IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 07.08.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Writ Petition Nos.2837, 3001 and 3030 of 2015
And M.P.Nos.1 to 1, 2 to 2 and 3 to 3 of 2015

Reserved on 01.04.2015

M/s.Nitish Tools Pvt.Limited,
Rep. by its Managing Director,
M.Thenmozhi ...Petitioner in W.P.No.2837 of 2015

M.Thenmozhi
Managing Director of
M/s.Nitish Tools Pvt.Limited ...Petitioner in W.P.No.3001 of 2015

C.Manoharan ...Petitioner in W.P.No.3030 of 2015

Versus

1.Customs, Central Excise & Service Tax,
Settlement Commission,
Additional Bench, II Floor Narmada Block,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Commissioner of Central Excise,
Race Course Road,
Coimbatore.

3.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin-628 004 ...Respondents in all Writ Petitions

Common Prayer: Writ Petitions are filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, to call for the records pertaining to impugned order No.34/2014-Cus, dated 29.12.2014 passed by the first respondent in S.A.Cus.15-17/2014-S.C., in so far as the petitioners are concerned and quash the same and further direct the first respondent to re-hear and dispose of the Settlement Applications filed before them by the petitioners herein on merits after affording an opportunity of personal hearing by furnishing the documents requested by the petitioner.

For Petitioners : Mr.A.K.Jayaraj

For Respondents : Mr. A.P.Srinivas

COMMON ORDER

The petitioners herein have come forward with these writ petitions, seeking to challenge the order, dated 29.12.2014 passed by the Customs, Central Excise & Service Tax Settlement Commission, the first respondent herein under Section 127(B) of the Customs Act, 1962 (in short, "the Act"), in and by which, the applications filed by the petitioners seeking immunity by way of settlement of the disputes arose out of show cause notice, dated 13.4.2013, came to be dismissed on the ground of failure of the petitioners to make full and true disclosure of duty liability under Section 127(B)(1) of the Act.

2. The brief facts, necessary for disposal of the writ petitions, are as follows:

3. The Director of Revenue Intelligence collected information that the petitioners have been resorting to gross under valuation of carbide tips and hollow drill rods imported by them through different ports and thereby they detained two consignments of carbide tips and other two consignments of hollow drill rods for investigation and they conducted search in the premises, viz., offices and residences of the petitioners and seized incriminating documents, laptop, hard disk and other relevant evidence regarding undervaluation and also unaccounted currency notices of Rs.50 lakhs and the Officers of Tuticorin Customs seized one consignment of carbide tips and hollow drill rods valued at Rs.1,08,75,425/- which were imported by M/s.SSE vide Bill of Entry 7086043, dated 12.6.2012 on 16.7.2012. After completion of investigation, the petitioners were issued show cause notice dated 13.4.2013. The Central Board of Excise and Customs, vide order, dated 28.3.2014, assigned the adjudication of the entire show cause notices with the Commissioner of Customs, Custom House, Tuticorin. The petitioners have submitted their replies, wherein, while raising several other contentions, admitted the liability. Thereafter, it appears that the petitioners have moved the applications under Section 127-I(1) of the Customs Act, 1962 before the Settlement Commission, pleading for immunity from fine, penalty and prosecution as well as for cancellation and return of PD Bond, Indemnity bond, bank guarantee, etc. and also for immunity from prosecution and penalty.

4. According to the petitioners, in their absence, the documents recovered from the laptop by engaging the service of an expert; the

imported tools were made from recycled materials on which 20% discount was available; the imported goods having been manufactured at cottage industries from where most of the import was made were bound to have slight manufacturing defects and the same are sold as seconds at throw way discounted prices; for lack of demand for a long time, the goods were sold as stock lots and 80% of their imports were only stock lot material, seconds and tools made from recycled carbides and a combination of the above factors was attributed to the difference in price between the contract and the actual import price.

5. On an over all consideration of facts, the Commission by its impugned order, dated 29.12.2014, concluded that the petitioners have not only failed to make true and full disclosure of their duty liability in their applications, but have also failed to provide required co-operation to the Bench to settle the case in a true spirit of settlement. Therefore, the Bench, by virtue of powers vested in it in terms of Section 127-I(1) of the Act, 1962 sent the case back to the Commissioner of Customs for adjudication in accordance with provisions of the Act. The Bench had observed that the Commissioner would decided the case as if no application for settlement had been filed by the petitioners. Challenging the same, the respective petitioners have come forward with the present writ petitions, to quash the same in so far as they were concerned.

