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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7907 OF 2017

Country Club Hospitability & Holidays Ltd. ...Petitioner
vs.
Union of India & others ...Respondents

Mr.Prakash Shah i/b PDS Legal for the Petitioner
Mr.Pradeep S. Jetly a/w Mr.J.B.Mishra for the respondents

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : NOVEMBER 15, 2017

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 The order impugned in this petition under Articles 226 and 227 of the Constitution of India is an order made on 13 different applications made by 13 different Branches of the petitioner-company by invoking section 32-E of the Central Excise Act,1944 (for short "Central Excise Act"). We must note here that by virtue of provisions of section 83 of the Finance Act,1994, certain provisions specified therein of the Central Excise Act,1944 (for short "Central Excise Act") have been made applicable in relation to service tax. That is how by making 13 separate applications through its 13 different Branches, the petitioner invoked section 32-E of the Central Excise Act on which an order has been made by the Settlement Commissioner rejecting the applications by passing an order under sub-section 5 of section 32-F. The applications have been

rejected on the ground that they are hit by section 32-O of the Central Excise Act. The Settlement Commission relied upon the order dated 31st October 2014 by which penalty of Rs.1,50,000/- was imposed on the petitioner. On that ground, a disqualification under section 32-O of the Central Excise Act was invoked and it was held that the applications were not maintainable.

2 The learned counsel for the petitioner has taken us through the impugned order. He submitted that the Settlement Commissioner could not have relied upon the order dated 31st October 2014 as the said order was passed on the application made by a branch of the petitioner at Coimbatore which was having a separate registration for service tax. He also pointed out that 13 branches of the petitioner which made the applications on which impugned order has been passed have different and separate registrations for service tax. He submitted that the said branches are separate assessees and in the present case, penalty was admittedly not imposed on any of the 13 branches which were having separate registrations which applied under section 32-E. He invited our attention to the circular dated 8th August 2013 issued by the Central Board of Excise and Customs, New Delhi. He submitted that the clarification issued by the said circular applies to the service tax liability and the clarification is not confined to the Service Tax Voluntary Compliance Encouragement Scheme, 2013 (for short `the said Scheme'). He submitted that the clarification is

that two separate branches are two distinct assessees for the purpose of service tax levy. Therefore, every branch or unit which is having a separate registration and which is issued show cause notice is entitled to take benefit of section 32-E. The submission is that the penalty of Rs.1,50,000/- is imposed on a different assessee which was a different branch of the petitioner-company. The second submission is that on plain reading of the bar created by section 32-O, it is applicable when there is an imposition of penalty on the ground of concealment of particulars of due liability. He invited our attention to the order dated 31st October 2014 as regards Coimbatore Branch of imposing penalty. He urged that in the show cause notice, penalty was claimed under sections 76, 77 and 78 of the Finance Act, 1994 but there is no finding recorded in the order dated 31st October 2014 that the penalty of Rs.1,50,000/- is being imposed on the ground of concealment which is covered by section 78 of the Finance Act,1994. He submitted that in absence of a clear finding to the effect that the penalty was imposed by invoking section 78 of the Finance Act,1994, section 32-O of the Central Excise Act cannot be invoked at all. Thirdly, he invited our attention to section 32-F of the Central Excise Act which deals with the procedure to be followed on the applications for settlement of case. He submitted that in the present case, the applications made by the petitioner had crossed the stage of section 32-F of the Central Excise Act as the Settlement Commission came to the conclusion that the applications deserved to be proceeded with and that the Settlement Commission found that the applications do not deserve to be rejected. He submitted that after the stage of sub-section 1 of section 32-F Central Excise Act was over, there was no occasion for rejecting the applications on the issue of maintainability including the issue of the bar created by section 32-O of the Central Excise Act. He invited our attention to the decision of a Division Bench of this Court in the case of Poona Tools Pvt. Ltd Vs. Union of India[1]. He submitted that as held in the said decision, the applications could not have been thrown out on the ground of the bar created by section 32-O as the stage of sub-section 1 of section 32-F of the Central Excise Act was already over and the issue of maintainability had already been decided. He invited our attention to paragraphs 9 and 10 of the said decision. Relying upon the decision of the Allahabad High Court in the case of Commissioner of Central Excise Vs. Sun India Pharmacy Pvt. Ltd.[2], he submitted that sub-section 1 of section 32-O could be invoked only if the Settlement Commissioner has earlier imposed penalty on the assessee on the ground of concealment of particulars of duty liability. He would therefore submit that the view taken by the Settlement Commission is erroneous.

3 The learned counsel for the respondent while supporting impugned Judgment and Order relied upon

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1 2015 (323) ELT 572 (Bom.)

