IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.08.2017

CORAM

THE HONOURABLE MR. JUSTICE T.S.SIVAGNANAM

W.P. No. 13736 of 2004
and W.P.M.P.No.16137 of 2004

M/s. Tamil Nadu Newsprint and
Papers Limited,
62, Anna Salai, Guindy,
Chennai -32, rep. by its
S.Meenakshisundaram
Co-ordinator (Legal). ..Petitioner

Vs.

1. The Settlement Commission,
Custom House,
Rajaji Salai, Chennai.

2. The Commissioner of Central Excise,
Tiruchirapalli Commissionerate,
1, Williams Road, Cantonment,
Tiruchirapalli. ..Respondents

Prayer: Petition under Article 226 of the Constitution of India praying for issue of a Writ of Certiorarified Mandamus to call for the records comprised in Order No.43/2003-CE, dated 29.12.2003 on the file of the Settlement Commission, Chennai/1st respondent and quash the same and further direct the respondent to admit the application under Section 32E(1) under the Central Excise Act, 1944.

For Petitioner :: Ms. Cynduja Krishnan

For Respondents :: Mrs.R. Hemalatha,
Senior Panel Counsel

O R D E R

Heard Ms. Cynduja Krishnan, learned counsel for the petitioner and Mrs.R. Hemalatha, learned Senior Panel Counsel for the respondents.

2. The petitioner is M/s. Tamil Nadu Newsprint and Papers Limited, Government of Tamil Nadu Company and they are aggrieved by the order passed by the Settlement Commission, Additional Bench, Chennai in rejecting their application filed for settlement of the demand raised in the show cause notice dated 02.12.2002 on the ground that the petitioner has not made full and true disclosure of their duty liability.

3. The controversy involved in this writ petition lies in a very narrow campus. The petitioner is engaged in the manufacture of paper and paper products falling under Chapter No. 48 of the First Schedule to the Central Excise Tariff Act, 1985 and they have been availing Modvat/Cenvat credit facility for discharging central excise duty on their final products. The officers of the Directorate General of Central Excise Intelligence, Regional Unit, Madurai, visited the petitioner's factory on 08.08.2001 and conducted verification. This led to the issuance of show cause notice dated 02.12.2002 calling upon the petitioner to show cause as to why (i) an amount of Rs.10,85,791/-, being the wrong credit availed by them, as mentioned in the show cause notice, should be disallowed and recovered from them under Rule 57AH of Central Excise Rules, 1944 read with proviso to Section 11A(1) of Central Excise Act, 1944; (ii) an amount of Rs.14,76,987/-, being the the duty on the intermediate products, paper core and bleach liquor, should not be demanded from them under proviso to Section 11A(1) of the Central Excise Act; (iii) the amount paid by the petitioner vide bills dated 11.01.2002 and 20.02.2002 should not be appropriated towards the demand of Rs.14,76,987/-; (iv) a penalty should not be imposed on the petitioner under Rules 57AH and 173Q of Central Excise Rules, 1944 and under Section 11AC of Central Excise Act, 1944; and (v) the interest at the applicable rate on the duty evaded should not be demanded from the petitioner under Rule 57AH of Central Excise Rules, 1944 and Section 11AB of Central Excise Act, 1944.

4. On receipt of the show cause notice, the petitioner approached the Settlement Commission and filed an application under Section 32E of the Central Excise Act, 1944. The period for which the show cause notice was issued was from November 1997 to June 2001, which was the period of dispute. The petitioner has referred to the show cause notice dated 02.12.2002. In column No.12 of the application, the petitioner had mentioned that the additional amount of duty disclosed and accepted as payable being Rs. 24,13,266/-. The petitioner had further stated that they have remitted a sum of Rs.28,00,923/- and therefore, seeking a refund of Rs. 3,87,657/-. Thus, as per the annexure, the admitted duty liability was Rs.24,13,266/-. In other words, the petitioner’s case was that they are entitled for refund of Rs. 3,87,657/- as to that

extent, the demand was barred by limitation and they had paid an excess amount of excise duty by way of an adjustment with the Modvat/Cenvat credit. The petitioner, in their application, stated that the show cause notice dated 02.12.2002 concedes that the petitioner had remitted excise duty to an extent of Rs.28,00,923/- on paper core and bleach liquor consumed captively for the manufacture of exempted categories of paper for the period 1996-97 to June, 2001. However, in the show cause notice, the demand raised was only for the period from November, 1997 to June, 2001 and the duty component for the said period works out to Rs.14,76,987/- thereby leaving an excess payment of Rs.13,23,936/-, which is not forming part of the show cause notice proceedings. Thus, after disclosing all the facts, the petitioner prayed before the Commission to settle the issue by passing appropriate orders confirming the duty liabilities of Rs.9,36,279/- and Rs. 14,76,987/- and adjust the same with the payments made by the petitioner to the extent Rs.28,00,923/- and permit the petitioner to receive a refund of Rs.3,87,657/- and to pass such other further orders as the Commission may deem fit and proper in the circumstances of the case. Further, the petitioner prayed for waiver of penalties proposed in the show cause notice.

