

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10422 OF 2016

M/s Auto Creators	... Petitioner
v/s	
Union of India and others	... Respondents

Mr Sujay Kantawala with Mr Brijesh Pathak for the Petitioner.
Mr M. Dwivedi with Mr Sham V. Walve for Respondent No.2.

CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA JJ.

Reserved On : 24th October, 2016
Pronounced On : 21st November, 2016

JUDGMENT [PER B. P. COLABAWALLA J.] :-

1. Rule. Respondents waive service. By consent of parties, rule made returnable forthwith and heard finally.

2. By this Writ Petition under Article 226 of the Constitution of India, the Petitioner has challenged the common order dated 14th March, 2016 (for short **“the impugned order”**) [Exh. “J” to the Petition] passed by the Settlement Commission,

Additional Bench, Customs and Central Excise, Mumbai (Respondent No.4 herein) by which it rejected the Settlement Application filed by the Petitioner. To decide the admissibility of the said Settlement Application, Respondent No.4 examined the following three conditions:-

- (i) Whether the Application was in respect of a 'case' within the meaning assigned in the clause (b) of section 127A of the Customs Act, 1962?
- (ii) Whether the Applicant has paid the additional admitted duty liability along with the interest as required by clause (c) of the first proviso to section 127B of the Customs Act, 1962?
- (iii) Whether the condition of filing of a Bill of Entry as stipulated in clause (a) of the first proviso to section 127B of the Customs Act, 1962 is fulfilled?

3. As far as conditions (i) & (ii) are concerned, the Settlement Commission held in favour of the Petitioner. However, as far as condition (iii) is concerned, the Settlement Commission inter alia held that the same was not complied with by the Petitioner in view of the fact that the requisite Bill of Entry had not

been filed before the issuance of the Show Cause Notice. According to the Settlement Commission, the Petitioner had imported four containers for which two separate bills of entry were filed. One Bill of Entry (and which related to one container) was filed before the issuance of the Show Cause Notice whereas the other Bill of Entry (for balance three containers) did not find mention in the Show Cause Notice (for short **“the SCN”**) as it was filed after the issuance of the same. On the basis of this finding, the Settlement Commission inter alia held that the Petitioner did not comply with condition (iii) mentioned above and rejected the Settlement Application filed by the Petitioner. It is this very finding that is challenged in this Writ Petition. We must at once note that the Revenue has not challenged any findings or conclusions reached by Respondent No.4 in the impugned order and therefore, as far as they are concerned, the findings / conclusions arrived at in the impugned order have become final.

4. The brief facts giving rise to the present controversy are as under:-

(a) The Petitioner is a proprietary concern of one Shri

Satpal Singh, Mumbai. Respondent No.1 is the Union of India. Respondent No.2 is the Commissioner of Customs, Nashik and Respondent No.3 is the Commissioner of Customs (Import), Nhava Sheva, Uran, Raigad 400 707. Respondent No.4 is the Settlement Commission, Additional Bench, Customs and Central Excise, Mumbai, who has passed the impugned order. All the above authorities viz. Respondent Nos.2 to 4 exercised powers and functions under the provisions of the Customs Act, 1962 (for short **“the Act”**) and its allied statutes.

- (b) It is the case of the Petitioner that in the normal course of business it imported Air Freshners and Choco-Pie Biscuits. Accordingly, in the month of December 2014, one Mr Zeeshan Khan approached the Petitioner for import of items being regularly imported by him and offered compensation for the same. Accordingly, an agreement was also entered into between the Petitioner and the said Mr Zeeshan Khan. It appears that during the course of import, some error occurred and extra

items were dispatched in the consignment. On examination of the Bill of Entry No.8158086 dated 31st January 2015, the Department found Air Fresheners, Perfumes, Body Spray and other items such as cigarettes, cylinders of refrigerant-22 gas, fabrics etc. This Bill of Entry was with reference to one container and there is no dispute that this Bill of Entry (No.8158086) has been filed long before the issuance of the SCN.

- (c) As far as the balance three containers are concerned, it is the case of the Petitioner that the Department examined the goods much before the filing of the Bill of Entry and seized the goods. The Petitioner, after repeated efforts, was permitted to file a Bill of Entry for these three containers viz. Bill of Entry No.2128700 dated 4th August, 2015.
- (d) In the meanwhile, the Petitioner received a SCN dated 29th July, 2015 proposing to confiscate the goods covered by both the Bills of Entry. The SCN proposed to invoke penal charges under sections 112 and 114AA of

the Act against the Petitioner. Faced with this SCN, the Petitioner, in order to settle the case with the Revenue, filed a Settlement Application (Exh. "A" to the Petition) before Respondent No.4 on 7th October, 2015 seeking settlement of their case under Chapter XIV-A of the Act and also prayed for immunity from fine, penalty and prosecution.

