

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

Reserved on : 02.12.2016

Pronounced on : 15.05.2017

+ **W.P.(C) 412/2006 & 413/2006**

UNION OF INDIA

..... Petitioner

Through: Mr. Satish Aggarwala, Adv.

Versus

M/S. *PADMINI* POLYMERS LTD. & ANR ..... Respondents

Through: Mr. Mr. V. Lakshmikumaran with Mr. S. Vasudevan and Mr. Abhinav Jaganathan, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE NAJMI WAZIRI**

**NAJMI WAZIRI, J**

1. These petitions seek the quashing of the orders passed by respondent no. 2, Customs Central Excise Settlement Commission ( hereinafter referred to as 'the Settlement Commission') on 30.05.2005 and 31.05.2005 by which it allowed the applications of respondent no. 1, M/s. *Padmini* Polymers, under Section 125B of the Customs Act, 1962 ('the Act' for short). The order is impugned on two grounds inter alia, the first being that the provisions of Section 127A and 127B of the Act are for *bona fide* applicants to approach the Settlement Commission for settlement of dues which are mistakenly not paid or over paid, and not for tax dossiers indulging in criminal activities. The learned counsel for the petitioner states that the power to grant immunity against criminal prosecution is to be used sparingly and in deserving cases and that the present case is not one of misclassification or mis-declaration but one in

which respondent no. 1 offered to pay the differential unpaid tax only after incriminating evidence for prosecution had been gathered by the petitioner. The learned counsel relied on the principle laid down in ***CIT vs. B.N. Bhattacharya 1979 (118) ITR 461 (SC)*** wherein the court held that, “*It is not to provide a rescue shelter for big tax-dodgers who indulge in criminal activities by approaching the Settlement Commission.*” The second ground on which the impugned order is challenged is that the settlement commission has erred in overlooking the fact that during settlement proceedings, it is not for the petitioner to establish respondent no.1’s guilt beyond reasonable doubt; instead it was for the licence holder to establish its innocence apropos the issues raised in the show cause notice. The learned counsel further contended that the aspect of over invoicing of CD ROMs and Audio CDs could only have been appreciated after a full trial and the settlement commission is not the appropriate forum to adjudicate the same or appreciate the evidence submitted to it.

2. The facts of the case are that respondent no. 1 (for short “*Padmini*”), a manufacturer of CD ROMs and audio CDs sold both domestically and internationally; it obtained 25 advance licences under the Duty Exemption Scheme notified by Ministry of Commerce in terms of EXIM policy between November, 1996 and March, 1997. Against the exports made, *Padmini* was entitled to duty free imports through the aforesaid licences under the schemes provided in Foreign Trade policy such as DEPB, EPCG and DEEC. These licences were freely transferrable and were sold in the open market by *Padmini* to third party importers to utilise them. Against seven of the advance licences, no imports were made. Against licence No. 83515, a duty benefit of

Rs.9,06,300/- was obtained without fulfilment of the corresponding export obligation. Against another licence bearing No. 82338, the export obligation was unfulfilled to the extent of Rs. 13,76,973/-. Regarding the remaining 16 advance licences, *Padmini* had claimed fulfilment of the export obligations.

3. The petitioner – Directorate of Revenue Intelligence had issued two Show Cause Notice (SCN) on 20.04.2001 and 11.02.2001 respectively alleging that *Padmini* had claimed fraudulent fulfilment of the export obligation. Accordingly, it demanded jointly and severally an amount of Rs. 20,84,75,559/- (Rs. 19,44,83,561/- in respect of 33 DEPB licences and Rs. 1,39,91,998/- in respect of EPCG licence) vide Show Cause Notice dated 20.4.2001 and customs duty of Rs. 7,81,73,260/- in respect of 25 DEEC licences as unpaid duties. The notice proposed a charge of interest as well as confiscation of the imported goods under Section 111(o) of the Act, and of the CD ROMs and Audio CDs exported. It also proposed the imposition of penalty under Section 114, 114A read with Section 112(a) & (b) of the Act.

