

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2474 OF 2015**

M/S. CINEYUG WORLDWIDE

through its Partner Mr. Ali Morani, a
Partnership Firm having their Office at
301, Rose Apartments, Juhu Church Road,
Mumbai 400049

...Petitioners

Versus

1. THE UNION OF INDIA

Ministry of Finance Law & Justice,
Aayakar Bhavan, New Marine Lines,
Mumbai – 400 020

**2. THE COMMISSIONER OF SERVICE
TAX, Mumbai-II,**

115, New Central Excise Building, M.K.
Road, Churchgate, Mumbai 400 020

...Respondents

APPEARANCES

FOR THE PETITIONERS

Ms. Padmavati Patil, Advocate.

FOR THE 2ND RESPONDENT

Mr. Jitendra B. Mishra, Advocate.

CORAM

**: S.C. Dharmadhikari
& G.S. Patel, JJ.**

JUDGMENT RESERVED ON

: 11th January 2016

JUDGMENT PRONOUNCED ON

: 22nd January 2016

ORAL JUDGMENT: (Per G.S. Patel, J.)

1. Rule. Mr. Mishra for the 2nd Respondent waives service. By consent, Rule is made returnable forthwith. The Writ Petition is called out and taken up for hearing and final disposal. We have heard Ms. Patil, learned Advocate for the Petitioners and Mr. Mishra, learned Advocate for the 2nd Respondent at some length and considered their rival submissions and the material on record.

2. This is a Writ Petition under Article 226 of the Constitution of India. It is directed against Final Order No. 24/Final Order/ST/RB/2015 dated 18th February 2015¹ passed by the Settlement Commission, Additional Bench, Customs & Central Excise, Mumbai under Section 32F(5) of the Central Excise Act, 1944 in a Settlement Application No. 142/ST/JL/2014-SC(MB) SA(ST) 262/2014 dated 29th May 2014. By that order, the Settlement Commission rejected the application in question as impermissible under Section 32E of the Central Excise Act, 1944 (“CEA”).

3. The Petitioners are a partnership firm. They provide event management services. These services are covered by Section 65(40) read with Sections 65(41) and 65(105)(zu) of the Finance Act, 1994. The Petitioners are registered with the Service Tax Department under registration No. AAFFC3158GST001.

4. During the Financial Years 2007-2008 to 2010-2011, the Petitioners claim to have suffered a set back in their business. This is

¹ Exhibit “A”, pp. 36-47

inter alia attributed to various prominent clients defaulting in paying the Petitioners' fees for event management services rendered. The Petitioners say that they had no option but to write off the amounts of unpaid fees by reversing the entries in question in their books of account.

5. 1During this period (FY 2007-2008 to 2010-2011) in view of the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, service tax was payable by the 5th of the month immediately following the calendar month in which payments were received for taxable services rendered and billed. For assesseees who were individuals, proprietorship or partnership firms, service tax was payable quarterly, by 5th of the month following the quarter in which such payments were received. According to the Petitioners, their liability to pay service tax would have arisen only on their receiving fees from their clients. The Petitioners claim that since they had not received fees from some of their clients (which included major enterprises such as Star India, Unilever Limited and Zee TV etc.), the Petitioners were unsure whether service tax would nonetheless be paid on the fees that they had billed or charged for services rendered, despite the fact that the fees in question had not actually been received by the Petitioners at all. This, the Petitioners say, resulted in a delay in payment of service tax as also short payment.

6. During the course of a Service Tax Audit of the Petitioners' records, a written query was raised on 11th May 2012² seeking details of an amount of Rs. 13,67,233/- shown as "other income" for

² Exhibit "B", p. 48

the period 2009-2009. The Petitioners responded to this query by their letter dated 15th June 2012,³ saying that out of this amount of Rs. 13,67,233/- shown as 'other income', an amount of Rs. 3,58,423/- was interest on fixed deposits with banks and the remainder, Rs. 10,08,800/- pertained to reimbursement of payments of music licence fees from Videocon Industries Limited. The Petitioners explained that they had made these payments on behalf of Videocon Industries at its request and that this amount of Rs. 10,08,800/- was merely a reimbursement. The Petitioners clarified that they had not charged Videocon Industries any amount as fees for making this payment on its behalf. The Petitioners produced various ledger copies and other documents, including a copy of their agreement with Videocon Industries in this behalf.

