

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

WRIT PETITION Nos.38658, 38728 AND 38751 OF 2015

Between:

- WP. No.38658 of 2015:

M/s. Madhucon Projects Limited rep., by its Managing Director Sri Nama Seetaiah.

.... Petitioner

Vs.

Customs, Excise and Service Tax Settlement Commission, Additional Bench, Chennai – 01 and another.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 02.06.2016.

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?
2. Whether the copies of judgment may be marked to Law Reports/Journals
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

JUSTICE RAMESH RANGANA1

* THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
* THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

+ WRIT PETITION Nos.38658, 38728 AND 38751 OF 2015

% Dated 02-06-2016

- W.P.No. 38658 of 2016:

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.... Petitioner

Vs.

\$ Customs, Excise and Service Tax Settlement Commission, Additional Bench, Chennai – 01 and another.

.... Respondents

! Counsel for the petitioner: Sri S.Ravi, Learned Senior Counsel and Sri Ch.Pushyam Kiran.

^ Counsel for respondents: Sri Jalakam Satyaram, Learned Standing Counsel for Central Excise.

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> HEAD NOTE:

? Citations:

1. (1985) 1 SCC 591
2. [1961] 1 SCR 902
3. (1990) 2 SCC 231
4. (2003) 7 SCC 66
5. (2004) 2 SCC 249
6. AIR 1934 PC 188
7. (1989) 4 SCC 378
8. AIR 1967 SC 389
9. AIR 1953 SC 252
10. AIR 1966 SC 1577
11. AIR 1977 SC 915

12. (1973) 1 SCC 216
13. AIR 1977 SC 915
14. AIR 1997 SC 3467
15. AIR 1955 SC 661
16. AIR 1958 SC 468
17. AIR 1963 SC 1667 = (1964 (1) SCR 897
18. AIR 2003 SC 66
19. IR 1966 SC 764 = (1966 (1) SCR 890
20. (2009) 10 SCC 531
21. (2010) 10 SCC 744
22. (1999) 3 SCC 722
23. AIR 2008 SC 1749
24. (2008) 4 SCC 720
25. 1999(4) SCC 468
26. (1988) 4 SCC 402
27. (1975) 2 SCC 175
28. (2009) 8 SCC 646
29. (1905) AC 369 (PC)
30. AIR 1957 SC 540 = 1957 SCR 488
31. (2007) 6 SCC 528
32. AIR 1975 SC 1843
33. AIR 1965 SC 703
34. (1979) 1 SCC 92
35. AIR 1980 SC 962 = 1980 Supp SCC 92
36. AIR 1963 SC 1241
37. (1969) 2 SCC 429
38. AIR 1960 SC 12
39. (2003) 4 SCC 305
40. (1999) 9 SCC 700 = AIR 1999 SC 1867
41. AIR 1956 SC 35 = (1955) 2 SCR 842
42. (2001) 5 SCC 175 = AIR 2001 SC 1832
43. (1989) 1 SCC 760
44. (2004) 2 SCC 249
45. (1998) 3 SCC 234
46. (1846) 4 MIA 179 = 6 Moo PC 1 (PC)
47. (1910) AC 444 (HL)
48. AIR 1962 SC 847
49. (1985) 4 SCC 343 = (1985) 156 ITR 323
50. 2015 (325) E.L.T. 575 (Cal)
51. 2001 (4) SCC 534
52. (2001) 5 SCC 407
53. 1953 SCR 1 = AIR 1952 SC 369
54. (2001) 8 SCC 540
55. AIR 1961 SC 609 = (1961) 2 SCR 765
56. AIR 1970 SC 1173 = (1969) 2 SCR 481
57. AIR 1965 SC 1092 = (1965) 2 SCR 269
58. AIR 1958 SC 341 = 1958 SCR 1102
59. AIR 1960 SC 1175= (1960) 3 SCR 727
60. AIR 1973 SC 1214
61. (2007) 3 SCC 794
62. (2006) 12 SCC 607
63. AIR 1973 SC 2524
64. (2006) 7 SCC 714
65. AIR 2001 SC 1080
66. (1992) 2 SCC 598
67. (2001) 2 SCC 549

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

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WRIT PETITION Nos.38658, 38728 AND 38751 OF 2015

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COMMON ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

W.P. No.38658 of 2015 is filed by the petitioner seeking a writ of mandamus to declare Order No.53/2014-ST dated 14.11.2014 passed by the 1st respondent, rejecting their settlement application with respect to service tax liability for the period October, 2010 to March, 2012, as arbitrary, illegal, unlawful and violative of principles of natural justice. W.P. No.38728 of 2015 is filed by the petitioner seeking a writ of mandamus to declare Order No.38/2013-ST dated 06.11.2013 passed by the first respondent, in so far as penalty of Rs.19,00,000/- was imposed without any valid ground or reason, as illegal, arbitrary, unlawful and violative of principles of natural justice. W.P. No.38751 of 2015 is filed by the petitioner seeking a writ of mandamus to declare Order No.36/2013-ST dated 30.10.2013 passed by the first respondent, in so far as penalty of Rs.2,35,000/- was imposed without any valid ground or reason, as illegal, arbitrary, unlawful and violative of principles of natural justice.

Facts, as stated in the writ affidavit, are that the petitioner-Company is engaged in the construction of roads, dams, bridges, irrigation projects, power projects, mining activities etc. They obtained registration in March, 2008 for payment of service tax for certain categories of services. It is their case that they were unaware of the need to obtain service tax registration for project services, activities relating to mining, industrial construction and erection, commissioning and installation services, construction of complex service, works contract services etc and,

consequently, they did not obtain registration; service tax officials, who visited their corporate office in the year 2010, had pointed out, during preliminary scrutiny, that, while some of their business activities were taxable, other services were exempt; immediately thereafter they got themselves registered for these activities also; the statement of their General Manager (Finance) was recorded by the Senior Investigation Officer on 24.05.2011; investigation continued till 2012, and show-cause notices were issued at different points of time; a show-cause notice in OR No.69 of 2010 dated 23.08.2011 was issued, for the period 01.08.2008 to 30.06.2010, demanding Rs.18,95,04,140/- as service tax; a second show-cause notice in OR No.137/2011 dated 22.10.2011, relating to the period July, 2010 to September, 2010, was issued demanding Rs.2,35,52,072; thereafter, a third show-cause notice in OR No.97/2012 dated 24.04.2012 was issued for the period October, 2010 to March, 2012, and Rs.46,08,66,273/- was demanded as service tax; the petitioner submitted applications to the Settlement Commission with respect to all the three show-cause notices, and paid the entire amount with interest as demanded by the Settlement Commission in respect of the first and second show-cause notices; with respect to the third show-cause notice also, they had discharged their service tax liability; they disclosed particulars upto March, 2012, and sought settlement even beyond the period specified in the third show-cause notice; they also admitted additional liability under mining and mineral service, works contract service and goods transport service, which were earlier overlooked by the authorities; in its Order dated 14.11.2014, the Settlement Commission recorded that the previous two applications were filed on 28.01.2013 and 18.04.2013, by that time the third show-cause notice issued on 24.04.2012 was already available in the hands of the petitioner, they could have filed an application for settlement at that time along with the previous applications or at least before the decision on the previous applications as the show cause notices were periodical in nature, and as the third application was filed after the earlier two applications were settled by the Commission, it was liable to be rejected in view of the bar under Section 32-O of the Central Excise Act ("the Act" for short).

The petitioner would contend that mere omission to file an application under Section 32-E of the Act in respect of the third show-cause notice, on or about the time the earlier two applications filed under Section 32-E of the Act with respect to the earlier two show cause notices were settled, did not justify rejection of the third application; the three show-cause notices were in respect of a continuous period from 01.08.2008 to 28.02.2012; the respondents could have issued only one notice for the entire period even by the date the third split up notice was issued; there was no reason to issue three notices for identical issues, and for a continuous period invoking the proviso to Sections 73 and 78 of the Finance Act, 1994; the Settlement Commission had settled identical cases arising out of the earlier two show-cause notices without any objection; no finding was recorded by the Commission that there were any malafides on their part; as they had fully admitted the proposed liability without demur, it could not be said that there was failure on their part to disclose full particulars and consequent liability; they were, however, imposed penalty without any justification; they had furnished all their records including the annual balance sheet, and did not suppress any facts; and the Commission was not justified in imposing penalty pursuant to the earlier two show-cause notices, and in refusing to entertain the third application on this ground.

In the counter-affidavit filed in W.P. No.38658 of 2015, the Deputy Commissioner, Customs and Central Excise, Hyderabad, stated that the Writ Petition was filed belatedly, more than a year after the order dated 14.11.2014 was passed by the Settlement Commission; the petitioner had obtained registration in March, 2008 for payment of service tax under the categories of transport of goods by road, and banking and other financial services; subsequently, during the course of investigation by officers of the Directorate General of Central Excise (Intelligence), the petitioner got the services, viz., mining service, erection, commissioning and installation service, works contract service, construction of commercial or industrial building and civil structure service and construction of residential complex service, included in their registration certificate; after detailed investigation, a show-cause notice in SCN No.57/2011 in OR NO.69/2010 dated 23.08.2011 was issued alleging non-payment of service tax under the service tax categories of (i) mining of mineral, oil or gas services under Section 65(105)(zzzy) of the Finance Act, 1994; (ii) works contract services under Section 65(105)(zzzza) of the Finance Act, 1994, (iii) erection, commissioning or installation services under Section 65(105)(zzd) of the Finance Act, 1994, and short payment of service tax under transport of goods by road service falling under Section 65(105)(zpz) of the Finance Act, 1994; service tax of Rs.18,19,78,297/- was demanded under Section 73(1) of the Finance Act, 1994 for the period 01.08.2008 to 30.06.2010; the show-cause notice proposed a demand of interest under Section 75, and penalty under Sections 76, 77 and 78 of the Finance Act; the show-cause notice was made answerable to the