4. In substance the petitioner had alleged that CD ROMs were exported by *Padmini* @ \$23/29.50 to two Singapore companies i.e. M/s. Inter Metallco and M/s. Multimedia Inter Trade which then re-exported the same to M/s. Multi Sync Trends @ \$1.60 per piece. Similarly, CD Audios were exported by *Padmini* at \$4.5 to 8.5 per piece to the aforesaid Singapore companies which then re-exported the same to M/s. Multi Sync Trends @ \$0.93 per piece. It is alleged that M/s Multi Sync Trends purchased CD ROMs from M/s Rainbow Technology, USA @ US\$ 0.83 to \$2.18 per piece. These titles were in turn supplied to the respondent @ US\$ 2.5 per piece and invoices were supplied to M/s Inter Metallco,

Singapore. The learned counsel for the petitioner argues that these transactions would bear evidence to the fact that M/s Multi Sync Trends as well as M/s Inter Metallco were aware of the actual value of CD ROMs, but were still prepared to import these titles by themselves and through their sister concern i.e. M/s Multimedia Intertrade and M/s. Indam Marketing at highly inflated prices. The petitioner alleged that, interestingly, most of the CD ROMs were lying unsold in warehouses in the USA. The petitioner had also alleged a relationship between M/s Indam Marketing owned by Mr. Ravi Gupta, who was also an employee of M/s Multi Sync Trends at the time when the CD titles had been purchased from the original copyright holder M/s Rainbow Technologies. The counsel alleged that Mr. Ravi Gupta was aware of the actual value of the CD ROMs yet he purchased them at 20 times the value and argued that there would be no justifiable reason for M/s. Multi Sync Trends, USA to bear such huge losses. M/s. Multi Sync Trends, USA had represented itself as a division of Padmini Multimedia which has been admitted by the present respondent No. 2 as its group company. Hence, the petitioner contended that the extraordinary pricing of imports by the Singapore and USA importers from *Padmini* were evidence of a clear nexus between the buyer and the seller, and of fraudulent transactions which are not justifiable as arms length trade under Section 14 of the Customs Act. Meanwhile, the DGFT during the pendency of the SCN cancelled the 25 advance licences granted to *Padmini* as *void ab initio*.

5. During the proceedings before it, the Settlement Commission had directed the Commissioner (Investigations) to furnish certain specific information apropos the amount for which 25 licences had been issued; the export obligations fulfilled/purported to be fulfilled along with the

evidence, as may be; import value against each of them; admitted duty liability vis-a-vis the actual duty liability apropos the revenue and the duty liability according to the Commissioner (Investigations); the evidence on record in each instance was to be indicated. The latter's report admitted to a mistake in the computation of duty from Rs. 7,81,73,260/- to 7,76,68,432/-.

6. *Padmini* had argued that the cost of their CD ROMs was inclusive of the development costs of their own software and costs of purchase of the titles, as well as, marketing, advertising and replication cost; that software has short business cycles with corresponding profit cycles. Hence, there is a contemporaneous higher pricing only in the early phase of sales of such products. They referred to the David Bush Guide indicating prevalent prices at the relevant period in support of their submission. *Padmini* also contended that the Ministry of External Affairs and Embassies of India abroad have purchased CD titles from them at the prices mentioned in their shipping bills; that the sale price of CD ROMs in India had nothing to do with the FOB value of the same and comparing the two was un-justifiable. It also argued that at the relevant period, out of the 33,61,297 pieces of CD ROMs sold by them during the period pertaining to the present case, 11,95,250 pieces of CD ROMs were exported, while almost twice that number i.e. 21,66,047 pieces were sold in India itself. It was stated that the domestic sales include merchant exporters who had later exported the said goods at much higher prices than the export prices of *Padmini*. Reference was made to the example of M/s. Crown International, to whom *Padmini* had sold the CDs at a price of Rs.640/- per piece which were exported by the former at Rs. 730/- per piece. Ultimately the proceedings against M/s Crown International were

dropped, after accepting their FOB value of \$18 per piece. *Padmini*, like the other 8 exporters before the Settlement Commission, had relied upon the aforementioned catalogue indicating the prevalent prices reflecting the value of the software in the market. The parties before the Settlement Commission had argued that the price of the CDs is not merely the basic cost of the CD plus replication cost but involves the software development, marketing and other overhead costs. Therefore, it was stated that *“the value declared under Section 14 of the Act is that price at which the goods or the like goods are ordinarily sold or are offered for sale for delivery at the time and place of importation or exportation in the course of international trade, where the buyer and seller have no interest in the business of each other and the price is the sole consideration for the sale or offered for sale.”*

