IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 12.07.2018	Delivered on 01.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

W.A.No.358 of 2015, W.P.No.15109 of 2018
and
M.P.No.1 of 2015 and WMP.No.17864 of 2018

W.A.No.358 of 2015:

M/s.Sri Vela Smelters (P) Ltd.,
Nallur Kadamapalayam Village,
Ponmakakapalayam, Paramathi Velur Taluk,
Namakkal District - 637203.

... Appellant

versus

1.The Customs and Central Excise Settlement Commission,
Additional Bench, Narmada Block, Custom House,
II Floor, No.60, Rajaji Salai,
Chennai - 600 001.

2.The Commissioner of Central Excise,
Salem Central Excise Commissionerate,
Foulks Compound, Salem.

3.The Additional Director General,
Directorate General of Central Excise Intelligence,
Chennai Zonal Unit, Rajaji Bhavan,
Besant Nagar, Chennai - 600 090.

... Respondents

W.P.No.15109 of 2018:

M/s.Vela Smelters (P) Ltd.,
Nallur Kadamapalayam Village,
Ponmakakapalayam, Paramathi Velur Taluk,
Namakkal District - 637203.

... Petitioner

Versus

1.The Commissioner of Central Excise,
Salem Central Excise Commissionerate,
Foulks Compound, Salem.

2.The Additional Director General,
Directorate General of Central Excise Intelligence,
Chennai Zonal Unit, Rajaji Bhavan,
Besant Nagar, Chennai - 600 090.

... Respondents

PRAYER in W.A.No.358 of 2015: Appeal filed against the order passed by this Court dated 26.11.2014 passed in W.P.No.30162 of 2012.

W.P.No.30162 of 2012

Writ of certiorarifies Mandamus, to calling for the file relating to the proceedings of the 1st respondent in final order number 21/2012 CE dt 9.10.2012 and quash the same and consequentially direct the 1st respondent to hear the application filed by the petitioner in application No.SA (E)/ 01-02/2012-SC on merit afresh.

PRAYER in W.P.No.15109 of 2018: This Writ Petition has been filed under Article 226 of Constitution of India seeking to issue a Writ of Certiorari calling for the records of the first respondent dated 27.03.2018 in reference No.C.No.V/72/15/134/2009-C.EX.Adj Order Sl.No.02/2018 and quash the same.

For Appellant/ petitioner : Mr.K.Jeyachandran
Both Case for M/s.Senthil Nathan

For Respondents : Mr.V.Sundareshwaran,
learned Senior Standing Counsel
Both Case

J U D G M E N T

R.SUBRAMANIAN, J.

1. The appellant challenges the order of the learned Single Judge dated 26.11.2014 made in W.P.No.30162 of 2012, in and by which, the learned Single Judge dismissed the Writ Petition filed by the appellant challenging the order of the Settlement Commission dated 09.10.2012 with a consequential direction to the Settlement Commission/ 1st respondent in the Writ Petition

to hear the application filed by the petitioner in application No. S.A.(E)/01-02/2012-SC afresh on merits.

2. The claim of the petitioner before the Writ Court was that it is a Private Limited Company engaged in manufacture of MS Ingots falling under Chapter 72 of the Central Excise Tariff. In the course of business, the petitioner/ appellant had imported MS Scrap for the purpose of using it in production in its own smelter unit and for conversion as ingots. Alleging that the petitioner had indulged in suppression of production and clandestine Removal of MS Ingots, the Department had issued a show cause notice to the petitioner/ appellant on 15.01.2008. Pursuant to the said show cause notice, after considering the objections of the petitioner an order came to be passed on 07.01.2009, confirming the proposal in the show cause notice, demanding a duty of Rs.28,18,945/- along with penal consequences.