Commissioner, Customs, Central Excise and Service Tax, Hyderabad; subsequently, vide show-cause notice in OR No.137/2011 dated 22.10.2011, the Commissioner had demanded service tax of Rs.2,68,19,623/-, for the period July, 2010 to September, 2010, based on the information provided by the petitioner to the department by their letters dated 02.08.2010, 30.08.2010 and 17.01.2011; the petitioner had furnished details of payment received by them, for the said period of the show-cause notice, vide their letters dated 19.10.2011 and 20.10.2011; the show-cause notice proposed a demand of interest under Section 75, and penalty under Sections 76, 77 and 78 of the Finance Act; subsequently another show-cause in OR No.97/2012 dated 24.04.2012 was issued demanding service tax of Rs.42,38,02,245/-, for the period October, 2010 to March, 2012, based on the information provided by the petitioner to the department vide their letters dated 02.08.2010, 30.08.2010 and 17.01.2011; the petitioner had furnished details of their liability on the services rendered by them to their service recipients, and the details of the Cenvat credit availed by them during the said show-cause notice period, by their letter dated 23.04.2012; the show-cause notice proposed a demand of interest under Section 75 and penalty under Sections 76, 77 and 78 of the Finance Act; interest on delayed payment of service tax was demanded under Section 75 of the Finance Act; the show-cause notice also demanded payment towards irregular Cenvat credit of Rs.21,47,23,290/- availed by the petitioner, along with interest under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994; penalty under Rules 15(1) and (3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 was also demanded; the petitioner filed applications before the Settlement Commission accepting their liability by filing declarations under Section 32E of the Act in respect of the first two show-cause notices dated 23.08.2011 and 22.10.2011 respectively; the first respondent, after a detailed hearing, passed orders in Order No.38/2013-ST dated 06.11.2013 and Order No.36/2013-ST dated 30.10.2013 respectively; the first respondent directed the petitioner to pay Rs.19,00,000/- and Rs.2,35,000/- respectively; the petitioner was informed that these penalties were being imposed on them under the penal provisions invoked in the show-cause notice, and for granting them immunity from penalty in excess of this amount; a condition was imposed that the same should be paid within 30 days of receipt of the order; aggrieved thereby the petitioner had filed these two Writ Petitions after a lapse of more than two years after orders were passed by the Settlement Commission in respect of their two earlier applications; in the said applications, the petitioner had accepted their liability by filing applicable declarations under Section 32E of the Act as made applicable to service tax matters under Section 83 of the Finance Act, 1994; the Settlement Commission, after a detailed hearing, observed that the application was hit by the bar in terms of the express provisions of Section 32-O of the Act; and the application filed by the petitioner was rejected by order dated 14.11.2014.

It is further submitted, in the counter-affidavit filed on behalf of the 2nd respondent, that the orders passed by the Settlement Commission are the culmination of judicial proceedings under the provisions of Section 32P of the Act; these Orders were passed after conducting a number of detailed hearings in the case; the petitioner was claiming ignorance of the provisions of law; while admitting their liability, they had now come forward with the lame excuse which necessitated rejection; the petitioner was not a small or a medium assessee, who did not have the services of experienced Chartered Accountants; the petitioner, being a limited company and after obtaining registration for some of the taxable services provided by them to their clientele, cannot claim ignorance of the other services being provided by them for which they are liable to pay service tax; the Writ Petition as filed is only an afterthought to delay proceedings in the case; the initial show-cause notice, for the period 01.08.2008 to 30.06.2010, was issued on the basis of the statements given by the petitioner; the second show-cause notice, covering the period 01.07.2010 to 30.09.2010, was issued on the basis of the information provided by the petitioner to the department by their letters dated 02.08.2010, 30.08.2010 and 17.01.2011; they had furnished details of the payment received by them for the said period of the show-cause notice vide their letters dated 19.10.2011 and 20.10.2011; the third show-cause notice, covering the period 01.10.2010 to 31.03.2012, was issued to the petitioner; this notice was issued on the basis of the information provided by the petitioner to the department by their letters dated 02.08.2010, 30.08.2010 and 17.01.2011, and the details of payments received by them for the said period of the show-cause notice by their letter dated 23.04.2012; after having accepted liability to pay service tax, the petitioner had approached the Settlement Commission to settle the case after filing truthful declaration before them; in its order, the Settlement Commission had clearly explained the basic fallacy of the petitioner's case; in the Order, the Settlement Commission incorporated facts relating to the previous applications, and the

orders passed in respect of those applications; the first respondent had referred to the imposition of penalty in the earlier two orders, and had specifically referred to Section 32-O of the Act; consequently, the third application submitted by the petitioner was dismissed; having failed to get a favourable settlement, in respect of the third application, the petitioner has now approached this Court for obtaining relief, for their grievances, by filing three Writ Petitions; one of the Writ Petitions has been filed after a lapse of more than one year from the date of the order dated 14.11.2014; the petitioner was attempting to confuse judicial proceedings before this Court, and to gain benefit by getting a favourable decision in the other two Writ Petitions after a lapse of two years; it could not be said that the petitioner, after a lapse of two years, had suddenly realized that the orders of the Settlement Commission were not judicious, and required intervention; and the Writ Petitions were liable to be dismissed. The counter-affidavit records the scope and jurisdiction of the Settlement Commission as (1) in view of Section 32-F, the Settlement Commission proceeds to decide and settle a case when an application is submitted by an assessee voluntarily making a true and correct declaration of the facts relating to the case; (2) the Settlement Commission is entitled to decide and may exercise all the powers of an original authority in deciding the case. The decision of the Settlement Commission is final and conclusive. It is not an appealable order in terms of Section 32-M of the Act; and (3) the object of the Settlement Commission is to settle an issue which has been brought before it at the instance of an assessee, and the function of the Settlement Commission is not an adjudicatory function.

In its order dated 30.10.2013 the Settlement Commission observed that the applicant had filed an application for settlement admitting service tax liability of Rs.2,35,52,071/- for the period 01.07.2010 to 30.09.2010, as against the demand of Rs.2,68,19,623/-; the admitted interest liability was Rs.11,90,340/-; during the hearing held on 25.10.2013, payment of service tax of Rs.2,35,52,071/- and interest of Rs.11,90,340/- was confirmed by the revenue; during the course of proceedings, the applicant made additional disclosure, and accepted and agreed to pay the balance amount of Rs.32,67,552/- after receipt of the order from the Bench; in the facts and circumstances of the case, the Bench considered the additional amount of Rs.2,68,19,623/- to be the applicant's true and full disclosure, besides applicable interest liability thereon; the Bench, therefore, considered it to be a fit case for settlement of service tax liability at Rs.2,68,19,623/-; the applicant had paid Rs.11,90,340/- towards interest; and additional interest, if any, required to be paid should be worked out by the jurisdictional Commissioner, and informed to the applicant for discharge of his full interest liability. The first respondent observed that the applicant had not paid service tax for the period July, 2010 to September, 2010 for various services rendered within the due dates, and had also not filed ST-3 returns in time; the applicant had not even taken registration for works contract services, erection commissioning or installation services and mining services; the fact that they had carried on various activities, which rendered them liable for payment of service tax, was not informed to the Department; non-payment of service tax attracted penalty under the relevant legal provisions relating to service tax; the Bench considered the applicant liable for penal action; however, as the applicant had made a full and true disclosure of additional service tax liability and had co-operated during the proceedings, the Bench considered the applicant eligible for partial immunity from penalty. Consequently, the first respondent imposed a penalty of Rs.2,35,000/- on the applicant under the penal provisions invoked in the show-cause notice, and granted them immunity from penalty in excess thereof. The applicant was also granted immunity from prosecution under the Act, and was informed that the immunity granted to them was liable to be withdrawn at any time if it came to the notice of the Bench that, in obtaining the order of settlement, any material particulars had been withheld or any false evidence had been given.

In its order dated 06.11.2013, the first respondent observed that the petitioner had not paid service tax, for the period August, 2008 to June, 2010, for various services rendered within the due dates; they had also not filed ST-3 returns in time; they had not even taken registration for works contract service, erection, commissioning and installation service, and mining service; the fact of providing various services, which rendered them liable for service tax, was not informed to the department; and non-registration, and non-payment of service tax, attracted penalty under the relevant legal provisions. The first respondent held that the petitioner was liable for penal action. However, as they had made a full and true disclosure of additional service tax liability and had co-operated during the proceedings before the Commission, the first respondent considered the petitioner eligible for partial immunity from penalty.

In its order dated 14.11.2014, for the period October, 2010 to March, 2012, the first respondent (i.e. the

Settlement Commission) observed that the petitioner had filed three applications covering three show-cause notices (1) SCN No.57/2011 dated 23.08.2011 for the period August, 2008 to June, 2010, (2) SCN No.137/2011 dated 22.10.2011 for the period July, 2010 to September, 2010, and (3) SCN No.97/2012 dated 24.04.2012 for the period from October, 2010 to March, 2012; orders were passed in the first show-cause notice on 30.10.2013, and in the second show-cause notice on 06.11.2013, before the application, in respect of the third show-cause notice, was filed on 25.11.2013; in the first order dated 30.10.2013, a penalty of Rs.2,35,000/- was imposed on the petitioner, and in the second order dated 06.11.2013 a penalty of Rs.19,00,000/- was imposed on them; the petitioner had filed the third application, arising out of show-cause notice No.97/2012 dated 24.04.2012 covering the period of demand from October, 2010 to March, 2012, on 25.11.2013; during the course of hearing on 13.08.2014, the petitioner's counsel had submitted that the bar under Section 32-O of the Act was not applicable in this case, as they had approached the Commission on an identical matter for the subsequent period; this submission was not supported by the provisions of Section 32-O of the Act; applications, in respect of the first two show-cause notices, were filed by the petitioner on 28.01.2013 and 18.04.2013 both of which was only after the third show cause notice was issued to them on 24.04.2012; they could have filed the third application for settlement along with the previous two applications, or at least before the decision on the previous applications, as the show-cause notices were periodical in nature; and they had filed the third application after the earlier two applications were settled by the first respondent. After extracting Section 32-O(1)(i) of the Act, the first respondent observed that, in the previous show-cause notices, penalty was proposed on the ground of suppression of facts with an intention to evade payment of service tax; subsequently penalty was imposed on them in each of the two orders dated 30.10.2013 and 06.11.2013; the third application filed by the petitioner was hit by the express bar under Section 32-O of the Act as made applicable to service tax matters; and, consequently, the petitioner's claim application was liable to be rejected.