7. *Padmini* admitted to its liability of Rs.33,37,257/- towards non-fulfilment of its export obligation partially in respect of two advance licences. The Settlement Commission noted that the Enforcement Directorate had accepted the respondent's claim of repatriation of the foreign exchange equivalent to the FOB value of the goods exported. It relied upon the order of the Special Director made on 30.03.2005, which noted that the remittance certificate issued by the banks indicating *inter alia* the invoice particular to *Padmini* related to the remittances received by it. The Settlement Commission observed that the Revenue had “succeeded in indicating the possibility of a case of over-valuation” in view of the prevalent contemporaneous lower prices and the fact that a substantial quantity of the exported goods were lying unsold in the USA without any indication as to whether the same were specifically sold at the time of remittances received from them. Hence, they would create a doubt

about the bona fide of the declared FOB value. Referring to Section 14 of the Act it held:

“10.1 The Customs Valuation Rules, 1988 framed under Section 156 of the Customs Act, deals with value of imported goods. As a matter of fact, even the provisions of Section 14 of the Act, refer only to goods on which duty is chargeable on ad-valorem basis, though the said Section covers the goods under export also. However, during the hearing both the applicant and the Revenue had admitted that the provisions contained in the said Section 14 can apply to the subject export goods also, though they are not chargeable to duty.

10.2 The important condition for acceptance or rejection of a sale price as per the aforesaid provision is that the goods should be ordinarily sold or offered for sale on that price for delivery at the time of place of exportation in the course of wholesale trade. The seller and buyer should not have any interest in the business of each other and even one in the business of other. The Bench finds that the Revenue has not let in satisfactory evidence to establish that there was interest in the business of each other between the applicant and their customers or that there was interest of one in the business of other or that this was not the price in the normal course of wholesale trade at the place of exportation. The fact that the applicant is alleged to have got certain trading concerns floated in the US to get their product disposed of, does not by itself establish mutuality of interest in the business of each other between the applicant and the said trading concern, got floated by others in the US, without any indication of flow back of money to the applicant. As against the actual repatriation of funds through bank remittances indicated by the applicant, the Revenue has failed to establish the extent of overvaluation and the manner in which it was got funded, inspite of the

much lower actual sale price, though there is a reference to the allegation of over invoicing of certain imports, which is in the process of adjudication.

10.3 The applicant's plea that though the market for that product nose-dived in 1997, they still managed to persuade the purchasers to abide by the contract and honour payment is not without force. The success in getting proceeds repatriated should not boomerang against the exporter. It is also not in dispute that the moneys had come through banking channels indicating the invoices they pertained to.

10.4 The Bench also observes that the SCN does not propose to demand duty based on prices actually charged by the applicant, as evidenced from any document with the Revenue. It is only on the basis of comparable prices abroad available with them as indicated in para 4.0 above. Considering the fact that the applicant has repatriated sale proceeds covered by the invoices raised by them, except for those that are admitted to have not been realised by them, allegation of over-invoicing does not appear to be convincing. The Bench also takes note in this context that even the AO dt. 5.8.2002 of this Bench has observed that "in view of this, we do not find any substance in the objection of the Revenue. We are however, satisfied that the disclosure made by the applicant of his duty liability and the manner in which he has arrived at it is reasonable. Particularly, since, it is not in dispute that remittances of fully declared export values have been received through the Banking channels and there is no allegation of any Hawala payment or any evidence that the proceeds received are in respect of anything other than the export goods, in question.(Emphasis supplied) It is also observed from a copy of the letter F.No.T-4/6-D/2001 (DEZ) 135 dt. 2.3.2005 of Dy.

Director/Directorate of Enforcement, filed by the applicant, that the Enforcement Directorate has specifically observed “In connection with the above, this is to inform that M/s. Padmini Polymers, New Delhi and its Directors have not been issued with any SCN for over-invoicing as there was no evidence to that effect.

10.5 Accordingly, the situation appears to be one of all the indications going to support the allegation of Revenue, though the evidences filed by Revenue are not, prima facie, adequate to uphold the said allegations. In the said situation, the Bench finds that with the extent of cooperation received from the main applicant company, they are also not able to arrive at any other correct FOB value of the CD ROMs when the one claimed by the applicant and that proposed by the Revenue are poles apart.”

8. In view of the above, the Commissioner then reasoned that *Padmini* had made out a case that the additions made for over-valuation of exports were not substantiated. Hence, the charge of non-compliance of export obligation apropos the advance licences was not tenable and neither was the charge of violation of post-import conditions and subsequent proposals to collect duty on the imported goods.