7. A reconciliation statement was also sent under cover of the Petitioners' letter dated 1st September 2012 for FY 2006-2007 to 2010-2011.⁴ The Petitioners state that in the Audit Report dated 19th November 2012 certain differences or discrepancies between service tax paid and service tax payable were pointed out to the Petitioners. It was claimed that there was a short payment of service tax of Rs. 36,61,893/- for the period from FY 2007-2008 to 2011-2011.

8. The Petitioners responded by their letter dated 29th November 2012 to this audit objection and submitted that the calculation of service tax allegedly short paid was incorrect due to various reasons. Among the reasons cited by the Petitioners was the

³ Exhibit "C", pp. 49-52

⁴ Exhibit "D", pp. 53-55

credit they gave to non-paying clients such as Star India, Hindustan Unilever Limited & Zee TV of the amount first charged for event management services. In other words, since the fees charged by the Petitioners had not been paid, the amounts were reversed. It was also pointed out that an amount of Rs. 2,00,000/- due from Reliance Broadcast Network for the FY 2010-2011 was written off since the party did not agree to pay these amounts. Supporting documents were forwarded along with this response.⁵ The Petitioners recomputed the amounts that, according to them, were due and arrived at a figure of Rs. 20,84,792/-. This was paid along with interest of Rs. 16,77,519/-. Thus, a total amount of Rs. 37,62,311/- was paid between 21st September 2012 and 22nd May 2014. Details of these payments, giving their dates, amounts and corresponding challan numbers are set out in the tabulation below paragraph 13 of the Petition.

9. On 19th April 2013, the Joint Commissioner issued a show-cause notice to the Petitioners proposing to recover service tax of Rs. 36,61,893/- for FY 2007-2008 to 2010-2011 along with interest and penalties.⁶

10. The Petitioners say that since they had accepted that there was a short payment of service tax and had in fact paid an amount of Rs. 20,84,792/- as also interest of Rs. 16,77,519/-, in addition to filing periodical returns as required, the Petitioners approached the Settlement Commission for a settlement of the dispute. They made an application for settlement of the case on 29th May 2014. This

⁵ Exhibit "E", pp.56-57

⁶ Exhibit "F", pp.58-65

was registered as Application No. SA(ST) 262 of 2014. An Application of this nature is contemplated under Chapter V of the CEA. In this Application, the Petitioners accepted their liability in the amount of Rs. 20,84,792/- and their interest liability of Rs. 16,77,519/-. By this Application, the Petitioners sought immunity from penalties and prosecution.⁷

11. It appears that a notice for proceeding with the Application was issued to the Petitioners by the Settlement Commission. Certain discrepancies in the Application were pointed out. The Petitioners provided some clarifications. Ultimately, on 30th June 2014 the Settlement Commission allowed the Petitioners' Application to proceed.⁸ The Application was opposed by the Revenue. It filed a report dated 5th August 2014 under Section 32F(1) of the CEA. It submitted that the difference between the values accepted by the Petitioners and those claimed by the Revenue was substantial; that the Petitioners had not substantiated their claim with any documents from their customers; that there were no corresponding entries in the audited Profit & Loss account and Balance Sheet to reflect any write off; and that the Petitioners had not accepted their full liability.⁹

12. The Settlement Commission fixed a personal hearing on 30th October 2014. During the course of this hearing, the Petitioners *inter alia* accepted an additional liability, thus taking their total admitted liability to Rs. 20,86,353/-. However, they also contended

⁷ Exhibit "G", pp. 66-78

⁸ Exhibit "J", pp. 87-88

⁹ Exhibit "K", pp. 89-93

that there was excess tax paid in FY 2009-2010. They requested an opportunity to explain their calculations. On 30th October 2014, the Settlement Commission directed the Revenue to examine the Petitioners' calculations and present a factual report within 15 days.¹⁰ By their letter dated 31st October 2014, the Petitioners submitted a reconciliation statement and various supporting documents.¹¹ The Revenue did not submit any verification report as directed by the Settlement Commission.