Elaborate oral submissions were put forth by Sri S. Ravi, Learned Senior Counsel appearing on behalf of the petitioner. Written submissions were filed by Sri Ch. Pushyam Kiran, Learned Counsel for the petitioner. Oral submissions were made, and written arguments filed on behalf of the respondents, by Sri Jalakam Satyaram, Learned Standing Counsel for Central Excise.

Sri S. Ravi, Learned Senior Counsel appearing on behalf of the petitioner, would submit that the application dated 18-4-2013 seeking settlement of the case, arising out of Show-Cause Notice O.R. No. 69/2010 dated 23-8-2011, for the period 01.08.2009 to 30.06.2010, was accepted by the Settlement Commission by its final order dated 6-11-2013 passed under Section 32F(5) of the Act; the settlement application dated 28.01.2013, seeking settlement of the case arising out of Show-Cause Notice O.R. No. 137/2011 dated 22-10-2011, for the period July, 2010 to September 2010, was accepted by the commission by its final order dated 30-10-2013 passed under Section 32F(5) of the Act; while disposing of these two applications, the Commission had recorded its finding that the Petitioner had made a full and true disclosure of their additional Service Tax liability, they had co-operated during the proceedings before the Commission, and the Commission considered them eligible for partial immunity from penalty; the Commission gave partial immunity with respect to levy of penalty, and imposed a penalty of Rs. 19,00,000/- and Rs.2,35,000/- respectively under these two orders; the third Settlement Application dated 25.11.2013 seeking settlement of the case arising out of Show-Cause Notice O.R. No. 97/2012 dated 24.04.2012, for the period October 2010 to March 2012, came to be rejected by order dated 14.11.2014; it is this order which is under challenge in W.P. No.38658 of 2015; and the ground on which the Commission rejected the application dated 25-11-2013 was that Section 32-O of the Act, as it applied to Service Tax proceedings by virtue of Section 83 of the Finance Act, 1994, barred a subsequent application if an earlier order, passed under Section 32F(5) or Section 32F(7) of the Act, provided for imposition of penalty on the ground of concealment of particulars of the applicant's duty liability.

Learned Senior Counsel would submit that, when objections were called for from the respondent-officials by the Commission, they did not raise any objection regarding the maintainability of the third application; the petitioner had no inkling that their application would be rejected on the hyper-technical ground that it was filed after orders were passed on the earlier two applications; the third application was rejected on the ground that it was barred under Section 32-O of the Act; as the third application was filed on 25.11.2013, the Explanation to Section 32-O of

the Act (which came into force on 06.08.2014) has no application; the petitioner had submitted their application prior to insertion of the Explanation to Section 32-O; before the Explanation was inserted to Section 32-O(1)(i) of the Act, it was only if the application had been rejected for failure of an applicant to fully and truly disclose all relevant facts to the Settlement Commission, and penalty had been imposed in that regard, was a subsequent application barred; as the application for Settlement was made by the Petitioner on 25-11-2013, their case should have been decided without reference to the Explanation to Section 32-O(1)(i) of the Act; the question which then arises is - whether the penalty contemplated under the said provision, prior to its amendment, was a penalty imposed for concealment of particulars before the Central Excise Officer or for concealment of particulars of liability before the Commission; the Commission has the powers of an assessing officer as declared under Section 32-I of the Act; the power to grant immunity is contained in Section 32K; the very application, under Section 32E(1) of the Act, pre-supposes suppression of facts before the assessing officer; and the only logical construction, that flows from the conspectus of these provisions, is that, prior to the amendment, it is only if the Commission had imposed penalty for concealment of particulars of duty before it, would the bar apply; an alternative construction could be that the pre-amended Section 32-O covered cases of concealment both before the Central Excise Officer and the Settlement Commission itself; in such an event, the consequences would be that this Court must hold the newly inserted Explanation to be a mere surplusage; if, on the other hand, the pre-amended Section 32-O contemplated penalty having been imposed only for concealment of particulars before the Central Excise Officer, the Explanation could be interpreted to be clarificatory in nature; such an interpretation, in the first instance, would mean that no subsequent application is maintainable as Section 32E(1) contemplates applications being made only if the Central Excise Officer has found evasion by an assessee; such a construction would also lead to the undesirable consequence, namely that a person who conceals particulars before the Commission would be completely immune, and can make successive applications; a reconciliation of these various positions would lead to the conclusion that the pre-amended provision contemplated a bar against a subsequent application, if penalty was imposed for concealment of particulars before the Commission; and the Explanation now extends the bar even in respect of cases of concealment before the Central Excise Officer.

On the other hand Sri Jalakam Satyaram, Learned Standing Counsel for Central Excise, would submit that pursuant to the show cause notice issued on 24.04.2012 by the Jurisdictional Commissioner, covering the period from October, 2010 to March, 2012, the petitioner had filed the third application before the Settlement Commission on 25.11.2013; by the time the said application was decided by the Settlement Commission on 14.11.2014, the amendment to Section 32-O(1)(i), by way of insertion of an Explanation thereto, was already in the Statute w.e.f 06.08.2014; Section 32-O of Act is made applicable to service tax matters by Section 83 of the Finance Act 1994; the Settlement Commission has taken cognizance of concealment of duty liability by way of non- registration, non filing of returns, non-payment of tax, and suppression of facts before the Central Excise Officer; the finding of fact recorded by the Settlement Commission indisputably reflects concealment of duty liability from the Central Excise Officer; even in the third show cause notice, there was concealment of duty liability from the Central Excise Officer in as much as the petitioner did not file the returns, for the relevant period, before him; and, in the instant case, the impugned Order was passed taking the amendment into consideration.

Learned Standing Counsel would submit that the issue of suppression/concealment was raised before the Commission; the show cause notices, the contents of which were brought to the notice of Settlement Commission, reflect suppression of facts which amounts to concealment from the Central Excise Officer in terms of Section 32-O(1)(i) of the Act; every Court/Tribunal is assumed to have taken the statutory position, as is applicable to the proceedings, into consideration while deciding a matter before it; it is evident from the finding recorded by the Settlement Commission, in rejecting the Petitioner's third application, that it has implicitly taken into consideration the Explanation, inserted to Section 32-O(1)(i) in the year 2014, while passing the impugned order; the Commission had found that there was concealment of duty liability from the Central Excise Officer in the previous proceeding before it; the earlier cases were found fit only for partial immunity from penalty; and the Commission had imposed 1% of the tax liability, concealed from the Central Excise Officer, as penalty .

Learned Standing Counsel would further submit that penalty was proposed to be imposed on the petitioner in first show cause notice which was challenged and decided by the Settlement Commission; in its order dated

06.11.2013, the Settlement Commission has explained and ordered accordingly; the order of the Settlement Commission clearly establishes suppression/ concealment from the Central Excise Officer by the applicant/ petitioner; and no useful purpose would be served in remanding the petition to the Settlement Commission for re-adjudication on the amended 32-O of the Act. Learned Standing Counsel would submit that, by taking his written and oral submissions and counter into the consideration, the writ petitions may be dismissed with exemplary costs.

The show-cause notice in OR No.69/2010 dated 23.08.2011 related to the period 01.08.2008 to 30.06.2010 for failure on the part of the petitioner to pay service tax on mining of minerals service, oil and gas service under Section 65(105)(zzzy), transport of goods by road service under Section 65(105)(zzp), works contract service under Section 65(105)(zzza), and erection, commissioning or installation services under Section 65(105)(zzd) of the Finance Act, 1994. After receipt of the said show-cause notice, the petitioner submitted an application before the Settlement Commission on 18.04.2013 which resulted in a final order being passed by the Settlement Commission on 06.11.2013. This order of the Settlement Commission dated 06.11.2013 is under challenge in W.P. No.38728 of 2015.

Another show-cause notice was issued to the petitioner in O.R.No.137 of 2011 dated 22.10.2011 for the period July, 2010 to September, 2010 for failure to pay service tax on mining of minerals service, oil and gas service under Section 65(105)(zzzy), and works contract service under Section 65(105)(zzza) of the Finance Act, 1994. After receipt of the show-cause notice dated 22.10.2011, the petitioner submitted an application to the Settlement Commission on 28.01.2013 which culminated in a final order being passed on 30.10.2013. This order of the Settlement Commission dated 30.10.2013 is under challenge in W.P. No.38751 of 2015.

The third show-cause notice in O.R.No.97/2012 dated 24.04.2012, for the period October, 2010 to March, 2012, was issued for failure of the petitioner to pay service tax on mining of minerals service, oil and gas service under Section 65(105)(zzzy), transport of goods by road service under Section 65(105)(zzp), and works contract service under Section 65(105)(zzza) of the Finance Act, 1994. After receipt of the show-cause notice dated 24.04.2012, the petitioner submitted an application to the Settlement Commission on 25.11.2013 which culminated in an order being passed on 14.11.2014. It is this order of the Settlement Commission dated 14.11.2014 which is under challenge in W.P. No.38658 of 2015.

