law and the Customs Act. In the sense, in the Income Tax Law any application must be made before the investigation has started or before the authority has collected any material or any notice is issued to the applicant. In the Income Tax Law there is a voluntary

aspect in the disclosure .On the contrary, in the Customs Act, the provision makes it mandatory that the Applicant can file an application only after show cause notice is issued, which show cause notice as we have pointed out hereinabove, would pertain even to confiscation. i.e. to say the person who has committed fraud or smuggling or deliberate misdeclaration would only receive such show cause notice and such a show cause notice is essential ingredient before making an application. If that be so, there can never be never be any case of voluntary aspect in the case of application for settlement before the Settlement Commission under the Customs Act.”

14. For these reasons, the Court differs with the judgment of the learned Single Judges of the Madras and Karnataka High Courts, concurring with the view taken by the Single Judge of the Bombay High Court. Applications concerning misdeclaration are admissible under Section 127B.
15. The second issue before the Court concerns the requirement of a deposit as a pre-condition to approaching the Settlement Commission. This is located in clause (c) of the first *proviso* to Section 127B, which reads: “*Provided that no such application shall be made unless ... (c) the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB.*” The argument advanced by the petitioner is that this amount becomes “*due under Section 28AB*” only when a duty demand is raised by the Revenue. Since the show cause notice served on the petitioner in the present case does not propose any duty liability, but only considers confiscation of the articles, the petitioner claims that

in this peculiar circumstance, there is no amount “*due*”, and thus, this pre-condition does not apply in this case. It is argued that this is the only workable interpretation of Section 127B in the specific circumstances before the Court today. For this, reliance is placed on the decision of the Supreme Court in *Jagdish Cancer and Research* (supra) for the proposition that in cases where confiscation under Section 124 is proposed, duty becomes ‘due’ only on redemption of goods under Section 125.

16. The Court finds this argument unpersuasive. Clause (c) to the first *proviso* mandates a pre-condition to approaching the Settlement Commission. The duty “*accepted by*” the applicant must be paid, before the matter can even be considered by the Settlement Commission. The Settlement Commission is, in essence, a safe haven for applicants who are otherwise at risk of punishment under the penal provisions of the Customs Act. The Settlement Commission can – if it considers it prudent – grant immunity from prosecution, but may not condone the liability amount or interest. Those must be paid nonetheless, as an applicant approaching the Settlement Commission cannot receive better treatment than those who do not. That limited obligation falls on all articles imported into Indian territory. Thus, in order to approach the Settlement Commission, and avail of the beneficial regime of limited immunity, the applicant must – as a reciprocal statutory good faith measure – pay the liability duty (i.e. at least the minimum tax effect possible from the wide range of measures that may be exercised under the

Customs Act.) The argument advanced by the petitioner in this case seeks to excuse the applicant to pay this minimum amount, but still avail the beneficial regime of Chapter XIVA. This cannot be the case. Neither does the text support such an argument. Sub-clause (c) bars an application till “*the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB.*” The applicant must therefore, first, pay the duty “*accepted by him*”, along with the “*interest due under Section 28AB.*” Section 28AB simply says that in case “*any duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded*”, such a levy must include interest. In other words, a levy under Section 28 – which authorizes a show-cause for duties not levied earlier – includes interest under Section 28AB. Thus, on a textual reading, clause (c) requires that the applicant must deposit the duty *he accepts* to be the liability, along with interest. This means that it is not necessary for the show cause notice to propose a liability amount for it to be ‘due’ under clause (c). This would include cases where a duty demand exists in the show-cause notice, but is not exhausted by this limited circumstance alone. In cases where the show-cause notice does not contain a figure, the applicant must use a best-judgment standard to determine the amount, and *at the very least*, deposit that amount. The use of the words “*accepted by him*” clearly include such a situation, and support the use of a self-assessment to require the applicant to deposit what he or she

thinks is the duty payable, since that in any case, is due *in law*, and cannot be waived by the Settlement Commission. Indeed, the Court notices that the self-assessment standard is also prescribed in Section 28(b), as an alternative to the duty ascertained by the Revenue.