13. On 23rd December 2014, the Petitioners received a communication stating that since one of the Members of the Settlement Commission has retired, a fresh date for re-hearing of the matter was scheduled on 15th January 2015. At that hearing, the Settlement Commission noted that no report had been received so far from the Revenue despite specific directions in that behalf. The response from the Revenue's representative was that he was unaware of any such directions. The Settlement Commission, therefore, adjourned the matter with a specific direction to submit a report within 10 days.¹²

14. The Petitioners then received the impugned Final Order dated 18th February 2015 by which the Settlement Commission rejected the Petitioners' Application as not admissible. The Final Order indicates that the Revenue had given its Report on 4th February 2015 and that this showed that the claim of the Petitioners could not be accepted. The Settlement Commission purported to

¹⁰ Exhibit "M", *pp.* 96-97

¹¹ Exhibit "N", *pp.* 98-162

¹² Exhibit "P", *pp.* 165-166

note that the Petitioners did not have sufficient supporting documentation.

15. In the Petition, a grievance is made¹³ that the Revenue's Report was never supplied to the Petitioners nor were the Petitioners given an opportunity of dealing with it. The Petitioners also claim that the Settlement Commission accepted the Revenue's contentions regarding discrepancies without giving the Petitioners an opportunity to explain that there were in fact no such discrepancies. In the Petition, the Petitioners have dealt with each one of the so-called discrepancies. It is submitted that the Settlement Commission has incorrectly and wrongly proceeded on the basis of the discrepancies recorded in the Revenue's Report. It is also submitted that the impugned order does not reflect any consideration at all of the Petitioners' Application, the grounds and reasons supplied by them, the documents furnished by them or their explanations, apart from not giving the Petitioners any opportunity to deal with the observations in the Revenue's Report. It is in these circumstances that the Final Order is challenged.

16. An Affidavit in Reply dated 10th December 2015 has been filed by one Mr. Shashank Dwivedi, Deputy Commissioner of Division-II, Service Tax VI, Mumbai. In paragraph 2 of this Affidavit, Mr. Dwivedi says:

"2. I say that the present petition inter alia challenges Final Order No. 24/Final Order/ST/RB/2015 dated 18-02-2015, whereby

¹³ Paragraph 29(A)7 at page 17

the Settlement Commission rejected the Settlement Application of the Petitioners as inadmissible. **The Settlement Commission observed that every aspect of the Revenue's investigations and conclusions were challenged. The facts were also disputed. There was no meeting ground between the Petitioners and the Revenue. It was observed that to come to a finding would require detailed appreciation of evidence, and the Settlement Commission was not a forum for evaluating evidence and deciding a matter involving complicated issues of facts and law. It was observed that the right forum was the adjudicating authority.** I say that the Show Cause Notice will now be adjudicated after hearing the Petitioners. I say that the Final Order passed by the Settlement Commission does not prejudice the Petitioners. I say that every contention of the Petitioners will be examined by the adjudicating authority on the basis of evidence and material furnished. I therefore most respectfully submit that no cause or intervention having been made out, this Honorable Court may be pleased to dismiss the petition with costs."