In this context, it is necessary to note that the third show-cause notice, in O.R.No.97/2012 dated 24.04.2012, was issued to the petitioner more than a year and half prior to the order passed by the Settlement Commission on 06.11.2013 with respect to the show-cause notice in O.R.No.69/2010 dated 23.08.2011, and on 30.10.2013 in respect of the show-cause notice in O.R.No.137/2011 dated 22.10.2011. It is not in dispute that the petitioner had filed the third application before the Settlement Commission on 25.11.2013 more than a year and half after receipt of the show-cause notice in O.R.No.97/2012 dated 24.04.2012. Even if the third application had been submitted just one month earlier i.e. at any time before the final order was passed by the Settlement Commission on the first of the earlier two show-cause notices on 30.10.2013, the bar under Section 32-O(1)(i) of the Act would, even according to the revenue, not have been attracted. It is only because the petitioner filed the third application before the Settlement Commission on 25.11.2013, with respect to the show-cause notice in O.R.No.97/2012 dated 24.04.2012, after the Settlement Commission had passed final Orders, in the application filed pursuant to the show-cause notice in O.R.No.137/2012 dated 22.10.2011, on 30.10.2013, and the order passed, in respect of O.R.No.69/2010 dated 23.08.2011, on 06.11.2013 did the Settlement Commission reject their application as barred under Section 32-O(1)(i) of the Act on the ground that penalty had been imposed on the petitioner under the earlier two orders dated 30.10.2013 and 06.11.2013.

The question which necessitates examination is whether the Explanation added to Section 32-O(1)(i) of the Act, by Section 101 of Finance Act 2 of 2014 w.e.f. 06.08.2014, is prospective or retrospective in its application. If it is the latter, the Settlement Commission was then justified in rejecting the petitioner's application by its Order dated 14.11.2014 on the ground that they had, by the earlier Orders dated 30.10.2013 and 06.11.2013, suffered penalty for concealment of particulars of their duty liability before the Central Excise Officer. If, on the other hand, the Explanation only operates prospectively, we must then examine whether Section 32-O(1)(i) of the Act, before the Explanation was added thereto, barred an application being entertained by the Settlement Commission when, by its earlier orders, it had imposed penalty on the very same applicant for concealment of duty liability before the

Central Excise Officer. It is useful in this context to note the contents of Section 32-O(1)(i) of the Act both prior to, and after addition of the Explanation thereto.

Section 83 of the Finance Act, 1994 makes certain provisions of the Central Excise Act, 1944, as in force from time to time, applicable in relation to service tax as they apply in relation to a duty of excise. The provisions referred to in Section 83 of the Finance Act include, among others, Sections 32, 32-A to 32-P of the Central Excise Act, 1944 (both inclusive). Consequently, the provisions of Chapter-V of the Central Excise Act, 1944 are applicable for settlement of service tax cases also. Sections 32-O(1)(i), in Chapter V of the Act before its amendment with effect from 06.08.2014, read as under:

“Where an order of settlement passed under sub-section (7) of section 32F, as it stood immediately before the commencement of Section 122 of the Finance Act, 2007 (22 of 2007) or sub- section 5 of Section 32F, provides for the imposition of a penalty on the person who made the application under Section 32E for settlement, on the ground of concealment of particulars of his duty liability; then, he shall not be entitled to apply for settlement under Section 32-E in relation to any other matter”.

By Section 101 of Finance Act No.2 of 2014, effective from 06.08.2014, the following Explanation was inserted to Section 32-O(1)(i) of the Act:

“In this clause, the concealment of particulars of duty liability relates to any such concealment made from the Central Excise Officer.”

Section 32-O(1)(i) of the Act, after its amendment with effect from 06.08.2014, reads as follows:

“Where an order of settlement passed under sub-section (7) of section 32F, as it stood immediately before the commencement of section 122 of the Finance Act, 2007 (22 of 2007) or sub- section 5 of section 32F, provides for the imposition of a penalty on the person who made the application under Section 32E for settlement, on the ground of concealment of particulars of his duty liability; then, he shall not be entitled to apply for settlement under Section 32-E in relation to any other matter.

Explanation: In this clause, the concealment of particulars of duty liability relates to any such concealment made from the Central Excise Officer.”

I. EXPLANATION TO A STATUTORY PROVISION : ITS PURPOSE:

Before examining whether Parliament intended to apply the Explanation to Section 32-(O)(1)(i) of the Act retr

There is no general theory, as to the effect and intendment of an Explanation, except that the purposes of the ‘Explanation’ are determined by its own words. An Explanation, depending on its language, might supply or take away something from the contents of a provision. (**Keshavji Ravji & Co. v. CIT**^[3]). An Explanation to a provision of an Act is inserted to clarify the vagueness which might have otherwise occurred in the provision of the Act. (**Dipak Chandra Ruhidas v. Chandan Kumar Sarkar**^[4]). An Explanation cannot be read as changing or as interfering with the incidence of a levy. (**M.P. Cement Manufacturers’ Assn. v. State of M.P.**,^[5]). An Explanation may also be introduced by way of abundant caution in order to clear any mental cobwebs surrounding the meaning of a statutory provision spun by interpretative errors, and to place what the legislature considers to be the true meaning beyond controversy or doubt. (**Keshavji Ravji & Co.**³). An Explanation may also be inserted *ex abundanti cautela* because of a groundless apprehension that a provision does not mean what it states. (**Abdul Latif Khan v. Mt.Abadi Begam**^[6]).

An Explanation only explains. An explanation or a clarification may be in respect of matters whose meaning is implicit, and not explicit in the main Section itself. An Explanation is different from a Proviso for a Proviso excepts, excludes or restricts while an Explanation explains or clarifies. While it could settle a matter of controversy, an Explanation may not be made to operate as an “exception” or a “proviso”. (**Aphali Pharmaceuticals Ltd. v. State of Maharashtra**^[7]; **Bihta Co-operative Development and Cane Marketing Union Ltd. v. Bank of Bihar**^[8]; **State of Bombay v. United Motors (India) Ltd.**^[9]; **Collector of Customs v. G. Dass & Co.**^[10]; **Burmah Shell Oil Ltd.**²; **Dattatraya Govind Mahajan v. State of Maharashtra**^[11]; **United Motors (India) Ltd**⁹).

Even if, on a true reading of an Explanation, it appears that it has widened the scope of the main section, effect should be given to the legislative intent notwithstanding the fact that the legislature named that provision as

an Explanation. Courts have to find out the true legislative intent, as the legislature has different ways of expressing itself. The words used alone are the repository of legislative intent and, if necessary, an Explanation may be construed according to its plain language and “not on any a priori consideration”. (**Aphali Pharmaceuticals Ltd.**⁷; **United Motors (India) Ltd.**⁹; **Hiralal Ratanlal v. State of U.P.**^[12]; **D.G. Mahajan v. State of Maharashtra**^[13]; **S. Sundaram Pillai**¹).

Mere description of a certain provision as an “Explanation” is not decisive of its true meaning. Ultimately it is the intention of legislature which is paramount, and mere use of a label cannot control or deflect such an intention. The interpretation must obviously depend upon the words used therein, but it must be borne in mind that when the provision is capable of two interpretations, that should be adopted which fits the description. (**Aphali Pharmaceuticals Ltd.**⁷; **Bihta Co-operative Development and Cane Marketing Union Ltd.**⁸; **United Motors (India) Ltd.**⁹; **G. Dass & Co.**¹⁰; **Burmah Shell Oil Storage and Distributing Company of India Ltd.**²; **Dattatraya Govind Mahajan**¹¹).

The object of an Explanation to a statutory provision is (a) to explain the meaning and intendment of the Act itself, (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve, (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful, (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act, it can help or assist the Court in interpreting the true purport and intendment of the enactment, and (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in its interpretation. (**S. Sundaram Pillai**¹).

The Explanation must be read so as to harmonise with and clear up any ambiguity in the main provision. (**M/s. Oblum Electrical Industries Pvt. Ltd., Hyderabad v. Collector of Customs, Bombay**^[14]; **Bihta Cooperative Development Cane Marketing Union Ltd.**⁸). It should not, ordinarily, be so construed as to widen the ambit of the Section. (**S. Sundaram Pillai**¹; **Bihta Cooperative Development Cane Marketing Union Ltd.**⁸). An Explanation appended to a Section or a Clause gets incorporated into it, and becomes an integral part of it, and has no independent existence apart from it. There is, in the eye of law, only one enactment of which both the Section and the Explanation are two inseparable parts. “They move in a body if they move at all”. (**Bengal Immunity Co. Ltd. v. State of Bihar**^[15]). It is a rule of construction well- established that Sections should be read along with the Explanation, unless there are compelling reasons contra, as constituting a single scheme. (**M.P.V. Sundaramier & Co. v. State of Andhra Pradesh**^[16]).

On a conjoint reading of Section 32-O(1)(i) of the Act, and the Explanation thereto, it is clear that, if penalty is imposed on the applicant by an order passed by the Settlement Commission under Section 32-F(5) of the Act for concealment of particulars of their duty liability from the Central Excise Officer, the applicant is thereafter not entitled to apply for settlement under Section 32-E in relation to any other matter. The petitioner herein was imposed penalty of Rs.2,35,000/- and Rs.19,00,000/- by the order of the Settlement Commission dated 30.10.2013 and 06.11.2013 respectively for concealment of duty liability from the Central Excise Officer. If the Explanation to Section 32-(O)(1)(i) of Act is held to apply retrospectively, the Settlement Commission must then be held to be justified in passing the impugned order dated 14.11.2014 rejecting the petitioner’s application for settlement dated 25.11.2013.

II. DOES THE EXPLANATION TO SECTION 32-O(1)(i) OF THE ACT OPERATE PROSPECTIVELY OR RETROSPECTIVELY?

The fact, however, remains that both the events firstly of a show cause notice being issued to the petitioner on 24.04.2012, and secondly which resulted in the petitioner submitting an application to the Settlement Commission on 25.11.2013, were before the Explanation was inserted to Section 32-O(1)(i) of the Act with effect from 06.08.2014. Retrospectivity or otherwise of the Explanation therefore assumes relevance. Where the legislature can make a valid law, it can provide not only for the prospective operation of the material provisions of

the said law, but also for the retrospective operation of the said provisions. (**Rai Ramkrishna v. The State of Bihar**^[17]; **M/s. Satnam Overseas (Export) v. State of Haryana**^[18]). The power to legislate includes the power to legislate prospectively as well as retrospectively and, in that behalf, tax legislation is no different from any other legislation. The power to tax can be competently exercised by the legislature either prospectively or retrospectively. (**Jawaharmal v. State of Rajasthan**^[19]; **M/s. Satnam Overseas (Export)**¹⁸). While clarificatory provisions have retrospective application, a provision cannot be said to be clarificatory if it neither supplies an obvious omission in the Act nor purports to explain any provision thereof. (**M/s. Satnam Overseas (Export)**¹⁸).

