

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1523 OF 2015

Under Water Services Company Limited
and Others
Office at: 7 MbPT Building, Malet Bunder
Mumbai- 400 009

..Petitioners

Vs.

Union of India and Others

...Respondents

Mr. Sujay Kantawala a/w Mr Brijesh Pathak, for the Petitioners.
Mr. Pradeep S. Jetly, for the Respondents.

**CORAM :- S. C. DHARMADHIKARI, J. &
B. P. COLABAWALLA, J.**

**Reserved On :- August 29, 2016.
Pronounced On :- September 16, 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, filed under Article 226 of the Constitution of India, exception is taken to the final order dated

31st October, 2014 [for short the **“impugned order”**] passed by the Settlement Commission Additional Bench, Customs and Central Excise, Mumbai (Respondent No.3 herein). The impugned order has been passed by the 3rd Respondent in the Settlement Applications filed by the Petitioners arising out of a common Show Cause Notice (**“SCN”**) dated 9th February, 2012. The Settlement Commission that passed the impugned order comprised of three Members. One Member settled the case of the Petitioners (**the minority view**) whereas the other two Members rejected the Settlement Applications filed by the Petitioners and sent the matter back for adjudication (**the majority view**). Taking exception to the majority view, the present Writ Petition has been filed.

3. The brief facts giving rise to the present controversy are as follows:-

- (a) The Petitioners entered into a Memorandum of Agreement (**“MOA”**) dated 8th November, 2006 with a party from Singapore for buying a Barge/Pontoon at an agreed price of US \$ 1,300,000. The said price also

included the cost of equipment such as crane, accommodation module, fenders etc and their fitments. Under the said MOA, various separate invoices were issued for sale of the said Barge / Pontoon, the said equipments and the fitment charges. Upon import of the said Barge / Pontoon, the Petitioners declared the same as a Barge for claiming benefit of duty exemption (effective rate of duty Nil) as per Item No.352 of the said Notification No.21/2002-Cus dated 1st March, 2002. The said Barge / Pontoon was later registered as USC-1 with the Indian Register of Shipping. As per the advice received by the 1st Petitioner, the said Barge / Pontoon was cleared by availing benefit of the said Notification and the Barge was assessed at NIL rate of duty by classifying it under CTH 89011040. The fitments like the crane, accommodation module, fenders etc were assessed separately and a Customs Duty of Rs. 65,41,741/- was inadvertently paid on the said fitments.

(b) Thereafter, the Directorate of Revenue Intelligence

(**“DRI”**), Jamnagar initiated certain investigations leading to seizure of the said Barge / Pontoon on 24th October, 2011. For provisional release of the same, the Applicant deposited a sum of Rs. 50 lakhs on 28th October, 2011 and thereafter the seized Barge / Pontoon was provisionally released. During the investigation being done by the DRI, it dawned on the 1st Petitioner that a mistake had occurred, in as much as they had paid customs duty on the equipment and fitting charges separately which otherwise were part of the main Barge / Pontoon, as was evident from the Bill of Entry No. 755132 dated 24th March, 2007. According to the Petitioners, the Barge having been classified in CTH 89011040, no duty should have been paid on whole of the Barge including the equipment thereof by virtue of they being covered under Item No. 352 of Notification No. 21/2002.

- (c) Be that as it may, the Petitioners thereafter received a common SCN dated 9th February, 2012, demanding duty of Rs. 43,80,845/- for the Barge / Pontoon. After

receiving the said SCN, the Petitioners decided that they did not want to contest the same and settle their case as per the provisions of the Customs Act, 1962. Accordingly, in or around 22nd October, 2013, all three Petitioners filed 3 separate Settlement Applications. Even though the SCN demanded duty in the sum of Rs.43,80,845/-, the Petitioners admitted the duty amount of Rs.63,27,559/- for the said Barge / Pontoon as a whole including the equipments and fitments thereon. Hence, additional duty in the sum of Rs.19,46,714/- was admitted by the Petitioner. A detailed calculation of this admission was also annexed to the Settlement Applications. Accordingly, the Petitioners prayed for (i) their case being admitted and settled as a whole; (ii) grant of immunity from imposition of any penalty and/or fine; (iii) grant of immunity from prosecution; and (iv) refund of the balance amount as per the pleasure of the Settlement Commission.