6. A common counter affidavit has been filed on behalf of the third respondent, wherein, it has been stated that the petitioners claimed for the first time in their application to the Settlement Commission that they had imported inferior quality of carbide tips and in the application, the petitioners unable to overcome the evidence drawn against them, while admitting the undervaluation of carbide tips, they came up with a new hypothetical theory that the goods imported by them were of inferior quality, but there is no scientific proof that the cemented carbide could also be inferior in quality. The petitioners have accepted their liability only to the extent of Rs 2 Crores which is only 11.89% of their actual duty liability of Rs 16.82 Crores demanded based on documentary evidence. Having the petitioner approached the Settlement Commission to settle the case, it is imperative on the part of the applicant to co-operate and participate in the proceedings to avoid delay in settling the issue. The petitioners approached the settlement commission and filed application on 26.03.2014. After having initial correspondences with the petitioners, the Settlement Commission decided to proceed with the hearing of the Application and issued letter dated 10.04.2014. The Department filed its report and contended that the petitioners have not made true and full disclosure of the facts relating to undervaluation and also the registration of the case by CBI on them and thus, sought for dismissal of the application. The Settlement Commission vide its letter, dated 28.8.2014 asked the petitioners to give their

comments about the maintainability of the application. The petitioners, by letter dated 9.8.2014 replied that CBI had issued summons after the filing of the application before the Settlement Commission and the case is not pending before any other Court and therefore, the application is maintainable. The petitioners also sought for the copy of the report issued by the Department and the same was furnished to the petitioners vide letter dated 16.9.2014. The petitioners have not filed any reply after receiving the report of the Department. Thereafter, the Settlement Commission fixed the final hearing of the application and posted the case on 13.11.2014. The notice was sent on 23.10.2014 and the counsel for the petitioners, just three days before the date fixed for the hearing, sent a letter dated 10.11.2014 stating that he is taking treatment for chronic spondilities and sought for adjournment by six weeks. There is no difficulty for the petitioners in appearing on the said date, but their counsel alone had difficulty. However, at the instance of same, the Commission adjourned the case by fixing the date of hearing on 4.12.2014. On 1.12.2014, the petitioner in W.P.No.2837 of 2015 sent a letter that she is not in a position to attend the personal hearing due to personal reasons. The Commissioner, thereafter, again fixed the date of hearing on 9.12.2014 and sent intimation dated 3.12.2014 specifically stating that no further extension would be entertained. But the petitioners sent another letter dated 14.12.2014 stating that she is yet to get documents from DRI and therefore, again sought for adjournment. Therefore, it shows that the petitioners are not interested in settling the issue at an early date as they had not disclosed all the facts and had not come clean before the Commission. When the next hearing was fixed on 19.12.2014, they requested for postponement for the first time on the pretext of non-receipt of un-relied upon documents which were not relied upon by the department for issuance of the show cause notice. Therefore, the Commission decided to proceed with the case, stating that “it appears that the applicant is not keen on settling the dispute, rather, they seem to delay their liability to pay government dues as long as possible by raising irrelevant issues.”. Accordingly, the Settlement Commission rejected the application of the petitioners holding that the petitioners have not only failed to make true and full disclosure of their liability in their applications but also failed to provide the required co-operation to the Bench to settle the case in a true spirit of settlement. There is no violation of principles of natural justice in this case as the Settlement Commission has given several opportunities to the petitioners and the petitioners alone had failed to utilize the same and the Commission has given categorical finding that the petitioners have not made true and full disclosure of the facts and they have not co-operated for settling the case before the Commission. The said finding is supported by valid records which are evident in the impugned order itself. A finding of fact and the decision of the Settlement Commission is not amenable to writ jurisdiction. The Settlement Commission has followed due process of law. With these averments, the third respondent sought for dismissal of the writ petition as not maintainable.

7. Heard the learned counsel on either side and perused the entire records.

8. Section 127-Bof the Customs Act, 1962, without proviso, reads as follows:

> "127-B. 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 but excluding the goods not included in the entry made under this Act and such application shall be disposed of in the manner hereinafter provided:

9. Therefore, under above provision, any importer/exporter or any other person may, in respect of a case, relating to him make an application before adjudication to the Settlement Commission to have the case settled. The application has to contain a full and true disclosure of the duty liability of the importer which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additionalamount 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 mis-classification, under-valuation or inapplicability of an exemption notification or otherwise. The fundamental requirement of an application under Section 127-B is a full true and candid disclosure by the applicant of the liability to pay duty which was not disclosed before the proper officer and of other details to which a reference has been made hereinabove. Significantly, these include particulars of the dutiable goods in respect of which the applicant admits a short levy, inter alia on account of mis-

declaration or undervaluation.