- (e) On receipt of the Settlement Application, Respondent No.4 issued a notice dated 14th October, 2015 under section 127C(1) of the Act inter alia conveying to the Petitioner that its Application was found deficient on the grounds mentioned in paragraph 2 of the said notice. Accordingly, the Petitioner was directed to explain in writing as to why its Application should be allowed to be proceeded with as envisaged under section 127C(1) of the Act.
- (f) The Petitioner filed a detailed reply to the aforesaid notice vide its Advocate's letter dated 19th October, 2015 and furnished detailed clarifications to Respondent No.4. Thereafter, Respondent No.4, by its

letter dated 27th October, 2015, informed the Petitioner that the issue of admissibility of its Application would be decided after hearing the Petitioner. The Revenue thereafter filed its report dated 12th January, 2016 with Respondent No.4 and the hearing on the admissibility of the Application of the Petitioner was conducted by Respondent No.4 on 27th January, 2016. After the conclusion of this hearing, the Revenue also filed its affidavit / written submissions on 5th February, 2016. In answer to this, the Petitioner, by their letters dated 5th February, 2016 and 25th February, 2016 made certain representations to Respondent No.4, especially in relation to the written submissions filed by the Revenue. It is in these circumstances that the Petitioner was shocked to receive the impugned order dated 14th March, 2016. According to the Petitioner, Respondent No.4 has not given a fair and just treatment to the Petitioner's Application which amounts to a gross abuse of the powers conferred under the Act. According to the Petitioner the impugned order is also passed in violation of the principles of natural justice and fair play and are violative of the Petitioner's fundamental rights

enshrined under Articles 14 and 19(1)(g) of the Constitution of India. It is the case of the Petitioner that whilst passing the impugned order, Respondent No.4 has made a reference to a certain report filed by the Investigating Agency dated 1st March, 2016, a copy of which has never been supplied to the Petitioner. This alone, according to the Petitioner, is an incurable breach of the principles of natural justice and which would make the impugned order vulnerable to challenge in writ jurisdiction. It is in these circumstances that the Petitioner is before us assailing the legality and validity of the impugned order dated 14th March, 2016 passed by Respondent No.4.

5. In this factual backdrop, Mr Kantawala, learned counsel appearing on behalf of the Petitioner, submitted that the impugned order passed by Respondent No.4 did not take into consideration all the aspects of the case and therefore, the impugned order is arbitrary and liable to be set aside. Mr Kantawala submitted that the record clearly reflects that the Petitioner had consistently made efforts for filing the Bill of Entry No.2128700 but the Department had examined the goods much prior to its filing and had also seized

the goods. Admittedly, the Petitioner was not allowed to file this Bill of Entry until after the issuance of SCN. However, as soon as the SCN was issued, the Department allowed the Petitioner to file the Bill of Entry. According to Mr Kantawala, the Settlement Commission has proceeded on a completely incorrect footing that the filing of the Bill of Entry should precede the issuance of the SCN. He submitted that there is no such mandate in section 127B of the Act for the Settlement Commission to come to the aforesaid finding. This is more so in the facts of the present case, since the SCN reveals that the containers were searched and seized much prior to filing of the Bill of Entry and which was admittedly filed subsequent to the issuance of the SCN. Even though this Bill of Entry (No.2128700) is not mentioned in the SCN, Mr. Kantawala submitted that the SCN itself reveals that the goods covered under the said Bill of Entry (No.2128700) were also the subject matter of this very SCN and which was sought to be settled by the Petitioner by filing a Settlement Application before Respondent No.4. Looking to these facts, Mr Kantawala submitted that the impugned order is contrary to the spirit of settlement and more particularly set out in Chapter XIV-A of the Act. Mr Kantawala submitted that the impugned order is likely to send completely wrong signals to citizens aspiring to have their cases settled under the provisions of

the Customs Act, 1962.

6. In the alternative, Mr Kantawala submitted that even otherwise the impugned order is unsustainable in view of the fact that it had been passed in breach of the principles of natural justice. Mr Kantawala was at pains to point out that after the hearing was concluded before the Respondent No.4, it had taken note of certain reports dated 1st March, 2016 filed by the Investigating Agency. These reports admittedly were never furnished to the Petitioner. Furthermore, Respondent No.4 has not even taken into consideration the representations made by the Petitioner vide its letters dated 5th February, 2016 and 25th February, 2016 respectively, but instead has relied upon the aforesaid reports. This, according to Mr Kantawala, has resulted in the gross miscarriage of justice inasmuch as the impugned order has been passed in clear breach of the principles of natural justice and is therefore liable to be quashed and set aside. In conclusion, Mr Kantawala submitted that for all the reasons set out earlier the impugned order is unsustainable and ought to be interfered with by us in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India.

7. On the other hand, Mr Dwivedi, learned counsel appearing on behalf of the Revenue, whole heartedly supported the impugned order. He submitted that it is an admitted fact that as far as Bill of Entry No.2128700 is concerned, the same was not filed before the issuance of the SCN and therefore Respondent No.4 correctly refused to entertain the Settlement Application filed by the Petitioner. Mr Dwivedi submitted that as per the mandate of section 127B, no Application can be entertained by Respondent No.4 unless the Applicant has filed a Bill of Entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported or exported through post or courier, as the case may be, and in relation to such document or documents, a show cause notice has been issued to him by the proper officer. In view of the aforesaid statutory provision, Mr Dwivedi submitted that the impugned order cannot be faulted and Respondent No.4 has correctly rejected the Settlement Application of the Petitioner. Consequently, he submitted that there is no merit in this Writ Petition and the same ought to be dismissed with costs.