(Emphasis added)

17. We will turn to this paragraph presently, as it appears to us to be one that vitiates the entire basis of the Final Order impugned in this Petition, but before we do so it is necessary only to note that the Affidavit in Reply does not contain a parawise traverse of the

Petition. Some of the claims by the Petitioners are disputed but in paragraph 3, Mr. Dwivedi says that a copy of the verification report was made available to the Petitioners' authorized representative, one Mr. Piyush Satra, on 5th February 2015. In our view, this is insufficient. What was required to be given to the Petitioners was a copy of the Revenue's Report and *also* an opportunity of dealing with it. That opportunity appears to us clearly to have been denied.

18. We have also carefully considered the impugned order in question. From paragraph 8.1 onwards of the Report, we find the findings of the Settlement Commission. In paragraph 8.5, the Settlement Commission opines:

"8.5 From the above it is seen that every aspect of Revenue's investigations and conclusions have been challenged by the Applicant. Even the facts of the case have not been accepted by both sides. There is thus no meeting ground at all between the Revenue and the Applicants. To come to a definite finding, it would require detailed appreciation of evidence. The Settlement Commission is not the Forum for evaluating such evidence and deciding the matter which involves complicated issues of fact and law. The right Forum for this is the adjudicating authority. This view is supported by the decision of the Delhi High Court in the case of Union of India vs Dharampal Satyapal reported in 2013 ELT (2989) 653 (Del) wherein it has been held as under:

'49. The other principle which has been set down in several judgment of this court is that the Settlement Commission is not a substitute for adjudication proceedings before the central excise authorities and where complex issues of fact and law are involved for which a detailed inquiry is necessary, settlement proceedings cannot act as a proper substitute for the adjudication proceedings. In *Picasso Overseas and Others v. Director General of Revenue (Intelligence) and Another* [W.P.(C) No. 1495 of 2007 and W.P. (C) No. 4401 of 2007] decided on 3-8-2009 by a Division Bench of this Court, the point directly arose for consideration. The issue posed before this Court was : "... .. Can the Settlement Commission substitute itself for the adjudicating officer and arrive at a decision on highly contentious issue requiring detail and complex investigation for arriving at an adjudication of such facts". In paragraph 9 the following principles were set out:

- (i) The Settlement Commission cannot substitute itself for the adjudicating officer by deciding complicated and highly disputed

or contentious questions and issues of facts themselves, because the expression "settlement" is used in the Customs Act in contradistinction with "adjudication" and the very scheme of the settlement provisions is to settle and not adjudicate.

(ii) All the provisions made it abundantly clear that what is required of the Settlement Commission is a decision when there are terms of settlement agreed to by the Applicant and duty liability which is accepted by him, he could not be fastened with the liability which he never intended as accepted to be payable by him.

(iii) Section 127(1) as it stood then, used the expression "complexity of the Investigation" which shows that highly complex and contentious questions of fact cannot even be admitted for processing.

50. It was thus held that if the case involves highly complex and disputed questions of fact for which detailed inquiry is necessary, the Settlement Commission should refer the matter back to the adjudicating officer to be taken up

from the stage from which the matter was before such officer just before the making of the settlement application.

51. The above principles were reiterated by two other judgments of this Court:-

(i) Ashwani Tobacco Company Pvt. Ltd. V UOI & Ors., 2010(251) E.L.T. 162 (Del.);

(ii) Director General or Central Excise (intelligence) v. Murarilal Harishchandra Jaiswal Pvt. Ltd. And Ors., 172 (2010) DLT 593 + 2013(291) E.L.T. 484 (Del.)

52. In the second of the above decision, this Court observed the *"where at the admission stage under Section 127 C (1) the case throws a high decree of variation between the facts and contentions of both the parties before the Settlement Commission"*, then in such a case the Settlement Commission should not even admit an application because it is clear that the Department of Customs does not accept the duty which an Applicant feels is payable by him and therefore is bound to inquire into highly disputed questions of facts. *"The Division Bench however hastened to add that these observations will not apply to demands which are totally unsupported."*