5. The Commission considered the matter and by the impugned order rejected the same solely on the ground that the petitioner has not made a full and true disclosure of their duty liability . Section 32E of the Central Excise Act, 1944 deals with applications for settlement of cases. Sub-section (1) of Section 32E states that, "an assessee may, in respect of a case, relating to him make an application, before adjudication, to the Settlement Comission to have the case settled in such form and in such manner as may be prescribed and containing the full and true disclosure of his duty liability, which has not been disclosed before the Central Excise Officer having jurisdiction." The term " case" has been defined under Section 31(c) to mean "any proceedings under the Act for levy, assessment and collection of excise duty pending before the adjudicating authority on the date on which the application under sub-section(1) of Section 32E is made." This is a prerequisite as a show-cause notice has to be issued by the concerned authority to enable the assessee to approach the Commission. The distinction, with regard to the powers of the Settlement Commission under the Income Tax Act, 1961 and the Customs Act, 1962 was considered by a Division Bench of this Court in the case of V.C. Mohan V. Commissioner of Customs (AIR) Chennai –I reported in 2008 (222) ELT 344 Madras and it was pointed out that," it is mandatory that the applicant could file an application only after show cause notice is issued, which show cause notice would pertain even for confiscation of goods

on the ground of fraud or smuggling or deliberate mis-declaration. Such show cause notice is a condition precedent before making an application.” Though the said judgment was rendered considering Section 127B of the Customs Act, 1962, the same is in parimateria with Section 32E of the Central Excise Act, 1944. Thus, the petitioner had rightly approached the Commission on issuance of show cause notice.

6. The next issue to be considered is whether there has been a full and true disclosure of the duty liability by the petitioner in the application filed before the Commission. The Commission has opined in the impugned order that there has been no full and true disclosure. The reason for taking such a stand is that the petitioner should have admitted their entire duty liability and could not have taken a stand that part of the demand is time- barred and could not have sought for any refund as the Commission has no such power to order for refund.

7. In my considered view, the facts of the case are quite peculiar and distinct and the term, “full and true disclosure” has to be interpreted considering the facts of each case and if such an interpretation is given, in my view, there has been a full and true disclosure by the petitioner, though the manner in which it has been presented may not be appropriate. The reason being that the show cause notice itself was restricted to the period from November, 1997 to June, 2001. It is only after the receipt of the show cause notice that the petitioner had the cause of action to appear before the Commission. The show cause notice admits that the petitioner had paid Central Excise duty to an extent of Rs.28,00,923/- and that covers the period anterior to the period mentioned in the show cause notice and that is from June 1996 onwards.

8. It is true that the petitioner has taken a technical plea with regard to the Department’s Jurisdiction to demand excise duty beyond the period of 5 years. However, the petitioner has disclosed the admitted duty liability after mentioning that they have already paid a sum of Rs. 28 lakhs. Therefore, in my considered view it cannot be taken as a case where there is no full disclosure of the duty liability nor can the application made by the petitioner be construed as an untrue disclosure of duty liability.

9. So far as the claim for refund is concerned, it is upto the Commission to consider whether to grant such refund or not. However, that could not have been a ground to come to the conclusion that there is no full and true disclosure of duty liability by the petitioner.

10. Thus, considering the facts and circumstances of the case, it is seen that the show cause notice covered only the period from November 1997 to June, 2001. It is not a case where the petitioner failed to make a full and true disclosure of their duty liability, but appears to have raised a technical plea, which could not have been the reason to throw out the application filed by the petitioner, which is a Public Sector Company wholly owned by the Government of Tamil Nadu.

11. For the above reasons, this Court is inclined to accept the case of the petitioner and interfere with the impugned order. The writ petition is allowed and the impugned order is set aside. The matter is remitted back to the Settlement Commission for consideration of the petitioner's application on merits and in accordance with law. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

nv/sai

To

1. The Settlement Commission,
Custom House,
Rajaji Salai, Chennai.

2. The Commissioner of Central Excise,
Tiruchirapalli Commissionerate,
1, Williams Road, Cantonment,
Tiruchirapalli.

+1cc to Mr.S.Muthuvemkataraman, Advocate Sr.55240
+1cc to Mrs.R.Hemalatha, Advocate Sr. 55214

W.P. No. 13736 of 2004

AR(V)
VR(08/09/2017)