III. THE RIGHT TO SEEK SETTLEMENT IS REGULATED BY THE PROVISIONS OF CHAPTER-V OF THE ACT:

While examining the question, whether or not the Explanation to Section 32-(O)(1)(i) has retrospective operation, it is necessary to consider the nature of the right which the provision and the Explanation seek to curtail. The right to make an application to the Settlement Commission is a statutory right conferred and regulated by the provisions of Chapter V of the Act. As the right to make an application for settlement, like a right of appeal, is a creature of a statute, the remedy must be legitimately traceable to the statutory provisions. (**Super Cassettes Industries Ltd. v. State of U.P.**^[20]; **Competition Commission of India v. SAIL**^[21]). It is for the legislature to decide whether the said right should be unconditional or conditional. (**SAIL**²¹; **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar**^[22]; and **Kashmir Singh v. Harnam Singh**^[23]). This right can be circumscribed by the conditions in the grant. (**Government of A.P. v. P. Laxmi Devi**^[24]; **Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the City of Ahmedabad**^[25]; **Vijay Prakash D. Mehta v. Collector of Customs**^[26]; **Anant Mills Ltd. v. State of Gujarat**^[27]).

It is necessary, therefore, to examine the nature of this right in the light of the relevant statutory provisions. Section 32E, in Chapter-V of the Act, refers to the application for settlement of cases and, under sub-section (1) thereof, an assessee 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 prescribed and containing a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction, the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by him and such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification, under-valuation, inapplicability of exemption notification or CENVAT credit [or otherwise] and any such application shall be disposed of in the manner hereinafter provided. Under the first proviso thereto no such application shall be made unless (a) the applicant has filed returns showing production, clearance and central excise duty paid in the prescribed manner; (b) a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant; (c) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and (d) the applicant has paid the additional amount of excise duty accepted by him along with interest due under Section 11AA.

The second proviso to Section 32-E(1) enables the Settlement Commission, if it is satisfied that circumstances exist for not filing the returns referred to in clause (a) of the first proviso to sub-section (1), after recording reasons therefor, to allow the applicant to make such application. The third proviso disables an application being entertained by the Settlement Commission under Section 32E(1) in cases which are pending with the Appellate Tribunal or any Court. The fourth proviso stipulates that no application under Section 32-(E)(1) shall be made for the interpretation of the classification of excisable goods under the Central Excise Tariff Act, 1985 (5 of 1986). Section 32E(4) provides that an application, made under Section 32-E(1), shall not be allowed to be withdrawn by the applicant.

The ingredients of Section 32E(1), which relate to the application for settlement of cases, are: (a) an assessee is entitled, in respect of his case, to make an application to the Settlement Commission to have the case settled. The word "application", though not defined under the Act, means the action of bringing something into

material or effective contact with something else. It also includes the making of a request expressly of a formal nature. The word "applicant" means a person who applies or makes a request especially formally; (b) such an application can be made to the Settlement Commission only before adjudication; (c) the application must be submitted in such form and in such manner as may be prescribed by Rules; (d) the application should contain a full and true disclosure of the assessee's duty liability; (e) the full and true disclosure made by the assessee, in its application to the Settlement Commission regarding their duty liability, must not have been disclosed earlier before the Central Excise Officer having jurisdiction; (f) the applicant should disclose to the Settlement Commission the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by them, and such other particulars as may be prescribed including particulars of excisable goods in respect of which the assessee admits short levy on account of misclassification, under-valuation and inapplicability of exemption notification; and (g) any such application shall be disposed of by the Settlement Commission in the manner provided in Chapter-V.

In addition to the restriction placed by the first proviso, of making an application to the Settlement Commission only after receipt of a show-cause notice from the Central Excise Officer for recovery of duty, additional restrictions are placed thereby on the applicant invoking the jurisdiction of the Settlement Commission i.e., (1) the applicant should have filed returns showing the particulars stipulated under clause (a) of the proviso. Even a person, who has filed returns for a certain duration, would fall within the ambit of Clause (a) of the first proviso to Section 32E(1). (2) the additional duty, accepted as payable by the applicant, should be more than three lakh rupees. The jurisdiction of the Settlement Commission cannot be invoked where the amount admitted as payable by the assessee towards duty, in addition to what they had paid earlier, is less than Rs.3.00 lakhs; and (3) the applicant should have paid the additional amount of excise duty, admitted by them as due, along with interest thereon in terms of Section 11AA of the Act. The third proviso to Section 32-E bars an application being entertained by the Settlement Commission in cases which are pending before the Appellate Tribunal or any Court. The fourth proviso to Section 32E(1) discourages any attempt by an applicant to have a classification dispute settled by the Commission since there cannot, ordinarily, be any settlement with regards classification of goods which must be uniform for all manufacturers of identical goods.

Unlike the adjudicatory process, settlement proceedings take place only if the assessee voluntarily opts for resolution of the dispute through the settlement process under Chapter V of the Act. It is only after the assessee has received a show-cause notice from the Central Excise Officer regarding non-payment of duty, and before the duty liability has been adjudicated by the said Officer, can an application be made by the assessee to the Settlement Commission under Section 32-E(1) of the Act. One of the pre-conditions for availing the remedy of a settlement of the dispute is for the assessee to disclose their full and true duty liability and the manner in which it arose. Section 32E(1) emphasises the need for the assessee to fully and truly disclose their duty liability to the Settlement Commission which they had not earlier disclosed to the Central Excise Officer. The onus is on the assessee to satisfy the Settlement Commission with credible evidence/documents that the duty liability disclosed by them is full and true, irrespective of the amount demanded in the show cause issued to them by the Central Excise Officer. The Revenue is entitled to dispute the correctness of the claims of the applicant. In examining the applicant's claim of having fully disclosed the true nature of their duty liability, the Commission is entitled to take into consideration the allegations in the show-cause notice, and the submission of the Revenue in this regard.

IV. THE RIGHT TO INVOKE THE JURISDICTION OF THE SETTLEMENT COMMISSION IS GOVERNED BY THE LAW IN FORCE WHEN THE SETTLEMENT PROCEEDINGS COULD HAVE BEEN INSTITUTED:

The statutory right to make an application to the Settlement Commission, like a right of appeal, vests in an applicant at the time the original proceedings could have been instituted i.e., soon after a show cause notice for recovery of duty, issued by the Central Excise Officer, is received by them. Just as depriving a suitor in a pending action, of an appeal to a superior tribunal which belonged to him as of right, is a very different thing from regulating procedure, (**Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corpn.**^[28], **Colonial Sugar Refining Company v. Irving**^[29]), the right conferred on an applicant to make an application for settlement is a

substantive statutory right and is not a mere matter of procedure. Again like the right of appeal, which accrues to the litigant and exists as on and from the date the lis commences although it may be actually exercised when the adverse judgment is pronounced, the right to make an application for settlement is also a right governed by the law prevailing on the date when the settlement proceeding could have been instituted, and not by the law that prevails at the date of the decision of the Settlement Commission, (**Garikapati Veeraya v. N. Subbiah Choudhry**^[30]; **Nahar Industrial Enterprises Ltd.**²⁸; **Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd.**^[31]), or during pendency of settlement proceedings.

V. PROVISIONS WHICH TOUCH UPON AN EXISTING RIGHT WOULD NOT, ORDINARILY, HAVE RETROSPECTIVE OPERATION:

While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch upon a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. It is settled law that a right of appeal, being a substantive right, preserves all successive appeals available under the law then in force to the parties to the Suit throughout the rest of the career of the suit. Likewise the right to make an application to the Settlement Commission is preserved from the date on which the show cause notice is received by the applicant. There are two exceptions to the application of this rule, viz, (1) when, by competent enactment, such right of appeal (right to make an application for settlement) is taken away expressly or impliedly with retrospective effect; and (2) when the Court to which appeal lay at the commencement of the suit (or the Settlement Commission) stands abolished. (**Jose Da Costa v. Bascora Sadasiva Sinai Narcornium**^[32]; **Kasibai v. Mahadu**^[33]; **Colonial Sugar Refining Co. Ltd.**²⁹). Again like a right of appeal which is not affected, by the repeal of the enactment conferring such a right, after the lis has commenced, unless the repealing enactment either expressly or by necessary implication takes away such a remedy, (**Maria Cristina De Souza Sadder v. Amria Zurana Pereira Pinto**^[34]; **SAIL**²¹), the remedy of seeking settlement also accrues to an applicant when he receives the show cause notice and, save abolition of the Settlement Commission itself, would not be affected by a subsequent amendment. This substantive right is governed by the law prevailing at the time of commencement of the proceedings. (**Garikapatti Veeraya**³⁰; **Kasibai**³³). The submission of Sri Jalakam Satyaram, Learned Standing Counsel for Central Excise, that, as the Explanation to Section 32-(O)(1)(i) was inserted with effect from 06.08.2014 during pendency of settlement proceedings, the subsequent decision of the Settlement Commission on 14.11.2014 is governed by the said Explanation, therefore, necessitates rejection.