19. Ms. Patil submits that the entire approach of the Settlement Commission is incorrect and contrary to the settled law as laid down

in a long catena of decisions of this Court. She submits that it is the statutory mandate and duty of the Settlement Commission under Chapter V of the CEA to strive for a possible settlement of the case, so that the interests of the Revenue are protected and that the Revenue is not put to a loss through protracted or delayed proceedings. The settlement provisions are intended to advance revenue collection and resolve pending disputes. Importantly, they make allowance for a defaulting taxpayer to make a clean breast of things and, against a commonly settled and negotiated payment of duty liability, to obtain immunity from payment of penalty and prosecution. To merely opine only on the basis of Revenue's Report that because there was a difference between the Petitioners' case and that of the Revenue, no settlement is possible is directly contrary to the statutory mandate. In no case, Ms. Patil says, will there *not* be such a difference. Indeed, the whole purpose and object of the Settlement Commission is to bridge that difference and to arrive at a *via medea*. Ms. Patil submits that if in every case the Settlement Commission is supposed only to accept the version put up by the Revenue, then, there can be no "settlement" as contemplated by the statute at all, and the whole of the Chapter V of the CEA might as well be taken off the statute book. The very word "settlement" implies, she submits, a negotiated compromise of the dispute in a reasonable manner that is mutually acceptable to both sides, with neither side being allowed to insist on satisfaction or acceptance of its entire claim.

20. Chapter V of the CEA was introduced by an amendment of 1998. The Settlement Commission is constituted under this Chapter (Sections 31 to 32-P). Section 32-A provides for the jurisdiction and

powers of the Settlement Commission. Section 32-I, sets out the powers and procedures of the Settlement Commission and subsection (1) clearly says that the Settlement Commissioner has all the powers that are vested in a Central Excise Officer under the CEA or the Rules made thereunder. Section 14 of the Act confers on the Central Excise Officer the power to summon persons to give evidence and to produce documents in enquiries under this Act. From this it is at once clear that the Settlement Commission has plenary powers to summon and take evidence. If there was any doubt about this, it is completely set at rest by the plain wording of Section 32-L(2) which speaks specifically of the Central Excise Officer being entitled to use all the materials and information produced by a petitioner before the Settlement Commission, “or the result of the enquiry held or evidence recorded” by the Settlement Commission in the course of proceedings before it “as if such materials, information, enquiry and evidence had been produced before such Central Excise Officer or held or recorded by him in the course of proceedings before him”. For the Respondents to say, therefore, in paragraph 2 that the Settlement Commission is “not a forum for evaluating evidence or deciding a matter involving complicated issues of facts and law” is clearly incorrect. We are surprised to find precisely this observation in paragraph 8.5 of the impugned order. This finding is contrary to the plain wording of the statute.

21. In our view, Ms. Patil is also correct in citing before us several decisions of the Division Benches of this Court. One of us (S.C. Dharmadhikari, J.) was a member of four of the five Division Benches in these cases.

22. In *SSF Plastics India Private Limited v Union of India*,¹⁴ the Division Bench of this Court considered at some length a case where there was an abrupt closure of the settlement proceedings, also holding the Application as not admissible. In paragraph 9 of that decision, it was noted that the Settlement Commission found that the Petitioner in that case was contesting the methodology adopted by the Department. The Court held that the Settlement Commission Bench could not on the basis that it would have to go into the law and details of the disputes, pass the impugned order closing the case. The Division Bench observed that even if the Revenue did not accept the case of a petitioner before the Settlement Commission, the Bench was not handicapped and could not just fold its hands. The Settlement Commission must be mindful of its statutory obligation and duty. No shortcut is permissible in law. Matters must be taken to their logical end. We believe that these observations apply squarely to the facts of the facts of the present case before us.

23. The legislative framework of Chapter V has been set out by this Court.¹⁵ Our Court has also noted that it is not proper to abandon the proceedings in a peremptory fashion or in violation of the principles of natural justice, i.e., without putting the applicant to notice about the consideration of a particular fact or legal

¹⁴ 2015 (325) E.L.T. 837 (Bom.)