17. Learned counsel for the petitioner has argued that the words “*customs duty ... along with interest due under Section 28AB*” mean that clause (c) as a whole is applicable only when a notice has been issued under Section 28. It is argued that if there no notice under Section 28 imposing a duty demand, Section 28AB does not come in the picture. Thus, it is argued, the rigour of clause (c) itself is inapplicable in this case. Here, it is important to parse the decision in *Jadish Cancer and Research* (supra). The Supreme Court there considered the demarcation between Section 28 and Section 124/125 of the Customs Act. The Court held that in cases where a notice for confiscation has been issued under Section 124, a notice under Section 28 is not proper, but rather, only under Section 125(1), which permits redemptions of goods in lieu of a fine. Subsequently, however, the Court notices Section 125(2) “[w]here any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.” Thus, *Jagdish Cancer and Research* (supra) held that the same goods cannot be the subject of two notices under the same enactment imposing tax on the same

event. However, the content of a Section 28 notice – which imposes duty liability – is replicated in clause (2) of the Section 125. The duty to pay customs liability is a minimum obligation both Sections 28 and 125 uniformly accept. In this case, the notice for confiscation has been issued under Section 124 (and does not refer to Section 28). But this does not mean that a minimum duty liability – which arises in either circumstance – is not payable to the Settlement Commission. Instead of the duty assessed by way of a notice under Section 28, along with interest under Section 28AB, the applicant must pay the duty as admitted by him, since such amount is anyway payable even under the Section 124/125 regime. To hold to the contrary would create an unmerited distinction between goods on which duty was not levied earlier under Section 28 and goods which were confiscated because of that reason under Section 124, insofar as neither condones payment of the duty demand.

18. There is no disagreement with the position that once served with a show-cause notice under Section 124, the proper officer under Section 28 cannot simultaneously issue a notice. This was the view in *Jagdish Cancer and Research* (supra). This does not mean, however, that minimum duty is not payable on approaching the Settlement Commission under Section 127B. The reference to “*interest due under Section 28AB*” is disjunctive from the phrase “*paid the additional amount of customs duty accepted by him*”. The latter may arise under Section 28 *or* under Section 124/125. The customs duty, either

the amount required by a Section 28(b), or the amount self-assessed under a Section 124 notice, must be paid under clause (c). *In case* it is the former, clause (c) further mandates that this must be accompanied by interest under Section 28AB, since it may otherwise be argued that such amount payable only includes the principal duty and not the interest under a different section. The interpretation provided by the petitioner leads to the incoherent conclusion that if there is no interest under Section 28AB, no duty is payable. However, whilst duty may not be payable under Section 28, but is certainly payable under Section 125. The minimum condition of pre-depositing such amount before the Settlement Commission remains intact.

19. Neither is there any reason to distinguish between an individual who erroneously refunded under Section 28, by demanding the deposit, but excusing an individual who has deliberately suppressed facts before the authorities earlier. If anything, this places a premium on fraud, locating an advantage upon the latter category of individuals to substitute the ordinary course of adjudication with the Settlement Commission's jurisdiction. The neutral regime of the Settlement Commission, however, does not distinguish between the two sets of applicants. Accordingly, even in cases where there is a notice under Section 124, which does not propose a customs duty, the applicant must self-assess the liability and pay such amount as a pre-condition. This issue is thus decided against the applicant.

20. There is one more reason as to why we think that the petitioner's contention is untenable. The opportunity to approach the Settlement Commission is a sort of concession given by the government to errant assesseees to enable them to come clean. This opportunity is hedged in by certain conditions, one of which is that the assessee shall pay the additional amount of customs duty accepted by him along with interest due under Section 28AB. What the petitioner contends is that the interest under Section 28AB does not become due once a show-cause notice is served under Section 124 and, therefore, the petitioner should be allowed to approach the settlement commission without satisfying the condition. The legislative intention, however, appears to us to be otherwise. If one of the many conditions prescribed by the first proviso to Section 127B cannot be complied with, albeit because of statutory disability – even assuming the petitioner is right in its contention that there is a statutory disability in calculating the interest due under Section 28AB – the result would be that such a case was not intended to be covered by the section; it is not open to the petitioner to argue that because of the statutory disability (whatever that may be) one of those conditions cannot be complied with but yet the petitioner should be permitted to approach the Settlement Commission. As already pointed out, an assessee is permitted to approach the Settlement Commission subject to inviolable conditions, the proper and complete

compliance with which cannot be compromised or condoned in any manner. Even on this score the petitioner as to fail.

21. Having expressed this view of the matter, the Court clarifies this judgment leaves open the parties' contentions on other grounds, including the applicability of Section 123 of the Act, by way of the third *proviso* to Section 127B, which may be considered by the Settlement Commission, if advanced by the parties, in accordance with law.

22. For the above reasons, this Court is of the opinion that there is no merit in the petition. The same is accordingly dismissed without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V.EASWAR
(JUDGE)**

MARCH 24, 2014