2 2016 (340) E.L.T. 464 (All.)

the decision of a Division Bench of Calcutta High Court in the case of C.P.Re-Rollers Ltd. vs. Union Of India[3].

4 We have given careful consideration to the submissions. As stated earlier, by virtue of section 83 of the Finance Act,1994, section 32-E of the Central Excise Act was made applicable to the payment of service tax. As stated earlier, there were 13 applications filed by the petitioner-company invoking section 32-E of the Central Excise Act which were the applications for settlement of case. Show cause notices were issued to the said 13 branches demanding service tax for a period from 1st January 2013 to 31st March 2014. On the issuance of said show cause notices that 13 separate applications were made.

5 The procedure to be followed on receipt of the applications under section 32-E is set out in section 32-F. What is relevant for our consideration is sub-sections 1 to 5 of section 32-F which read thus:

> SECTION 32F. Procedure on receipt of an application under section 32E. —
> (1)On receipt of an application under sub-section (1) of section 32E, the Settlement Commission shall, within seven days from the date of receipt of the application, issue a notice to the applicant to explain in writing as to why the application made by him should be allowed to be proceeded with, and after taking into consideration the explanation provided by the applicant, the Settlement Commission, shall, within a period of fourteen days from the date of the notice, by

3 2016 (338) E.L.T.369 (Cal.)

an order, allow the application to be proceeded with, or reject the application as the case may be, and the proceedings before the Settlement Commission shall abate on the date of rejection :

Provided that where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

(2)A copy of every order under sub-section (1), shall be sent to the applicant and to the Commissioner of Central Excise having jurisdiction.

(3)Where an application is allowed or deemed to have been allowed to be proceeded with under sub-section (1), the Settlement Commission shall, within seven days from the date of order under sub-section (1), call for a report along with the relevant records from the Commissioner of Central Excise having jurisdiction and the Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission :

Provided that where the Commissioner does not furnish the report within the aforesaid period of thirty days, the Settlement Commission shall proceed further in the matter without the report of the Commissioner.

(4)Where a report of the Commissioner called for under sub-section (3) has been furnished within the period specified in that sub-section, the Settlement Commission may, after examination of such report, if it is of the opinion that any further enquiry or investigation in the matter is necessary, direct, for reasons to be recorded in writing, the Commissioner (Investigation) within fifteen days of the receipt of the report, to make or cause to be made such further enquiry or investigation and furnish a report within a period of ninety days of the receipt of the communication from the Settlement Commission, on the matters covered by the application and any other matter relating to the case :

Provided that where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under sub-section (5) without such report.

(5)After examination of the records and the report of the Commissioner of Central Excise received under sub-section (3), and the report, if any, of the Commissioner (Investigation) of the Settlement Commission under sub-section (4), and after giving an opportunity to the applicant and to the Commissioner of Central Excise having jurisdiction to be heard, either in person orthrough a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order 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 report of the Commissioner of Central Excise and Commissioner (Investigation) under subsection (3) or sub-section (4).

6 Section 32-O reads thus:

> "SECTION 32O.Bar on subsequent application for settlement in certain cases. — [(1)] [Where, before the 1st day of June, 2007] -
>
> (i) an order of settlement passed under sub-section (7) 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; or
> (ii) after the passing of an order of settlement under the said sub-section (7) in relation to a case, such person is convicted of any offence under this Act in relation to that case; or
> (iii) the case of such person is sent back to the Central Excise Officer having jurisdiction by the Settlement Commission under section 32L, then, he shall not be entitled to apply for settlement under section 32E in relation to any other
> matter.
>
> [(2) Where an assessee has made an application under sub-section (1) of section 32E, on or after the 1st day of June, 2007 and if such application has been allowed to be proceeded with under sub-section (1) of section 32F, such assessee shall not be entitled to apply for settlement under section 32E in relation to any other matter :
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> Provided that such assessee shall not be prevented from filing an application for settlement if the issue in the subsequent application is, but for the period of dispute and amount, identical to the issue in respect of which the earlier application is pending before the Settlement Commission."

7 Firstly, we deal with the contention that under the order dated 31st October 2014, there was no penalty specifically imposed under section 78 of the Finance Act,1994. The said order imposing penalty of Rs.1,50,000/- was passed on the basis of the applications made before the Settlement Commissioner by the Coimbatore Branch of the petitioner-company. We have perused the show cause notice on the basis of which the applications were made. In clause 14 of the show cause notice, it was stated thus:

> "**14. PENAL PROVISION :**
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> It appears that for the contraventions discussed above, CCIL have rendered themselves liable for penalty under Section

> 76 and 78 of Finance Act,1994 and liable to penalty for failure to maintain proper records, failure to pay Service Tax within the prescribed time limit and failure to file the prescribed returns in time under section 77 of Finance Act,1994."