(d) After these Settlement Applications were filed by all

the three Petitioners, the office of the 3rd Respondent issued a notice dated 29th October, 2013 under section 127C(1) of the Customs Act, 1962 inter alia directing the Petitioners to explain in writing as to why these Applications should be allowed to be proceeded with. By the said notice, an answer was also sought for in relation to the discrepancies mentioned in the said notice.

- (e) The Petitioners filed a detailed reply to this notice vide their Advocate's letter dated 7th November, 2013 and furnished all the details. A perusal of this letter indicates that all the discrepancies that were raised by the 3rd Respondent, were duly answered by the Petitioners. Thereafter, being satisfied with the explanations given by the Petitioners, the Settlement Commission, vide its order dated 12th November, 2013, allowed these Applications to be proceeded with and the same was duly informed to the Petitioners vide its letter dated 14th November, 2013 (page 146 of the paper book).

- (f) After the Settlement Applications were allowed to be proceeded with, the first hearing of these Applications took place on 26th March, 2014 when none appeared on behalf of the Revenue and neither any report was filed by the Revenue. Accordingly, Respondent No.3 was pleased to direct the Revenue to file its report within seven days. Finally, the Revenue filed its report vide its letter dated 15th April, 2014 which was received by the office of the 3rd Respondent on 19th May, 2014. In answer to the said report, the Petitioners also filed their detailed written submissions (which are annexed at Exhs “I”, “J” and “K” to the Petition).
- (g) Thereafter, final hearing of the Settlement Applications was conducted on 9th October, 2014 wherein the Petitioners made detailed arguments and also relied upon several decisions not only of the Settlement Commission, Chennai Bench but also of different High Courts, including one of this Court.

After hearing the parties, the Settlement Commission (Respondent No.3) passed its final order on 31st October, 2014 (the impugned order). As mentioned earlier, the Settlement Commission comprised of three Members. One Member of the Settlement Commission settled the case of the Petitioners and ordered that (i) since the duty was settled at Rs.43,80,845/- and Petitioners had already paid more than this amount, no further amount was payable on this score; (ii) since excess payment has been made in this case, there was no question of payment of any interest; (iii) a fine of Rs.50,000/- be imposed as a fine in lieu of confiscation and granted immunity from fine in excess of this amount; (iv) a penalty of Rs. 50,000/- be imposed on Petitioner No.1; and (v) a penalty of Rs. 10,000/- and Rs.15,000/-, be imposed on Petitioner Nos.3 and 2 respectively. Immunity was also granted from prosecution under the Customs Act, 1962. As far as the other two Members are concerned, they disagreed with the findings of the First Member basically on the ground that the Petitioners had not made proper

disclosures or co-operated with the Commission by admitting any additional duty and interest in terms of the demand in the SCN dated 09.02.2012, and as required under Section 127B. According to them, the disclosures for settlement were only a request to reclassify the fitments to the Pontoon, alongwith the Pontoon, and adjust the duty paid initially in 2007 against the fitments classified under the respective CTH. In view of the above, the other two Members rejected the Settlement Applications of the Petitioners for not making proper disclosures amounting to non-co-operation in the proceedings and non-payment of any admitted duty and interest as required under clause (c) to the 1st proviso to section 127B(1), and accordingly sent the matter back to the proper officer in terms of Section 127-I of the Customs Act, 1962 for disposal of the SCN as required under law. It is this majority view that has been impugned in this Writ Petition.