10. In the present case, it is the specific case of the respondents that the petitioners have accepted their liability only to the extent of Rs.1,98,33,832/- which is only 11.89% of their actual duty liability of Rs.16.82 crores demanded by the department based on the documentary evidence. The specific case of the petitioners is that the set of relevant documents recovered from their laptop on 01.02.2012 by the department were not furnished in order to substantiate their case. It is not in dispute that the department had retrieved the data from laptop under mahazar proceedings on 13.01.2012 in the presence of the petitioners and they had vouched each and every document at the time of their retrieval and appended their signatures. It is to be noted that though the petitioners have made application for settlement before the Commission as early as 26.3.2014 and at no point of time, they made any requisition to the department to furnish the above said documents. However, it was only on 14.12.2014, the petitioners sought for furnishing of the documents. By the time, the petitioners were admittedly given sufficient opportunities to come up with true and full disclosure of their liability, however, right from the inception, as could be seen from the record, it appears that the petitioners have been dodging the matter without participating in the settlement proceedings. As seen from the record, it appears that the Settlement Commission vide its letter, dated 28.8.2014 asked the petitioners to give their comments about the maintainability of the application. The petitioners, by letter dated 9.8.2014 replied that CBI had issued summons after the filing of the application before the Settlement Commission and the case is not pending before any other Court and therefore, the application is maintainable. The petitioners also sought for the copy of the report issued by the Department and the same was furnished to the petitioners vide letter dated 16.9.2014. The petitioners have not filed any reply after receiving the report of the Department. Thereafter, the Settlement Commission fixed the final hearing of the application and posted the case on 13.11.2014. The notice was sent on 23.10.2014 and the counsel for the petitioners, just three days before the date fixed for the hearing, sent a letter dated 10.11.2014 stating that he is taking treatment for chronic spondilities and sought for adjournment by six weeks. There is no difficulty for the petitioners in appearing on the said date, but their counsel alone had difficulty. However, at the instance of same, the Commission adjourned the case by fixing the date of hearing on 4.12.2014. On 1.12.2014, the petitioner in W.P.No.2837 of 2015 sent a letter that she is not in a position to attend the personal hearing due to personal reasons. The Commissioner, thereafter, again fixed the date of hearing on 9.12.2014 and sent intimation dated 3.12.2014 specifically stating that no further extension would be entertained. But the petitioners sent another letter dated 14.12.2014 stating that she is yet to get documents

from DRI and therefore, again sought for adjournment. Therefore, it shows that the petitioners are not interested in settling the issue at an early date as they had not disclosed all the facts and had not come clean before the Commission. When the next hearing was fixed on 19.12.2014, they requested for postponement for the first time on the pretext of non-receipt of un-relied upon documents which were not relied upon by the department for issuance of the show cause notice.

11. Further, the petitioners have also not disclosed about the case registered against them by ACB under the provisions of Prevention of Corruption Act. Though it is the case of the petitioners that on the date of filing of the application before the Settlement Commission, the case was not registered, however, there is no impediment for the petitioners to bring the said fact to the notice of the Commission after registration of the criminal case during the pendency of the settlement proceedings. As rightly held by the Commission, the petitioners have not failed to make true and full disclosure of their duty liability in their applications, but have also failed to provide the required co-operation to the Bench to settle the case in a true spirit of settlement. Therefore, considering the facts and circumstances of the case and more particularly, the lack of co-operation on the part of the petitioners for settlement of their case, the Commission has rightly held that it is a fit case for sending it back to the original authority for disposal in accordance with law. Section 127-I of the Act, the Settlement Commission is empowered to send back the matter to the proper officer where it finds that the applicant is not cooperating with it. Accordingly, the Settlement Commission, by virtue of Section 127-I(1) of the Act, has sent the case back to the Commissioner of Customs for adjudication in accordance with the provisions of Act.

12. Having gone through the entire order of the Settlement Commission and on consideration of the entire facts and circumstances, this Court is of the considered view that the order of the Commission impugned in these Writ Petitions is a well reasoned order, which requires no interference.

In the result, the Writ Petitions fail and they are dismissed. No costs. Consequently, connected MPs are closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

Suk

To

1.Customs, Central Excise & Service Tax,
Settlement Commission,
Additional Bench, II Floor Narmada Block,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Commissioner of Central Excise,
Race Course Road,
Coimbatore.

3.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin-628 004.

1 CC to Mr.A.K.Jayaraj, Advocate SR.No. 41085

1 CC to Mr.A.P. Srinivas, Sr. Standing Counsel for Customs & Central Excise and Service Tax, No.284, New Additional Law Chambers, II Floor, High Court, Madras - 104. SR 41186

W.P.Nos.2837, 3001 & 3030 OF 2015

BVR (CO)
PSI (20.08.2015)