VI. STATUTORY PROVISIONS WHICH CONFER A RIGHT AND PROVIDE A REMEDY OF SETTLEMENT SHOULD BE GIVEN A LIBERAL CONSTRUCTION:

Chapter-V of the Act places emphasis on settlement of cases as, unlike adjudication which is lengthy and cumbersome, a settlement brings about a finality to the entire dispute. The provisions of Chapter-V are attracted only when an assessee desires to avail the option of a settlement. The scheme of Chapter-V of the Act is for the Settlement Commission to exercise complete jurisdiction over the case after it is admitted till it is finally settled. The proceedings before the Commission lead to an expeditious culmination of the entire proceedings, and the finality attached to the Commission's order avoids any further litigation thereafter. Statutes providing the right to make an application to the Settlement Commission, like a right of appeal, should be given a liberal construction in favour of the right, since they are remedial in nature. The right will not be restricted or denied unless such a construction is unavoidable. (**Super Cassettes Industries Ltd.**²⁰; **V.C. Shukla v. State**^[35]; **Crawford : The Construction of Statutes**). As the Explanation to Section 32-O(1)(i) was inserted with effect from 06.08.2014 long after the petitioner received the show cause notice dated 24.04.2012, which resulted in their making an application for settlement on 25.11.2013, the Explanation cannot be applied retrospectively to deny the petitioner the right to make an application to the Settlement Commission which accrued to them when they received the show cause notice dated 24.04.2012.

VII. AN EXPLANATION, ADDED TO A PROVISION, SHOULD BE CONSTRUED HARMONIOUSLY WITH OTHER PROVISIONS OF CHAPTER-V OF THE ACT, AND SHOULD NOT BE READ IN ISOLATION:

The question, whether or not the Explanation has retrospective application, can be examined from another angle also. It is settled law that the Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute. It must compare the clause with other parts of the Law, and the setting in which the clause to be interpreted occurs. (**State of West Bengal v. Union of India**^[36]). It is necessary, therefore, to note the provisions of the Act, including those in Chapter V thereof, to the extent relevant albeit in brief. Section 11A of the Act relates to recovery of duties not levied or not paid or short-levied or short-paid, and sub-section (1) thereof enables a Central Excise Officer, within one year from the relevant date, to serve a notice on the person chargeable with the duty, which has not been levied or paid or which has been short-levied or short-paid, requiring him to show cause why he should not pay the amount specified in the notice. Under Section 11-A(4) where any duty of excise has not been levied or paid or has been short-levied or short-paid, by the reason of (a) fraud, (b) collusion, (c) any wilful mis-statement, (d) suppression of facts, (e) contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show-cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11-AA, and a penalty equivalent to the duty specified in the notice. Section 11-A(5) stipulates that where, during the course of any audit, investigation or verification, it is found that any duty has not been levied or paid or has been short-levied or short-paid for the reasons mentioned in clauses (a) to (e) of sub-section (4), but the details relating to the transactions are available in the specified record, then, in such cases, the Central Excise Officer shall, within a period of five years from the relevant date, serve a notice on the person, chargeable with the duty, requiring him to show-cause why he should not pay the amount specified in the notice along with interest under Section 11AA and penalty equivalent to fifty per cent of such duty. Under Section 11-A(10) the Central Excise Officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation if any made by such person, determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice.

Section 31(a), in Chapter V of the Act, defines "assessee" to mean any person who is liable for payment of excise duty assessed under the Act or any other Act and includes any producer or manufacturer of excisable goods. Section 31 (c) defines "case" to mean proceedings under the Act or any other Act for the levy, assessment and collection of excise duty, or any proceeding by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before a Central Excise Officer or Central Government. Section 32(1) of the Act requires the Central Government, by notification in the Official Gazette, to constitute a Commission to be called the Customs and Central Excise Settlement Commission for the settlement of cases under Chapter-V of the Act. Section 32A relates to jurisdiction and powers of the Settlement Commission and under sub-section (1) thereof, subject to the other provisions of Chapter-V, the jurisdiction, powers and authority of the Settlement Commission may be exercised by benches thereof.

Section 32F prescribes the procedure on receipt of an application under Section 32E. Sub-section (1) thereof stipulates that, on receipt of an application under Section 32E(1), the Settlement Commission shall issue a notice calling upon the applicant to explain why the application made by him should be allowed to be proceeded with. After taking the explanation, so provided by the applicant, into consideration, the Settlement Commission is required either to pass an order allowing the application to be proceeded with, or to reject the application in which event the proceedings before the Settlement Commission abates. Section 32F(2) requires a copy of every such order to be sent to the applicant, and to the Commissioner of Central Excise having jurisdiction. Section 32F(3) requires the Settlement Commission to call for a report, along with the relevant records, from the Principal Commissioner of Central Excise or the jurisdictional Commissioner of Central Excise, and for these officers to furnish their reports. Section 32F(4) stipulates that, where such a report has been furnished to it, the Settlement Commission may, after examination of such report and if it is of the opinion that any further enquiry or investigation in the matter is necessary, direct the Commissioner (Investigation) to make such further enquiry or investigation, and furnish a report on matters covered by the application, and any other matter relating to the case. Section 32F(5) enables the Settlement Commission, after examination of the records, the report under sub-section (3), the reports under sub-section (4), and after giving an opportunity of being heard to the applicant and to the Principal Commissioner or the Commissioner of Central Excise having jurisdiction, and after examining such further

evidence as may be placed before it or obtained by it, to pass such orders as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the reports under Sub-Section (3) or Sub-Section (4) of Section 32F.

Wide powers are conferred on the Settlement Commission under Chapter V of the Act. Section 32G(1) confers power on the Settlement Commission, during the pendency of proceedings before it, to provisionally attach any property belonging to the applicant. Section 32H confers power on the Settlement Commission to reopen any proceeding connected with the case, but which has been completed under the Act before an application for settlement under Section 32E was made. Section 32-I (1) confers on the Settlement Commission all the powers which are vested in a Central Excise Officer under the Act or under the Rules made thereunder. During the pendency of proceedings before it, i.e., during the period after an application has been submitted to it and before an order is passed under Section 32-F(5), the Settlement Commission has exclusive jurisdiction, in terms of Section 32-I(2), to exercise the powers and perform the functions of a Central Excise Officer in relation to the case and, consequently, no other officer can exercise jurisdiction in the matter.

Section 32K(1) confers power on the Settlement Commission to grant the applicant immunity from prosecution for any offence under the Act. The power to grant immunity is, however, hedged by certain restrictions including that (1) the applicant should have co-operated with the Settlement Commission in the proceedings before it; and (2) the applicant must have made a full and true disclosure of his duty liability. The power to grant immunity can be exercised by the Settlement Commission subject to such conditions as it may think fit to impose. In addition to the power to grant immunity, Section 32K(1) confers power on the Settlement Commission to, either wholly or partially, grant immunity to the applicant from imposition of penalty, and fine under the Act, with respect to the case covered by the settlement. The proviso to Section 32-K(1) restricts the power of the Settlement Commission to grant immunity and stipulates that no such immunity shall be granted in cases where the proceedings, for the prosecution for any such offence, have been instituted before the date of receipt of the application under Section 32E of the Act.

The Explanation to Section 32K(1), as inserted by Act 22 of 2007 with effect from 01.06.2007, reads thus:

"For the removal of doubts, it is hereby declared that applications filed before the Settlement Commissioner on or before 31.05.2007 shall be disposed of as if the amendment in this section had not come into force".

Section 32K(2) stipulates that the immunity granted to a person under Section 32-K(1) shall stand withdrawn if such person fails to pay the sum specified in the order, or fails to comply with any other condition subject to which immunity has been granted, and thereupon the provisions of the Central Excise Act shall apply as if such immunity has not been granted. Section 32K(3) confers power on the Settlement Commissioner to withdraw the immunity granted under Section 32K(1) if it is satisfied that such person had, in the course of the settlement proceedings, concealed any particulars material to the settlement, or had given false evidence; and, thereupon, such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement. He shall also become liable for imposition of any penalty under the Act to which such person would have been liable had no such immunity been granted.

Section 32L(1) confers power on the Settlement Commission, if it is of the opinion that any person who made an application for settlement under Section 32E has not co-operated in the proceedings before it, to send the case back to the Central Excise Officer having jurisdiction. The Central Excise Officer is empowered to dispose of the case in accordance with the provisions of the Act as if no application under Section 32E had been made. Section 32M stipulates that the order of settlement shall be conclusive as to the matters stated therein, and no matter covered by such order shall, save as otherwise provided in Chapter-V, be reopened in any proceeding under the Act or under any other law for the time being in force. Section 32N stipulates that any sum, specified in the order of settlement passed under Section 32F(5), may be recovered and any penalty, for default in making payment of such sum, may be recovered as sums due to the Central Government. Section 32P stipulates that any proceedings, under Chapter V before the Settlement Commission, shall be deemed to be a judicial proceeding within the meaning of Section 193 and 228, for the purpose of Section 196 of the Indian Penal Code.

VIII. DECLARATORY OR CURATIVE PROVISIONS HAVE RETROSPECTIVE APPLICATION:

On a reading of the aforesaid provisions, it is clear that even before the Explanation was inserted to Section 32-O(1)(i) of the Act, with effect from 06.08.2014, an Explanation was inserted to Section 32K(1) of the Act by Act 22 of 2007 with effect from 01.06.2007. Unlike the Explanation to Section 32O(1)(i), the Explanation to Section 32K(1) uses the words “**for removal of doubts, it is hereby declared**”. A declaratory or curative provision should, ordinarily, be treated as retrospective. (**M/s. Satnam Overseas (Export)**¹⁸, **Shri Chaman Singh v. Srimathi Jaikaur**^[37]). A declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. (**Craies on Statute Law**; **M/s. Satnam Overseas (Export)**¹⁸). The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such a declaratory Act contains a preamble, and also the word “**declared**”. (**Central Bank of India v. Their Workmen**^[38]; **Craies on Statute Law, Fifth Edition, pp. 56-57**). The words “**for the removal of doubts it is hereby declared**” make it amply clear that Section 32-K(1) is curative and declaratory in nature, and has retrospective application.