4. In this factual background, Mr. Kantawala, learned

counsel appearing on behalf of the Petitioners, submitted that the findings of the Settlement Commission are wholly perverse. He submitted that the mandate of Section 127B inter alia clearly stipulates that no Settlement Application shall be entertained unless the Applicant has paid the additional amount of customs duty accepted by him along with interest [clause (c) to the 1st proviso to section 127B(1)]. He submitted that this was a condition precedent before the Applicant approached the 3rd Respondent for settlement of its case. If this condition precedent was not satisfied, the Settlement Application was liable to be rejected at the initial stage itself for non-fulfillment of this mandatory requirement.

5. In the facts of the present case, Mr. Kantawala submitted that as mandated by section 127C(1), the Settlement Commission issued a notice dated 29th October, 2013 to the Petitioners, wherein a specific query / discrepancy was raised that the Petitioners had not deposited the full duty along with interest and the same was a mandatory requirement before their Settlement Applications could be entertained by the Settlement Commission. In light of this, the Petitioners were asked to give

their written explanation within a period of 7 days. In reply to this notice, the Petitioners, by their letter dated 7th November, 2013 stated that the Petitioners had already erroneously paid an amount of Rs.65,41,741/-, at the time of clearance of the Barge covered by Bill of Entry No.755132 dated 24th March, 2007. Additionally the Petitioners had paid a sum of Rs.50,00,000/- on 28th October, 2011 towards customs duty during investigations. The Petitioners therefore stated that the amounts already paid were far more than what was demanded under the SCN and interest accrued thereon. This explanation of the Petitioners was duly accepted by the 3rd Respondent and thereafter an order was passed on 12th November, 2013, ordering that the Settlement Applications be allowed to be proceeded with. This being the case, Mr. Kantawala submitted that the findings of the majority view that the Petitioners were guilty of non payment of any admitted duty and interest as required under clause (c) to the 1st proviso to section 127B(1) was wholly perverse and contrary to the record. He submitted that once the Settlement Commission, being satisfied with the explanation given by the Petitioners regarding payment of duty and interest and allowing the Settlement Applications to be proceeded with, could not turn around and reject the Settlement

Applications on the specious ground that the Petitioners were guilty of non payment of any admitted duty and interest as required under Section 127B.

6. Mr. Kantawala additionally submitted that in the present case, the majority view came to a totally incorrect and perverse finding that the present Settlement Applications disclosed that it was only a request to reclassify the fitments of the Pontoon, along with the Pontoon, and adjust the duty paid initially in 2007. In this regard, he brought to our attention the record of the proceedings before the Commission itself wherein the submissions of the Advocate for the Petitioners were recorded that they were not disputing the change in classification proposed by Revenue in the SCN and that they have now accepted the classification of the whole Barge with the fittings under heading 8905 which attracts duty of 5%. Mr. Kantawala submitted that even in the Settlement Applications filed before the Settlement Commission, it was categorically stated as under:-

“The Applicant submits that the Application filed by it fulfills all the conditions for allowing the same to be proceeded with:

a. It has filed Bill of Entry in respect of import of the said goods and in relation to the same a Show Cause Notice has been issued by the proper officer

b. The additional amount of duty accepted by the applicant in its application exceeds three lakhs rupees

c. It is submitted that the interest is not applicable on the duty, however agrees to pay any such interest if determined by the Settlement Commission.

d. It is submitted that no appeal or any matter in respect of the matters covered by the present application is pending in the Appellate Tribunal or any court

e. The said goods are not covered by the Notification issued under section 123 of the Customs Act, 1962 nor any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed

f. The present application is not made for interpretation of the classification of the goods under the Customs Tariff Act, 1975

g. The present application is not barred by Section 127L of the Customs Act, 1962”

(emphasis supplied)

7. He, therefore, submitted that the Petitioners had never disputed the classification as proposed by the Revenue and this finding of the majority view of the Commission is wholly perverse. For all the aforesaid reasons, he submitted that the impugned order cannot be sustained and the same ought to be set aside and the Settlement Applications filed by the Petitioners be remanded back to the 3rd Respondent for being decided afresh after giving a *de novo* hearing to the Petitioners.

