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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 10804/2016, C.M. APPL.42297/2016

SANJAY DIESELS ..... Petitioner

Through : Sh. A.K. Prasad and Ms. Priyanka Goel, Advocates.

versus

THE COMMISSIONER OF CENTRAL EXCISE & ANR. ..... Respondents

Through : Sh. Sanjeev Narula, Sr. Standing Counsel and Sh. Abhishek Ghai, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

O R D E R

% 15.11.2016

1. The petitioner was issued with two Show Cause Notices (SCNs) on 30.07.2013 and 09.10.2013 by the Commissionerate of Customs and Central Excise pursuant to search of its premises (including the head office) on 24.10.2009 and 26.10.2009. The SCNs were preceded by investigations. The Revenue alleged that the assessee/petitioner had clandestinely cleared/removed a substantial quantity of manufactured DG sets from Delhi without payment of Central Excise and further claimed that they were manufactured in its Kathua unit in J&K. It later sought and obtained duty refund in respect of the Kathua unit which was located in the area based exemption scheme, as a part of the benefit admissible to it. The investigations revealed that the manufacturer had cleared 1965 DG sets clandestinely without registration and payment of duty. The total

value of the DG sets was ₹35,90,03,574/- The SCNs alleged violation of Section 11A together with proviso to sub-section 1 of the Customs Act, 1944 (hereafter “the 1944 Act”) and also claimed interest payable under Section 11AB together with penalty under Section 11AC of the 1944 Act. The SCNs were issued for penal action under Rule 25 of the Central Excise Rules, 2002 against ten other entities.

2. The petitioner/assessee, upon receipt of SCNs approached the Settlement Commission with an application on 16.03.2015, under Section 32E of the 1944 Act. The settlement application was allowed to be proceeded with on 30.03.2015 provisionally and a report was sought from the Commissioner of Customs and Central Excise, Delhi and J&K. The reports were filed on 22.07.2015 and 05.08.2015. Thereafter the matter was proceeded with on those separate dates. By the impugned order, after considering the submissions of the materials before it, the Settlement Commission declined relief. The appellant, therefore, approached this Court under Article 226 of the Constitution of India.

3. The appellant urges firstly that the impugned order is erroneous inasmuch as it violates principles of natural justice. Learned counsel highlighted that the last clarificatory report, with respect to discrepancies in the two DG sets was never made available to the petitioner and this serious infirmity vitiates the impugned order. It was urged secondly and more substantially that the tabular chart supplied by the assessee/petitioner clearly revealed that there was no real dispute or difference that required adjudication by the revenue which fell outside the scope of Settlement Commission’s jurisdiction.

Highlighting on the submission of this part, learned counsel stated that 1965 DG sets were manufactured in Delhi. The petitioner conceded to having removed and claimed 1554 DG sets from Kathua whereas in reality they were never manufactured or cleared from Kathua and were actually manufactured in Delhi, Having admitted that the only difference was in the payment of duty of 411 DG sets, it was stated that the annexures to the two SCNs covered about 195 DG sets and from these, in fact 189 DG sets were actually manufactured in the Kathua which meant that the balance that had to be reconciled or explained were only 27 DG sets. It was submitted that the assessee/petitioner's offer was to repay the amounts received as refund and also bear the penalty leviable in the circumstances as it were. In these circumstances, there was no real dispute requiring adjudication.

4. Learned counsel submitted that having regard to the context of Section 32L, the Settlement Commission could reject an application if and only if the parties concerned did not cooperate in its proceedings. In support of this, learned counsel relied upon *H.H. Interiors and Auto Components v. CIT* 2016 337 ELT 175. Learned Standing Counsel for the respondent urges that the Settlement Commission acted within its powers in refusing to grant any relief. It was highlighted that the petitioner was *prima facie* guilty of several violations and that its attempt to show reconciliation of accounts was really an effort to wriggle out of its liabilities. It was highlighted that non-payment of duty for manufactured goods, i.e. 1965 DG sets was a serious violation which itself warranted adjudication and appropriate

penalty. Learned counsel submitted that the attempt of the petitioner was to further compound that violation by passing-off as if these goods were manufactured in Kathua for which duty was not paid whereas the fact was that these had in fact been manufactured in Delhi, and claimed refund. In these circumstances, the attempt to say that the parties were in fact agreed on facts, was not acceptable to the Revenue. Learned counsel submitted that the petitioner's argument is flawed because in its claim before the Kathua Commissionerate it had even sought adjustment for input credit through Cenvat although the goods were never manufactured or even received at that place. The impugned order of the Settlement Commission *inter alia* records as follows:

> *"30. The contention of applicant for adjustment of wrong Cenvat Credit of Rs.1,83,37,218/- availed in their kathua unit with the duty liability at Delhi is not admissible as both the units are two separate assesses and they are required to discharge their respective liability under respective jurisdiction. The bench observes that the Delhi unit was not registered and for availing Cenvat credit the applicant has not fulfilled conditions laid down in Rule 4 of the Cenvat Credit Rules nor maintained documents and accounts as required under Rule 9; neither filed annual declaration relating to principal inputs to the Superintendent Central Excise. It is a fact that the inputs were used in the manufacture of DG sets at Delhi unit, but at this juncture no co-relation of the same can be made whether the same inputs were used in or in relation to manufacture of 1965 DG sets.*
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> *31. The contention of the applicant that similar adjustment was allowed by Settlement Commission in final order F-1570/CE/14-SC(PB) dated 5.2.14, the bench observes that the facts of the case in the above said*