8 Thus, the petitioner was put to notice that penalty will be imposed under sections 76, 78 and 77 of the Finance Act,1994. Ultimately, penalty has been imposed of Rs.1,50,000/- which has not been admittedly challenged by the petitioner. Paragraph 6.4 of the order dated 31st October 2014 reads thus:

> "**<u>PENALTY</u>**
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> 6.4 The applicant admitted the non-payment of Service Tax, on Club or Association Services' provided by them and paid the same along with interest before issue of Show Cause Notice. But for the investigation, the tax evasion would have gone undetected, and the applicant is, therefore liable for penal action. However, considering the cooperation, full and true disclosure of their liability, the Bench finds it fit to grant partial immunity from penalty."

9 Clause (iii) of the operative part of the said order reads thus:

> "(iii) The Bench imposes a penalty of Rs.1,50,000/- (Rupees one lakh and fifty

> thousands only) on the applicant under the provisions invoked in the Show Cause Notice and grants immunity in excess of the penalty indicated herein. This amount should be paid by the applicant within 30 days of receipt of this order and proof of payment be furnished to Jurisdictional Commissioner."

10 Firstly, it was not necessary for the Settlement Commission to specifically mention under which section the penalty was imposed as the assessee was already put to notice that penalties under sections 76, 78 and 77 were proposed to be imposed. The finding recorded as quoted above is very clear which holds that but for the investigation, tax evasion by the petitioner would have gone un-detected and the petitioner is therefore liable for penal action.

11 At this stage, we may again refer to section 32-O. It creates a bar for entertaining subsequent application for settlement. It provides that the bar will be attracted if there is an imposition of penalty on the person who makes an application for settlement on the ground of concealment of his duty liability. If the order dated 31st October 2014 is read in its entirety, there is a finding that particulars of the duty liability were concealed and were disclosed subsequently as set out in paragraph 2.1 of the said order. The bar under clause (i) of sub-section 1 of section 32-O is attracted once it is established that there was a penalty imposed on

the ground of concealment of particulars of duty liability. There is no specific requirement that the penalty should be imposed under section 78. Moreover, the said order of imposing penalty has become final. Therefore, the petitioner is bound by the said order and findings recorded therein. Therefore, we cannot accept the submission that there was no penalty imposed which is covered by clause (i) of sub-section 1 of section 32-O.

12 Section 32-E provides for an assessee making an application for settlement of the cases. Under section 32-O, while creating bar on subsequent application, the legislature has used the words "imposition of a penalty on the person who made application under section 32-A for settlement". In the present case, the person is the petitioner which is a limited company. Each branch of the petitioner-company had different registrations under the service tax. The Commission has made an in depth consideration of the issue and there is a detailed discussion on this aspect. The Tribunal referred to the definition of "person" under the Finance Act,1994 and came to the conclusion that the petitioner-company is a person. As stated earlier, the legislature has not used the word "assessee" in section 32-O. The embargo is on the "person" as distinguished from an "assessee".

13 Reliance was placed by the learned counsel for the petitioner on the circular dated 8th August 2013 issued by the Central Board of Excise and Customs,

New Delhi. He relied upon the second clarification issued under the said circular. The relevant part of the circular reads thus:

> "Government of India
>
> Ministry of Finance (Department of Revenue)
>
> Central Board of Excise & Customs, New Delhi
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> Subject: The Service Tax Voluntary Compliance Encouragement Scheme – Clarifications regarding.
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> The Service Tax Voluntary Compliance Encouragement Scheme (VCES) has come into effect from 10.5.2013. Some of the issues raised with reference to the Scheme have been clarified by the Board vide Circular No.169/4/2013-S.T., dated 13.5.2013 [2013 (30) S.T.R. (C17). Subsequently, references have been received by the Board seeking further clarifications as regards the scope and applicability of the Scheme."

14 Thus, the clarification issued by the said circular is as regards the provisions of the said Scheme. In fact, the circular has been issued on the basis of a reference seeking clarification as regards the scope and applicability of the said Scheme. Thus, the clarification issued by the Board is confined only to the scope and applicability of the said Scheme. The Said Scheme, as indicated by its name, is as regards voluntary compliance. Clause 106 of the said scheme reads thus:

"106.(1) Any person may declare his tax dues in respect of which no notice or an order of determination under section 72 or section 73 or section 73A of the Chapter has been issued or made before the 1st day of March,2013.

Provided that any person who has furnished return under section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of service tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return:

Provided further that where a notice or an order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period.