8. On the other hand, Mr. Jetly, learned counsel appearing on behalf of the Respondents, sought to support the impugned order. He submitted that in the facts of the present case, admittedly the Petitioners had not paid the amount of duty along with interest thereon as demanded in the SCN. The Petitioners were, therefore, guilty of not complying with the mandatory provisions of Section 127B and hence the 3rd Respondent (the majority view) had correctly rejected the Settlement Applications filed by the Petitioners. He additionally submitted that under the said section (Section 127B), no Settlement Application could be entertained by the 3rd Respondent for the interpretation of the classification of the goods under the Customs Tariff Act, 1975 [4th proviso to section 127B(1)]. According to Mr. Jetly, the present dispute was clearly one of classification as recorded by the majority view of the 3rd Respondent, and therefore, he submitted that the majority view in the impugned order is fully justified and legal and required no interference by us in our writ jurisdiction under Article 226 of the Constitution of India.

9. We have heard the learned counsel for the parties at length and perused the papers and proceedings in the Writ Petition as well as the annexures thereto. Before we deal with the present controversy, it would be necessary to make note of certain provisions of the Customs Act, 1962 and more particularly Chapter XIV-A thereof, which 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 was 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 a 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 (3rd Respondent) is

constituted.

10. Having set out in brief the objects for which Chapter XIV-A was inserted in the Customs Act, 1962, we shall now turn our attention to some of the statutory provisions of the said Act. On the date when the Settlement Applications arising out of the common SCN dated 9th February, 2012 were filed by the Petitioners (i.e. on 22nd October, 2013), 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, 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 28-AB:*

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-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 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."

(emphasis supplied)

11. There have been certain amendments to this section in

2014 and 2015 which are not really germane to decide the controversy before us. Be that as it may, as can be seen from the above reproduction, section 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 (c) of the 1st proviso to sub-section (1) of section 127B clearly stipulates that no such Settlement Application shall be made unless the Applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB. We must mention here that in the year 2014, Section 127B was amended and inter alia the words “section 28AB”, appearing in clause (c) of the 1st proviso to section 127B(1) was substituted with the words “section 28AA”. The 4th proviso to Section 127B(1) stipulates that no Settlement

Application under this sub-section shall be made for interpretation of the classification of the goods under the Customs Tariff Act, 1975.

12. Thereafter comes section 127C which prescribes the procedure to be followed on receipt of a Settlement Application under section 127B. Section 127C, in so far as the same is relevant for our purposes, reads thus:-

127-C. Procedure on receipt of an application under Section 127-B.—(1) On receipt of an application under Section 127-B, 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 Customs 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 Customs 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)

(5)

(6)

(7)

(8)

(9)

(10)"

(emphasis supplied)

13. Section 127C inter alia stipulates that on receipt of an Application under section 127B, the Settlement Commission shall, within seven days from the date of receipt of the Application, issue notice to the Applicant to explain in writing as to why the Application made by him should be allowed to be proceeded with. After taking into consideration the explanation provided by the Applicant, the Settlement Commission shall within a period of 14 days from the date of the notice, by an order, allow the Application to be proceeded with or reject the Application. Reading the provisions of sections 127B and 127C, it is clear that before the Application is allowed to be proceeded with, the Settlement

Commission has to be satisfied that the mandatory requirements as set out in section 127B are complied with. It is only once this threshold is crossed, that the Settlement Application is allowed to be proceeded with by the Settlement Commission.