8. We have heard the learned counsel for the parties at length and have perused the papers and proceedings in Writ

Petition including the annexures thereto including the impugned order dated 14th March, 2016. We have also given our anxious consideration to the relevant statutory provisions. To understand the controversy raised in the present Writ Petition, it would be necessary to make note of the relevant provisions of the Customs Act, 1962. Chapter XIV-A of the Customs Act, 1962 deals with settlement of cases. This Chapter contains sections 127A to 127N and was inserted w.e.f. 01-08-1998 by section 102 of Finance (No.2) Act, 1998 (21 of 1998). The object for inserting this Chapter was that the door to settlement with an errant and defaulting tax-payer should be kept open, keeping in mind the primary objective to raise revenue. The Legislature was of the view that a rigid attitude would inhibit a one-time tax evader or an un-intending defaulter from making a clean breast of his affairs and unnecessarily strain the investigation resources of the Government. The settlement machinery was thus meant for providing a chance to a tax-evader who wants to turn over new leaf as recommended by the Direct Taxes Inquiry Committee, popularly known as the 'Wanchoo Committee'. Keeping the aforesaid objective in mind, this Chapter viz. Chapter XIV-A was inserted in the Customs Act, 1962 under which the Settlement Commission is constituted.

9. Having set out in brief the objects for which Chapter XIV-A was inserted in the Customs Act, 1962, we shall turn our attention to some of the statutory provisions of the Act. On the date when the Settlement Application arising out of the SCN dated 29th July, 2015 was filed by the Petitioner (i.e. on or about 7th October, 2015), section 127B read as under :-

"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 (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, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported or exported through post or courier, as the case may be, and in relation to such document or documents, 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 lakhs rupees; and**

- (c) **the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28-AA;**

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);

[***]¹

[***]²

- (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."**

(emphasis supplied)

10. As can be seen from the above reproduction, section

1 Sub-S (1-A) omitted by Act 20 of 2015, S.86. Prior to its omission, Sub-S (1-A) read as under - "(1-A) – 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 127-C gas bit beeb 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 Sub-S (2) omitted by Act 25 of 2014, S.84(iii)(w.e.f. 1-10-2014). Prior to its omission, Sub-S (2) read as under - "(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."

127B(1) gives an opportunity to a person to approach the Settlement Commission to settle a case relating to him before the same is adjudicated and have the same settled. For this purpose, the said person has to make an Application before the Settlement Commission in such form and in such manner as specified by the 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 is incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by the Rules. Clause (a) of the 1st proviso to sub-section (1) of section 127B clearly stipulates that no Settlement Application shall be made unless the Applicant has filed a bill of entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported or exported through post or courier, as the case may be, and in relation to such document or documents, a show cause notice has been issued to him by the proper officer.

11. In the facts of the present case, it is an admitted fact that the Bill of Entry No.8158086 was filed before the issuance of the SCN. It is also an admitted fact that Bill of Entry No.2128700 was also filed by the Petitioner, though after the issuance of the

SCN, but before the Settlement Application was filed by the Petitioner before Respondent No.4. It is also not in dispute that these two Bills of Entries were filed in relation to four containers which are the subject matter of the SCN dated 29th July, 2015 and which was sought to be settled by filing the aforementioned Settlement Application. On reading the clause (a) of the 1st Proviso to sub-section (1) of section 127B, we cannot agree with the submission of Mr Dwivedi that the Bill of Entry has to be filed before the issuance of the SCN. If we were to accept the submission of Mr. Dwivedi, it would go against the very spirit for which Chapter XIV-A was brought into force under the Customs Act, 1962. In the facts of the present case, admittedly the second Bill of Entry (No.2128700) was filed before the Petitioner made its Settlement Application before Respondent No.4. In fact, it is the case of the Petitioner that they were not permitted to file this Bill of Entry (No.2128700) before the issuance of SCN and were allowed to file the same only after the SCN was issued. This has not been controverted by the Revenue. In these facts, we find that the Settlement Commission was in error in coming to the conclusion that the Settlement Application filed by the Petitioner was not admissible as it had failed to fulfill Condition (iii) set out above viz. that the Petitioner had not filed a Bill of Entry as stipulated in clause (a) of the 1st

Proviso to section 127B(1) of the Customs Act, 1962.

12. Even otherwise, we find that the impugned order is not sustainable on the grounds of breach of the principles of natural justice. On perusal of the record, we find that the Settlement Commission has referred to certain reports dated 1st March 2016, which were admittedly never supplied to the Petitioner. This fact is undisputed by the Revenue. This being the case, the impugned order cannot be sustained on this ground also and has to be quashed and set aside.

13. For all the aforesaid reasons, the Writ Petition succeeds and is allowed in terms of prayer clause (b). Rule is made absolute in the aforesaid terms. The Settlement Application filed by the Petitioner is restored to the file of Respondent No.4 for a de novo consideration in terms of what we have held in this judgment. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)

(S. C. DHARMADHIKARI J.)