¹⁵ *JSK Industries Private Limited v Union of India*, 2015 (317) E.L.T. 671 (Bom.)

provision.¹⁶ In *Bharmpal Panchal v Union of India*,¹⁷ a settlement application was rejected on the ground of pendency of an Appeal before CESTAT. In this decision, the objectives of the Settlement Commission were examined, including that it was set up and constituted on the recommendation of the Wanchoo Committee Report. The idea was to open the doors of settlement to taxpayers with the primary object of ensuring revenue returns and avoiding revenue loss. The Legislature intended to keep at bay an overly rigid approach and favoured a statutory regime that allows the defaulting taxpayers to come clean. The purpose is to avoid an unnecessary burden on Government resources. This is, clearly, the statutory mandate.

24. We will assume for the purpose of this Petition that a copy of the Revenue's report was in fact made available to the Petitioners. We find, however, that the Petitioner was given no opportunity of meeting it. The Settlement Commission seems to have straightaway accepted that Report not only as gospel, but as totally incontrovertible, and incapable of being subjected to any rational settlement. There is absolutely no basis for this, other than the Settlement Commission saying, to all intents and purposes, that the matter is apparently too onerous and too taxing on the Settlement Commission's time, energy and resources. This is wholly unacceptable. The very least the Settlement Commission ought to have done, in our view, was to give the Petitioner an opportunity to respond to the Revenue's observations and Report. Had the

¹⁶ *Poona Tools Private Limited v Union of India*, 2015 (323) E.L.T. 572 (Bom.); *Dream Yachts Private Limited v Union of India*, 2015 (322) E.L.T. 271 (Bom.)

¹⁷ 2015 (325) E.L.T. 690 (Bom.)

Petitioners then failed to do so, or if, on a close examination, that response was found on merits to be without substance, the application could have been dealt with accordingly. But to deny that opportunity and to thereby short-circuit a properly brought Settlement Case in this fashion is not, in our view, in keeping with the statutory mandate at all. Without this balancing and taking into account the views and submissions on both sides, we fail to see how any “settlement”, can be worked out or how the Settlement Commission can possibly discharge its bounden statutory duty. Indeed, it seems to us extremely strange that the Settlement Commission has adopted this approach given the obvious public purpose of the introduction of Chapter V to the CEA. By a summary rejection in this fashion of the settlement application the interest of the assessee is not met; but equally, and perhaps more importantly, the interest of the Revenue and, therefore, of public funds in the hands of Government, is also defeated. The entire purpose of ensuring a return to Revenue and avoiding costs in protracted litigation is lost.

25. We are satisfied that there has been a fatal violation of the principles of natural justice. We are also satisfied that the Settlement Commission has not proceeded in accordance with its statutory mandate under Chapter V of the CEA. We specifically reject and repeal the reason given by the Settlement Commission that it cannot take evidence or that, when confronted with conflicting submissions on facts and law, its only recourse is to dismiss a settlement application brought before it. Nothing could be further from the statutory intent.

26. The Petition succeeds in part. The impugned order dated 18th February 2015, Exhibit “A” to the Petition, is quashed and set aside. Settlement Application No. 142/ST/JL/2014-SC(MB) SA(ST) 262/2014 dated 29th May 2014 is remanded to the Settlement Commission for a fresh consideration uninfluenced by its findings and observations in the impugned order dated 18th February 2015.

27. By way of abandon caution, a copy of the Respondents’ response/report is to be provided to the learned Advocate for the Petitioners within 10 days of the present order being made available. The Petitioners will submit their response to that report within 10 days thereafter. The Settlement Commission will then consider all the material before it and pass an appropriate order on merits and in accordance with law.

28. We clarify that we have not addressed any of the contentions of either side on merits. These are specifically left open for consideration by the Settlement Commission.

29. The Writ Petition is disposed of in these terms with no order as to costs.

(G. S. Patel, J.)

(S. C. Dharmadhikari, J.)