IX. TWO DIFFERENT EXPRESSIONS IN A STATUTE MUST BE CONSTRUED TO CARRY DIFFERENT MEANINGS:

As Parliament has used two different expressions in the Explanation to two distinct provisions, this Court cannot presume the effect of both the Explanations to be the same. If both the Explanations were meant to have the same effect, and to have retrospective application, it was unnecessary for Parliament to use two different expressions in the Explanations to Section 32-K(1) and Section 32-O(1)(i) of the Act, as use of the same words would have sufficed. When two different expressions are used by the same statute, one has to construe these different expressions as carrying different meanings. (**Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corpn. of U.P. Ltd.**,^[39]). Different use of expressions in two provisions of a statute is for a purpose for, otherwise, the same expression would have been used. (**B.R. Enterprises v. State of U.P.**,^[40]). It would be difficult to maintain that, when two expressions of different import are used in a statute in two consecutive provisions, they are used in the same sense, and the conclusion must follow that the two expressions have different connotations. (**Member, Board of Revenue v. Arthur Paul Benthall**^[41]). When the legislature has taken care of using different phrases in different Sections, normally different meaning is required to be assigned to the language used by the legislature, and there is a presumption that they are not used in the same sense. (**Arthur Paul Benthall**⁴¹; **Oriental Insurance Co. Ltd. v. Hansrajbhai V Kodala**^[42]). If the legislative intent was not to distinguish, and it was intended that both the Explanation to Section 32-K(1) and Section 32-O(1)(i) should have retrospective operation, there would have been no necessity of expressing the position differently and, while using the words “**for the removal of doubts it is hereby declared**” in the Explanation to Section 32-K(1), to refrain from using a similar expression in Section 32-O(1)(i) of the Act. When the situation has been differently expressed the legislature must be taken to have intended to express a different intention. (**CIT v. East West Imports and Exports (P) Ltd.**,^[43]).

X. REMEDIAL ACTS, ORDINARILY, OPERATE PROSPECTIVELY:

As the newly inserted Explanation to Section 32-O(1)(i) does not indicate that it was enacted to remove any doubt or declare what the law has always been, it must be construed to be an ordinary remedial piece of legislation which would come into effect from the date of its enactment, and not a declaratory Act. (**Central Bank of India**³⁸). A remedial Act is not necessarily retrospective. While it may either be enlarging or restraining, it takes effect prospectively, unless it is given retrospective effect by the express terms of the statute or by necessary intendment. (**Central Bank of India**³⁸; **Craies on Statute Law, Fifth Edition, pp. 56-57**). It is difficult for us, therefore, to hold that the Explanation to Section 32-O(1)(i) of the Act has retrospective effect even prior to 06.08.2014 when it was introduced into the Act. Consequently Section 32-O(1)(i) of the Act, (prior to 06.08.2014 when an Explanation was inserted thereto), did not, when it spoke of concealment of particulars of duty liability, mean only concealment of particulars of duty liability before the Central Excise Officer.

XI. COURTS CANNOT MAKE UP DEFICIENCIES IN THE ACT AS A RESULT OF DEFECTIVE PHRASING:

As it is clear that the Explanation to Section 32-O(1)(i) does not have retrospective effect, Section 32-O(1)(i), as it stood prior to 06.08.2014, could mean imposition of penalty on the applicant on the ground of concealment of particulars of duty liability only before the Settlement Commission or concealment of duty liability either before the Settlement Commissioner or before the Central Excise Officer. The effect of Section 32-O(1)(i) is that, once penalty is imposed on the applicant on the ground of concealment of particulars of duty liability, then every subsequent application for settlement is barred, and the applicant is not entitled to avail the statutory remedy of a settlement, by moving an application before the Settlement Commission thereafter. As noted hereinabove, Section 32E(1) of the Act enables an application to be made to the Settlement Commission only in cases where the assessee has not disclosed its duty liability to the Central Excise Officer. The said provision however requires the applicant, which has failed to disclose its duty liability to the Central Excise Officer, to make a full and true disclosure of the duty liability to the Settlement Commission. The interpretation to be placed on Section 32-(O)(1)(i), as urged on behalf of the assessee, is that it is only if the assessee had concealed their duty liability to the Settlement Commission, and have suffered a penalty for such non-disclosure, is a subsequent application for settlement barred. On the other hand the construction placed on Section 32-(O)(1)(i) by the revenue would bar an applicant from availing the statutory remedy of a settlement, before the Settlement Commission, in terms of Chapter V of the Central Excise Act if the Settlement Commission had earlier imposed penalty for concealment of duty liability only before the Central Excise Officer, and not before itself.

The ambiguity in the language used in Section 32-O(1)(i) has resulted in two opposite construction being placed thereon, one on behalf of the assessee, and the other on behalf of the revenue. It is not for the Court, when legislative clarity is required, to untangle the legislative confusion. The legislature could have avoided the controversy, if it had wished to make the provision explicit, by the simple expedient of so providing. The legislature in its wisdom did not choose to do so. (**M.P. Cement Manufacturers' Assn. v. State of M.P.**,^[44]). Courts cannot aid the legislatures' defective phrasing of an Act. It cannot add or mend, and by construction make up deficiencies which are left there. (**SAIL**²¹; **State of Gujarat v. Dilipbhai Nathjibhai Patel**^[45]; **Crawford v. Spooner**^[46]). Rules of interpretation do not permit Courts to read words into an Act unless the provision as it stands is meaningless. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (**SAIL**²¹; **Vickers Sons and Maxim Ltd. v. Evans**^[47]; **Jumma Masjid v. Kodimaniandra Deviah**^[48]).

XII. SECTION 32-O(1)(I) BARS A SECOND APPLICATION FOR SETTLEMENT ONLY IF PENALTY WAS IMPOSED, IN AN EARLIER APPLICATION FILED BY THE ASSESSEE, FOR CONCEALMENT OF DUTY LIABILITY BEFORE THE COMMISSION ITSELF:

While Section 32-K(1) restricts the power of the Settlement Commission to grant immunity only if the assessee has co-operated with the Settlement Commission and has made a full and true disclosure of their duty liability, Section 32-K(3) confers power on the Settlement Commission to withdraw immunity to an assessee who had concealed material particulars before it. Section 32(L)(i) confers power on the Settlement Commission to send the case back to the Central Excise Officer if the applicant has not co-operated in the proceedings before it. Other than Section 32-O(1)(i), there is no other provision in Chapter V of the Act which confers power on the Settlement Commission to reject a subsequent application for settlement when penalty has been imposed on the applicant in an earlier application for concealment of particulars of duty liability before it.

While Section 32-(O)(1)(i) of the Act is not free from ambiguity, it must be borne in mind that the task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. Language is, at best, an imperfect instrument for the expression of human intention. One should not make a fortress out of the dictionary but remember that statutes always have some purpose or object to accomplish, and imaginative discovery is the surest guide to their meaning. (**Commissioner of Income Tax, Bangalore v. J.H.Gotla Yadgari**^[49]). A reasonable construction of Section 32-(O)(1)(i), prior to the Explanation being added

thereto with effect from 06.08.2014, would be that the Settlement Commission is barred from entertaining a subsequent application where a penalty has been imposed in an earlier application filed by the assessee for concealment of duty liability from the Settlement Commission itself. Accepting the construction placed on Section 32-O(1)(i) by the revenue would mean that, while the Settlement Commission can refuse to grant or withdraw immunity, and send a case back to the Central Excise Officer, it cannot bar a second application when penalty, for concealment of duty liability before it, has been imposed in the earlier application. Such a construction is difficult to accept. We find force in the alternative construction placed thereon by Sri S. Ravi, Learned Senior Counsel, that, prior to insertion of the Explanation with effect from 06.08.2014, the concealment referred to in Section 32-O(1)(i) of the Act related only to concealment of particulars of duty liability before the Settlement Commission, and not for concealment of such particulars before the Central Excise Officer, as that would accord with the other powers conferred on the Settlement Commission under Sections 32-(K) and (L) of the Act. In this context it is useful to note that in **Ankit Metal and Power Ltd. v. Settlement Commission**^[50], the Calcutta High Court held that the application under Section 32E should be in a prescribed form with full and true disclosure of the applicant's duty liability which has not been disclosed before the Central Excise Officer having jurisdiction; if there is any concealment in the application, and a penalty has been imposed by the Settlement Commission on the ground of such concealment, then a second application before the Settlement Commission is barred under Section 32-O(i) of the said Act; if penalty has not been imposed on the applicant, in an application for settlement under Section 32E, on the ground of concealment of particulars of their duty liability in that application, then the Commission should proceed to consider the applicant's case on merits.

XIII. EXPLANATION TO SECTION 32-O(1)(I) CANNOT BE CONSTRUED AS MERE SURPLUSSAGE:

If, as is now contended before us by Sri Jalakam Satyaram, Learned Standing Counsel for Central Excise, that the intention of the legislature was to bar the jurisdiction of the Settlement Commission being invoked again on a penalty being imposed earlier by the Commission for concealment of duty liability before the Central Excise Officer, insertion of the Explanation to Section 32-O(1)(i) was unnecessary, and must be held to be a mere surplussage for, even without the Explanation, Section 32-O(1)(i) should be held to have conveyed the same meaning. Courts have adhered to the principle that effort should be made to give meaning to each and every word used by the legislature, and it is not a sound principle of construction to brush aside words in a statute as being inapposite surplussage if they can have a proper application in circumstances conceivable within the contemplation of the statute. (**Gurudevdatte VKSSS Maryadit v. State of Maharashtra**^[51]; **Manohar Lal v. Vinesh Anand**^[52]; **Aswini Kumar Ghose v. Arabhinda Bose**^[53]). A construction that reduces one of the provisions to a "dead letter" must be avoided. (**Anwar Hasan Khan v. Mohd. Shafi**^[54]).