order were different from the present case in asmuch as (i) in the final order dated 5.2.14, both units i.e. one in Ludhiana and other in exempted area Udhampur were registered with Central Excise unlike the present case where the Delhi unit is not registered till date and (ii) both the revenue and the applicant had admitted that demand in both the SCNs were of same goods whereas in the present case, the goods are different i.e. 1554 at Jammu unit and 1965 at Delhi unit so no co-relation can be made that the goods were similar at this stage. Even considering the duplication in demand, there still exists a difference of 411 DG sets which cannot be explained at this stage. Even assuming in the additional submission of the applicant, the difference is of 27 DG sets, the fact still remains of a difference which conclusively proves that the demand in respect of Jammu SCN and Delhi-I SCN were of different goods. Therefore, the contention of the applicant that similar adjustment were made in Settlement Commission earlier order dated 5.2.2014 is not applicable in the present case in as much as the goods are still different & no adjustment can be made. The bench further observes that even the applicant does not full fill eligibility criteria for filing Settlement application.

32. The Bench observed that the applicant has not accepted about 82% of their duty liability and has contested the evidence collected by the Revenue. The revenue in its final report in respect of SCN issued by Delhi-I Commissionerate has clearly stated that in respect of 194 DG Sets, although the engine nos. are identical, it is not ascertainable at this stage whether there was any duplication of DG sets during calculation of duty. The difference of 411 no. of DG sets is not clearly explainable at this point. The revenue has further contended that Shri Kayum had done cladding of 903 DG Sets and received payment from the applicant (para 16 of SCN dated 30.7.13). However, there is difference in *value of the DG Sets mentioned at Sr. No.125 (Rs.2,02,700) and 127 (Rs.1,98,630) even though the engine no. is same. Similar situation exists for DG Sets mentioned at Sr. No.198 and 268 where value has been shown as Rs.1,98,630 and Rs.2,02,700. It proves that applicants claim of duplication of DG Sets is factually incorrect and liable to be rejected. In the additional submissions submitted by the applicant vide letter dated 29.1.16 and 1.2.16, the manner of explaining the difference of 411 and admitting that difference of only 27 DG sets exists is factually incorrect and denied by the revenue. The Bench observes that the applicant have rejected the evidences given by the Revenue in respect of their duty demand without convincing explanation. From these facts, it can be inferred that there is no true and correct disclosure by the applicant.*

33. Further, the Bench observes that in this case the stand of the applicant and the department are at huge variance. For an issue to be settled by the Commission there has to be convergence and agreement on fundamental facts which is lacking in this case.

34. The Bench, observes that Settlement Commission is a forum where the applicant/applicants should come in the spirit of surrender disclosing the full facts and not in a spirit of contention. In the present case, as seen from the rival submissions narrated in the preceding paragraphs, the applicant has approached the Commission treating it as an adjudication forum and not in good faith of settling their case which is a prime requirement in a proceeding before the Commission. It is to be borne in mind that the Settlement Commission is not an adjudicating authority. It is an arbitration forum where a dispute is settled in the interest of both the parties within the framework of law. This principle has clearly been enunciated by the Hon'ble High Court of Bombay in the case of Amrut Ornaments reported in

> *2014 (305) ELT 365 (Bom), by the Hon'ble Delhi High Court in the case of Union of India v. Dharampal Satyapal as reported in 2013 (298) ELT 653(Del) by the Hon'ble Allahabad High Court in the case of Vinay Wire Products P. Ltd. v. Dir. General of Central Excise Intelligence reported at 2014 (307) ELT 438 (All) and also by the Hon'ble Madras High Court in the case of Australian Foods Ltd. v. Commissioner of Central Excise, Chennai H reported in 2012 (254) ELT 392 (Mad)."*

5. The petitioner's argument that the denial of the clarificatory report was a serious violation of principles of natural justice that vitiates the entire order of the Settlement Commission, in the opinion of the Court, is without merit. The real dispute as it were did not turn on whether there was a discrepancy with respect to 2 or 27 DG sets. It concerned the petitioner's acts of omission and whether it admitted its liability. As the Settlement Commission noticed, it denied 82% of its liability whilst applying under Section 32E and approaching the Settlement Commission in the first instance. This meant that the tabular reconciliation it admitted before the Settlement Commission was really in furtherance of its effort to have the entire matter resolved through some sort of "sanitation exercise" as it were. It is undeniable that the petitioner did not pay duty in Delhi where the goods were actually manufactured. It is not as if duty was not paid only in respect of Kathua unit for which benefits and credits were sought from Kathua. In fact, there were 411 DG sets working out to over 20% of the quantity produced. What is more, to compound the non-payment of duty, the petitioner committed a further violation in

claiming that the goods were cleared from Kathua when they were not, and proceeded to draw the revenues and then also sought CENVAT credit. When it approached the Settlement Commission, it never admitted the liability of ₹ 4.81 crores towards duty demand. It is an attempt to supplement the concession as it were during the course of the proceedings - an indication that it somehow sought to tide-over and close the dispute even though there is no common moot point or the possibility of a moot point with the revenue. It was so observed by the Commission – citing previous reported judgment that the exercise before the Settlement Commission in such cases does not involve adjudication but rather ironing out itself where a particular agreement exists. In the present case, all elements to bring agreement between the parties, i.e. the petitioner and revenue are lacking. As far the judgment of this Court in *H.H. Interiors (supra)* is concerned, this Court notes that the use of the expression "cooperation" cannot be read in isolation and is contextual. Undoubtedly, the petitioner did not cooperate in the facts and the circumstances of the case. Furthermore, the term – "cooperation" is a phrase that has many hues which always take colour from the facts of the case. From the foregoing reasons, this Court finds no merit in the writ petition. It is accordingly dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

NOVEMBER 15, 2016
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