9. The majority view of the three judge Bench in the Settlement Commission was that the evidence brought forward by the revenue regarding over-valuation did not conclusively prove Revenue’s case. It held that:

*“Padmini” had made subsequent compliance of both the provisions of Exim Policy prevalent at the relevant time as well as Customs Notification NO. 203/92-Cus dated 19.5.1992 as amended by way*

*of fulfilling the export obligation in respect of 16 out of 25 advance licences obtained during November, 1996 to March, 1997. Further they found that while no imports were made against 7 of the remaining advance licences and out of 7, no export were made against only one licence No. 83515 in respect of which the applicants have derived duty benefit of Rs. 33,37,257/- (RS.19,06,300/- + Rs.13,76,937/-).*

The majority disagreed with the Chairman's view that a penalty of Rs.10.00 lakhs and Rs.5.00 lakhs should be imposed upon *Padmini* and its Managing Director Mr. Vivek Nagpal, respectively.

10. Hence, the matter was settled for additional duty liability of Rs.33,37,257/- as admitted by *Padmini* to the extent of its failure to fulfil its export obligation. The said amount was to be adjusted from the deposit of Rs. 2.5 crore voluntarily deposited by *Padmini*. The remaining amount was to be refunded to *Padmini* after adjustment of interest @ 10 % per annum.

11. Apropos the *ab initio* cancellation of the DEEC proceedings, the Commission was of the view that the goods were imported under valid licences, therefore, "*the latter's ab initio cancellation subsequent to imports would not have any impact on the said import*". During the arguments, the counsel for *Padmini* had submitted that the cancellation of proceedings *ab initio* by the DGFT had been set aside in the appeal proceedings and this petition is not maintainable since the order of the Settlement Commission has been passed after scrutiny of evidence on record and taking into consideration the due submissions of the parties.

12. The counsel for *Padmini* also argued that the petitioner – Directorate of Revenue Intelligence has no *locus standi* to file the writ petition under Article(s) 226/227 of the Constitution of India. If the Custom department was at all aggrieved by the impugned order, then the appropriate authority could have filed the writ petition. The petitioner being merely an investigating authority cannot contest the adjudication by the Settlement Commission. It was argued that only the officer of Customs who had been assigned to function either by the Central Board of Excise and Customs or by the jurisdictional Commissioner of Customs would be the “proper officer” for the purposes of assessment or re-assessment. In the present case, Additional Director General (DRI) had not been appointed as proper officer under Section 2(34) of the Act for the purposes of assessment or re-assessment. The respondents also relied upon the judgment of the Supreme Court in *Commissioner of Customs v. Sayed Ali & Anr.* 2011 (265) ELT 17 (SC) in this regard.

13. The issue of issuance of Show Cause notices by the DRI for collection of duty was adjudicated by this Court in *Mangali Impex Ltd. V. Union of India & Ors.* 2016(335)ELT605(Del.). It held that re-casting of Section 28 of the Act with the introduction of sub-section 11 thereto did not meet the objective it had sought to achieve. Qua *Sayed Ali & Anr.* (supra). In *Mangali Impex Ltd.* (supra), the Court observed as under:

“66. The mere fact that Section 28(11) has been given retrospective effect does not solve the essential problem pointed out by the Supreme Court in the Sayed Ali case, which is the absence of the assigning of functions to „proper officers” under Section 2(34) of the Act. The even more serious problem is the impossibility of reconciling

two contradictory provisions, viz., Explanation 2 to Section 28 and Section 28(11) of the Act.

67. The words 'this Section' in the newly inserted sub-section (11) of Section 28 obviously refers to Section 28 as enacted with effect from 8th April 2011 and not the Section 28 which existed prior to that date. The effect of Section 28(11) is to treat all officers of the Customs to be „proper officers“ only for the purposes of new Section 28 of the Act and not the earlier Section 28 of the Act. In particular, there is no validation of the SCNs issued prior to the amendment of Section 28 of the Act. As observed in Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan (supra), a legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it. The past actions of the officers of the DRI and DGCEI who are not designated as „proper officer“ in issuing SCNs for the period prior to 8th April 2011 have not been validated.

68. There is also merit in the contention of the Petitioners that Section 28(11) confers validity only on „the proper officer.“ As explained in Consolidated Coffee Ltd. v. Coffee Board (supra), the use of article „the“ as opposed to „an“ or „any“ is indeed significant. Only officers who have been assigned the functions of the „proper officer“ for the purposes of Section 17, i.e., assessment of the bills of entry can be considered as the proper officer for the purposes of Section 28(11) of the Act. As further explained in Shri Ishar Alloys Steels Ltd. v. Jayaswals Neco Ltd. (supra), the article „the“ always denotes a particular thing or person.