XIV. THE BENEFIT OF AMBIGUITY, IN THE LANGUAGE USED IN A TAX STATUTE, SHOULD GO TO THE ASSESSEE:

The very fact that an Explanation was added to Section 32-O(1)(i) of the Act with effect from 06.08.2014 goes to show that, prior thereto, the said provision was presumed, even by the legislature, to suffer from ambiguity necessitating legislative intervention and an Explanation being added thereto. Further even if it is presumed that Section 32-O(1)(i) is capable of more than one construction and the construction placed thereon, that concealment of particulars of duty liability relates to concealment either before the Settlement Commission or the Central Excise Officer, were to be held also to be a possible interpretation, it is well settled law that, in case of ambiguity in a fiscal/penal statute and where the provision is capable of being construed in more than one manner, the construction which favours the assessee should be preferred. In interpreting a fiscal statute, the court cannot proceed to make good deficiencies if there be any: the court must interpret the statute as it stands and in case of doubt in a manner favourable to the taxpayer. (**C.A. Abraham v. ITO**^[55]; **J.K. Steel Ltd. v. Union of India**^[56]). A taxing statute must be construed strictly, and if two meanings are equally possible, the meaning in favour of the subject must be given effect to. (**Board of Revenue v. Rai Saheb Sidhnath Mehrotra**^[57]). In construing the words of a tax statute if there are two possible interpretations then effect is to be given to the one that favours the citizen and not the one that imposes a burden on him. (**Central India Spg., Wvg. & Mfg. Co. Ltd. v. Municipal**

Committee^[58]). If there is any ambiguity of language, the benefit of that ambiguity must be given to the assessee. (**CIT v. Karamchand Premchand Ltd.**^[59]; **J.K. Steel Ltd.**⁵⁶). If a provision of a tax statute is ambiguous and is reasonably capable of more than one interpretation, that interpretation which is beneficial to the subject must be adopted. (**Collector, E.D. v. R. Kanakasabai**^[60]). In case of doubt or dispute, a construction should be made in favour of the taxpayer and against the Revenue. (**Manish Maheshwari v. CIT**^[61]; **J. Srinivasa Rao v. Govt. of A.P.**^[62]). If a provision of a taxing statute can be reasonably interpreted in two ways, that interpretation which is favourable to the assessee, should be accepted, (**I.T. Commissioner, W.B. v. N.H. Tea Co.**^[63]), and against the Revenue. (**Sneh Enterprises v. Commr. of Customs**^[64]; **Manish Maheshwari**⁶¹).

In this context it is necessary to note that Section 194-C of the Income Tax Act was amended by the Finance Act, 1995 with effect from 1/07/1995. Explanation III, which was inserted thereto, stipulated that, for the purposes of the said Section, the expression "work" shall also include (c) carriage of goods and passengers by any mode of transport other than by railways. In **Birla Cement Works v. Central Board of Direct Taxes**^[65], the Supreme Court held that, from 01.07.1995, Section 194-C of the Income Tax Act was applicable to transport contracts as well; the question, however, was whether the explanation was only clarificatory or it made applicable the provisions of Section 194-C to the types of contracts in question for the first time from the date of insertion of the explanation, i.e., 01.07.1995; two interpretations were reasonably possible on the question whether or not the contract for carrying of goods would come within the ambit of the expression "carrying out any work;" one of the two possible interpretations of a taxing statute which favours the assessee, and which has been acted upon and accepted by the Revenue for a long period, should not be disturbed except for compelling reasons; there were no compelling reasons to hold that Explanation III, inserted in Section 194-C with effect from 01.07.1995, was clarificatory or retrospective in operation; and Section 194-C, before insertion of Explanation III, was not applicable to transport contracts, i.e., contracts for carriage of goods.

XV. IS THE DELAY OF ONE YEAR, IN FILING W.P.NO.38658 OF 2015, FATAL?

W.P. No.38658 of 2015, wherein the validity of the order of the Settlement Commission dated 14.11.2014 is put in issue, was filed before this Court on 26.11.2015, a little over one year from the date on which the impugned order was passed. The rule which says that the Court may not enquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are, and how the delay arose. The principle on which relief to the party, on the grounds of laches or delay, is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created, and lapse of time is not attributable to any negligence on their part. The test is not as to the physical running of time. Where the circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. (**Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur**^[66]). Ordinarily, refusal to entertain a Writ Petition would be justified only where the delay and laches, in invoking the jurisdiction of the Court, is so inordinate as to necessitate an inference that the petitioner has abandoned their claim to the relief sought for. (**U.P. Pollution Control Board v. Kanoria Industrial Ltd.**^[67]).

It is not even the case of the Revenue that third party rights have intervened in the interregnum. As the petitioner has invoked the jurisdiction of this Court, just a little more than a year after the impugned order was passed, we are satisfied that the delay is not so inordinate as to necessitate dismissal of the Writ Petition or to deny the petitioner the relief sought for. This contention, urged on behalf of the Revenue, must also fail.

XVI. CONCLUSION:

Viewed from any angle, the Settlement Commission has erred in rejecting the petitioner's application for settlement dated 25.11.2013, by its order dated 14.11.2014, on the ground that the said application was barred by

Section 32-(O)(1)(i) of the Act. As noted hereinabove the Explanation to Section 32-O(1)(i) does not have retrospective effect and, consequently, the petitioner’s application dated 25.11.2013 would be barred under Section 32-(O)(1)(i) of the Act only if either of the two earlier settlement applications, submitted by the assessee, had suffered imposition of penalty for concealment of duty liability before the Settlement Commission itself. We see no reason, however, to undertake a minute scrutiny of the earlier orders passed by the Settlement Commission, on 30.10.2013 and 06.11.2013, to determine whether penalty was imposed on the petitioner for concealment of duty liability before the Settlement Commission itself. The order dated 14.11.2014, impugned in W.P. No.38658 of 2015, is set aside and the matter is remanded to the Settlement Commission for its consideration afresh in the light of the law declared and the observations made in this judgement. Needless to state that, before passing an order afresh on their application dated 25.11.2013, the Settlement Commission shall give the petitioner an opportunity of being heard.

Sri S. Ravi, Learned Senior Counsel, would submit that, if this Court were to agree with his submissions in W.P. No.38658 of 2015, the petitioner would then not wish to press the other two writ petitions; alternatively this Court may take into consideration that, as penalties were imposed by the Settlement Commission under the first two orders without assigning reasons for denial of part immunity, those two orders must be set aside in so far as imposition of penalty is concerned; and, consequently, the third order, rejecting the application dated 25-11-2013, must also be set aside.

As the impugned order of the Settlement Commission dated 14.11.2014 has been set aside, W.P. Nos.38728 and 38751 of 2015 are dismissed as not pressed, and W.P. No.38658 of 2015 is disposed of accordingly. However, in the circumstances, without costs. The miscellaneous petitions pending, if any, in the aforesaid Writ Petitions are also dismissed.

RAMESH RANGANATHAN, J.

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SURESH KUMAR KAIT, J.

Date:02-06-2016.
Note: L.R. copy to be marked.
B/o
MRKR/CS

[1] (1985) 1 SCC 591
[2] [1961] 1 SCR 902
[3] (1990) 2 SCC 231
[4] (2003) 7 SCC 66
[5] (2004) 2 SCC 249
[6] AIR 1934 PC 188
[7] (1989) 4 SCC 378
[8] AIR 1967 SC 389
[9] AIR 1953 SC 252
[10] AIR 1966 SC 1577
[11] AIR 1977 SC 915
[12] (1973) 1 SCC 216
[13] AIR 1977 SC 915
[14] AIR 1997 SC 3467
[15] AIR 1955 SC 661
[16] AIR 1958 SC 468
[17] AIR 1963 SC 1667 = (1964 (1) SCR 897
[18] AIR 2003 SC 66
[19] AIR 1966 SC 764 = (1966 (1) SCR 890
[20] (2009) 10 SCC 531
[21] (2010) 10 SCC 744
[22] (1999) 3 SCC 722
[23] AIR 2008 SC 1749
[24] (2008) 4 SCC 720
[25] 1999(4) SCC 468

[26] (1988) 4 SCC 402

[27] (1975) 2 SCC 175

[28] (2009) 8 SCC 646

[29] (1905) AC 369 (PC)

[30] AIR 1957 SC 540 = 1957 SCR 488

[31] (2007) 6 SCC 528

[32] AIR 1975 SC 1843

[33] AIR 1965 SC 703

[34] (1979) 1 SCC 92

[35] AIR 1980 SC 962 = 1980 Supp SCC 92

[36] AIR 1963 SC 1241

[37] (1969) 2 SCC 429

[38] AIR 1960 SC 12

[39] (2003) 4 SCC 305

[40] (1999) 9 SCC 700 = AIR 1999 SC 1867

[41] AIR 1956 SC 35 = (1955) 2 SCR 842

[42] (2001) 5 SCC 175 = AIR 2001 SC 1832

[43] (1989) 1 SCC 760

[44] (2004) 2 SCC 249

[45] (1998) 3 SCC 234

[46] (1846) 4 MIA 179 = 6 Moo PC 1 (PC)

[47] (1910) AC 444 (HL)

[48] AIR 1962 SC 847

[49] (1985) 4 SCC 343 = (1985) 156 ITR 323

[50] 2015 (325) E.L.T. 575 (Cal)

[51] 2001 (4) SCC 534

[52] (2001) 5 SCC 407

[53] 1953 SCR 1 = AIR 1952 SC 369

[54] (2001) 8 SCC 540

[55] AIR 1961 SC 609 = (1961) 2 SCR 765

[56] AIR 1970 SC 1173 = (1969) 2 SCR 481

[57] AIR 1965 SC 1092 = (1965) 2 SCR 269

[58] AIR 1958 SC 341 = 1958 SCR 1102

[59] AIR 1960 SC 1175= (1960) 3 SCR 727

[60] AIR 1973 SC 1214

[61] (2007) 3 SCC 794

[62] (2006) 12 SCC 607

[63] AIR 1973 SC 2524

[64] (2006) 7 SCC 714

[65] AIR 2001 SC 1080

[66] (1992) 2 SCC 598

[67] (2001) 2 SCC 549