(2)Where a declaration has been made by a person against whom-

(a) an inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-levied or short-paid has been initiated by way of -

(i) search of premises under section 82 of the Chapter; or

(ii) issuance of summons under section 14 of the Central Excise Act,1944 (1 of 1944), as made applicable to the Chapter under section 83 thereof; or

(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or

(b) an audit has been initiated.

and such inquiry, investigation or audit is pending as on the 1st day of March 2013, then, the designated authority shall, by an order, and for reasons to be recorded in writing, reject such declaration."

15 Apart from the fact that section 32-E and the said Scheme operate in different fields, the opening portion of clause 106 of the Scheme shows that emphasis is on "person" and not on an "assessee" declaring his tax dues. Therefore, argument that the clarification issued under the circular dated 8th August 2013 clarifies not only the said Scheme but also the liability in general under the service tax cannot be accepted. The clarification issued is confined only to applicability of the said Scheme.

16 We have already quoted sub-section 1 of section 32-F. The said provision enables the Settlement Commission to reject the application for settlement at the initial stage. There is an option available for the Settlement Commission either to reject the application or to proceed with the application. If sub-section 5 of Section 32-F is considered, it is apparent that even after crossing the stage of sub-section 1 of section 32-F, the

Settlement Commission is empowered to reject the application. In fact, sub-section 5 of section 32-F clearly indicates that the Commission may pass such order as it thinks fit on the matters covered by the applications. Section 32-O is a disqualification provided for entertaining an application for settlement. Therefore, the argument that after crossing the stage of sub-section 1 of section 32-F, the application cannot be rejected on the basis of the bar created by section 32-O, cannot be accepted at all. As stated earlier, sub-section 1 is only an enabling provision which permits the Settlement Commission to dismiss the application at initial stage.

17 That takes us to the decision of this Court in the case of Poona Tools Pvt. Ltd.(supra). Paragraphs 9 and 10 read thus:

> "9 In the present case, it would be pertinent to refer that there is no dispute about existence of the order passed by the Settlement Commission on 20th December 2012, to proceed with the application filed by the petitioners for settlement in respect of show cause notice dated 19th December 2012. It transpires that the Revenue/respondents had no objection for the admission of the application to proceed with the same, as the petitioners had fulfilled the required norms to be eligible to make such an application

pursuant to Section 32E. The decision was taken to proceed with in respect of an application for settlement lodged after the order dated 31st October 2013. In such a case, it would not be proper to abandon the proceedings much less without putting the applicant on notice about consideration of Section 32-O. We, in this peculiar set of facts, deem it appropriate that the decision with respect to proceeding with the matter being already taken, it does not deserve to be looked back to and reviewed and the Commission would rather proceed with the same.

10 We, therefore, set aside the order passed by the Settlement Commission and remand the matter for reconsideration by the Commission, giving opportunity to the parties concerned and after hearing them and to decide the application. The Commission to proceed with the application in accordance with its decision dated 20th December 2013. Rule is made absolute in the aforesaid terms."

18 The submission of the learned counsel for the petitioner was that the application cannot be rejected subsequent to the stage of sub-section 1 of section 32-F on the ground of bar created by section 32-O. Paragraph 9 is exactly to the contrary. The Division Bench has held that while deciding to

proceed with sub-section 1 of section 32-F, the applicant can always be put to notice that the Commission would be considering to apply section 32-O. In the fact of the present case, the impugned order itself records that (paragraph 7.1) that the applicants before the Settlement Commission were put to notice that the contention regarding bar of section 32-O would taken into consideration. Therefore, the decision of the Division Bench in the case of Poona Tools Pvt. Ltd. (supra) cannot be interpreted in the manner in which the learned counsel for the petitioner wants this Court to interpret.

19 A submission is attempted to be made by inviting the attention of the Court to paragraph 6.2 of the impugned order that the Revenue had left it to the Settlement Commission to decide the plea of the petitioner. Considering the scheme of section 32-E read with Section 32-F, it is a matter of discretion for the Settlement Commission either to accept the application or not. The decision of Allahabad High Court in the case of Commissioner, Central Excise vs. Sun India Pharmacy Pvt. Ltd. cannot help the petitioner in view of express language used by sub-section 5 of section 32-F.

20 We find no merit in the petition and the same is dismissed. At this stage, the learned counsel for the petitioner submits that the proceedings before the Adjudicating Authority may be stayed or deferred for a reasonable time, to enable the petitioner to

challenge this Judgment. The last date fixed was 9th November 2017. As of today, the petitioner is not aware of the next date. If the next date is fixed in the near future, we grant liberty to the petitioner to apply for limited protection.

(A.K.MENON,J.) (A.S.OKA,J.)