14. In the facts of the present case, it is an admitted fact that a notice was issued on 29th October, 2013 to the Petitioners as contemplated under Section 127C(1) and the Petitioners were called upon to give a written explanation whether the Settlement Applications filed by them fulfill the criteria as laid down under Section 127B of the Customs Act, 1962 and also inform the Commission whether the bar as set out under Section 127L of the Customs Act, 1962 is applicable in their cases. This notice was duly replied to by the Petitioners, by their letter dated 7th November, 2013. By this detailed reply, the Petitioners not only answered the discrepancies that were raised by the Settlement Commission but a categorical statement was made in the said reply that the Settlement Applications have not been made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975. One of the discrepancies raised was with reference to the deposit of duty demanded along with interest

thereon. Answering this discrepancy, the Petitioners stated that they had not deposited the full duty along with interest as they had already paid an amount of Rs.65,41,741/- as well as an amount of Rs.50,00,000/- towards customs duty during investigations, (making a total of Rs.1,15,41,741/-). This amount was far in excess of the duty demanded in the SCN of Rs.43,80,845/-. In view of the above, the Petitioners prayed that the Settlement Applications filed by them be allowed to be proceeded with. After receiving this reply, the Settlement Commission passed an order dated 12th November, 2013 under which it was ordered that the Settlement Applications filed by the Petitioners be allowed to be proceeded with. All these facts have been taken into consideration by the Single Member of the Settlement Commission (minority view), who has settled the case of the Petitioners.

15. Considering these facts, we are clearly of the view that the majority view of the Settlement Commission was in grave error in coming to the conclusion that the Settlement Applications filed by the Petitioners were liable for rejection on the ground of non co-operation in the proceedings and non payment of any

admitted duty and interest as required under Section 127B. As stated earlier, the Petitioners had explained that they had not made any additional payment of duty because in the past they had deposited the amount of duty which was far in excess of what was demanded in the SCN. This explanation was accepted by the Settlement Commission, and it was only thereafter that the case was allowed to be proceeded with. We, therefore, think that it was not correct on the part of the of the Settlement Commission (the majority view) to reject the Settlement Applications of the Petitioners on the ground of non payment of any admitted duty and interest as required under Section 127B.

16. As far as the findings of the majority view that the dispute in the present case related to classification, we equally find this finding to be incorrect. Firstly, under Section 127B, before the Settlement Applications are allowed to be proceeded with, the Settlement Commission has to be satisfied that by virtue of the Settlement Applications, the Petitioners are not seeking interpretation of the classification of the goods under the Customs Tariff Act, 1975. Such a declaration was categorically given by the Petitioners in their reply dated 7th November, 2013 before the

Settlement Commission ordered that the Settlement Applications of the Petitioners are allowed to be proceeded with. That apart, the records of the proceedings before the Commission on 26th March, 2014 (Exh. "E", page 148 of the paper book), also clearly indicate that the Petitioners were not disputing the change in the classification proposed by the Revenue in the SCN. It is categorically stated that the Petitioners had accepted the classification of the whole Barge with the fittings under Heading 8905 which attracts duty at 5%. This being the case, we are also of the view that the Settlement Applications of the Petitioners could not have been rejected on the ground that the same was only a request to reclassify the fittings to the Barge/Pontoon, along with Pontoon, and adjust the duty paid initially in 2007 against the fitments classified under the respective CTH. In view of the fact that the Settlement Commission itself had allowed the Settlement Applications of the Petitioners to be proceeded with under section 127C would only mean that at the threshold itself, the Commission was satisfied that the Settlement Applications filed by the Petitioners was not made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975. This apart, it was also the case of the Petitioners that they are not

disputing any classification as proposed by the Revenue in the SCN. In view of all this, we are clearly of the view that the Settlement Applications filed by the Petitioners could not have been rejected on this ground, as well.

17. In view of the foregoing discussions, we quash and set aside the impugned order dated 31st October, 2014 (Exh. "R" to the Petition) and the remand the matter back to the Settlement Commission to decide the Settlement Applications filed by the Petitioners on merits and in accordance with law and uninfluenced by any views of the majority or minority, rendered earlier. Rule is accordingly made absolute in the aforesaid terms. However, in the facts and circumstances of the present case, we leave the parties to bear their own costs.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)