69. The Court also finds merit in the contention that if jurisdiction is exercised by one officer of the Customs or of the DRI or DGCEI, it should impliedly oust the jurisdiction of other officers over the same subject matter. The doctrine of comity of jurisdiction requires that for the proper

administration of justice there should not be an overlapping of the exercise of powers and functions. The decision of the Punjab and Haryana High Court in Kenapo Textiles Pvt. Ltd. v. State of Haryana (supra) and the decision of the Supreme Court in India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. (supra) are relevant in this context.

Conclusion on the effect and validity of Section 28 (11) 70.1 The net result of the above discussion is that the Department cannot seek to rely upon Section 28(11) of the Act as authorising the officers of the Customs, DRI, the DGCEI etc. to exercise powers in relation to non- levy, short-levy or erroneous refund for a period prior to 8 th April 2011 if, in fact, there was no proper assigning of the functions of reassessment or assessment in favour of such officers who issued such SCNs since they were not „proper officers“ for the purposes of Section 2(34) of the Act and further because Explanation 2 to Section 28 as presently enacted makes it explicit that such non-levy, short-levy or erroneous refund prior to 8th April 2011 would continue to be governed only by Section 28 as it stood prior to that date and not the newly re-cast Section 28 of the Act.

70.2 Section 28 (11) interpreted in the above terms would not suffer the vice of unconstitutionality. Else, it would grant wide powers of assessment and enforcement to a wide range of officers, not limited to customs officers, without any limits as to territorial and subject matter jurisdiction and in such event the provision would be vulnerable to being declared unconstitutional.

70.3 As regards the period subsequent to 8th April 2011, it is evident that if the administrative chaos as envisaged by the Supreme Court in Sayed Ali (supra) should not come about, there cannot be any duplicating and/or overlapping of jurisdiction of the officers. It would have to be

ensured through proper co-ordination and administrative instructions issued by the CBEC that once a SCN is issued specifying the adjudicating officer to whom it is answerable, then that adjudication officer, subject to such officer being a 'proper officer' to whom the function of assessment has been assigned in terms of Section 2 (34) of the Act, will alone proceed to adjudicate the SCN to the exclusion of all other officers who may have the power in relation to that subject matter.

70.4 The question as to the constitutional validity and effect of Section 28 (11) of the Act is answered accordingly.”

14. During the proceedings when the *locus standi* of the petitioner was questioned, they impleaded the Commissioner of Customs, ICD Tuglaqabad, which was allowed on 12.11.2013, about 7 years after the writ petition was filed. However, the same would not validate the filing of the petition when such powers were not specifically conferred upon the DRI. Therefore, in the absence of a specific jurisdiction of the petitioner to have preferred this writ petition against the order of the Settlement Commission, the writ petition would not be maintainable. This Court in its judgment dated 16.10.2015 in W.P.(C) 9783/2015 held that:

*“It is well settled that the proceedings before the Settlement Commission are not adjudicatory but are by way of settlement. This Court does not sit in appeal over the settlement orders passed by the Settlement Commission. It is, therefore, not open to a party to make a grievance with regard to an adjudicatory process when the same is foreign to the proceedings before the Settlement Commission. We do not agree with the learned counsel for the petitioner that any interference with the impugned order is called for.”*

15. However, having considered the contentions of the learned counsel for the parties, the Court is of the view that in the absence of sufficient proof being led, Revenue's doubt about the FOB value of the goods cannot be sustained. It has not substantiated its contention that the exported goods were overpriced. Furthermore, there was nothing on record to conclude that there were business interests between *Padmini* and its importers in Singapore, United States and USA so as to doubt that the transactions between them were not in the normal course of trade or that it was not a transaction at arms' length. Hence, the declared FOB would have to be accepted. Also taking into consideration *Padmini's* contention that with the advent of the internet and its growing end-users in the relevant market, the market of CD Audio and CD ROMs suffered adversely. Since Revenue has not led any evidence to indicate either a '*Hawala*' transaction or a back flow of money to *Padmini* through illegal means regarding the value of the exported goods, the export transaction cannot be viewed with suspicion. In any case, all monies were received by *Padmini* through the banking channels as have been so certified by its bankers through remittance certificates.

16. In view of the above, this Court finds no reason to interfere with the impugned order of the Settlement Commission. The writ petition is without merit and is accordingly dismissed.

**NAJMI WAZIRI, J**

**S. RAVINDRA BHAT**

**MAY 15, 2017/acm**