3. The appeal filed by the appellant before the Commissioner, Central Excise Appeals was partially allowed and by an order dated 05.10.2009 the duty demanded was reduced to Rs.11,60,315/-. As against the order of the appellate Authority the appellant had moved the Central Excise and service Tax Appellate Tribunal (CESTAT) even during the pendency of the aforesaid appeal, the Director General of Central Excise Intelligence issued a show cause notice dated 27.10.2009 demanding the CENVAT credit of Rs.1,64,43,413/-. When the error in the computation of duty for the 2nd show cause notice was pointed out inasmuch as it did not take into account the reduction of the customs duty liability by the Commissioner, (Appeals) the same was rectified by the Department and the demand for CENVAT credit was reduced to Rs.1,43,43,413/-. It is the claim of the petitioner that they had imported 6914.490 metric tons of MS Scrap from various high sea sellers for utilization in the manufacture of MS ingots during the period from 01.04.2005 to 14.06.2006 under the 74 bills of entry.

4. It is also claimed by the appellant that the entire imported scrap along with locally purchased scrap was utilized as raw material in the manufacture of ingots and the same has been accounted for properly. The petitioner/ appellant has also availed of benefits of concessional rate of duty extended under customs notification No.21 of 2002 dated 01.03.2002. As per the conditions in the said notification, the petitioner/ appellant has also obtained End-use certificates from the Inspectors of the Central Excise Department and the same were produced before the Authorities concerned. They would claim that out of the 74 bills of entry under which the scrap was imported, for the scrap imported under 64 bills of entry, the appellant had been issued End use certificates and for the remaining 10 End use

certificates were not obtained. Therefore, for the remaining 10 bills of entry, the petitioner/ appellant had paid the differential duty.

5. Upon receipt of the 2nd show cause notice demanding CENVAT credit to the tune of Rs.1,43,43,413/-, the petitioner/ appellant filed an application before the Settlement Commission admitting the duty liability of Rs.22,04,747/- along with interest of Rs.4,82,359/-, the Settlement Commission had entertained the application by an order dated 20.01.2012. The 2nd respondent contended before the Commission that the end-use certificates issued by the Officers were not based on physical verification and therefore the validity of end-use certificates were called in question before the settlement Commission.

6. The petitioner/ appellant filed a rejoinder contending that the end-use certificates were issued after proper verification and having issued the end-use certificates the Department cannot go back and contend that the end-use certificates were not valid. However, Settlement Commission by an order dated 09.10.2012 concluded that the petitioner has not made a true and complete disclosure of the facts and upon such conclusion, the Settlement Commission sent back the case to the jurisdictional Commissioner for disposal in accordance with law. The Settlement Commission also observed that the appellant has not cooperated with the Settlement Commission for arriving at a fair settlement of the entire dispute. It is against the order of the Settlement Commission dated 09.10.2012, the petitioner/ appellant had filed a Writ Petition in W.P.No.30162 of 2012. Subsequently, it appears that, the 2nd respondent commenced the adjudication proceedings and by an order dated 15.04.2014, confirmed the proposal in the show cause notice dated 27.10.2009 claiming CENVAT credit to the tune of Rs.1,43,43,413/-. As against the said order the petitioner had filed W.P.No.15706 of 2014.

7. Both the Writ Petitions were taken up together by the learned Single Judge and the learned Single Judge, by a common order dated 26.11.2014 while dismissing the Writ Petition in W.P.No.30162 of 2012 allowed the Writ Petition in W.P.No.15706 of 2014 and remitted the matter to the Commissioner of Central Excise with a direction to the Commissioner to afford an opportunity of personal hearing and pass orders afresh after considering all the materials placed by the petitioner. Aggrieved by the order dismissing the Writ Petition in W.P.No.30162 of 2012, the petitioner has come forward with this intra-Court appeal.

8. We have heard Mr.K.Jayachandran, learned counsel for M/s.Senthil Nathan appearing for the appellant and Mr.V.Sundareshwaran, learned Senior Standing Counsel for the Department.

9. Mr.K.Jayachandran, learned counsel appearing for the appellant would vehemently contend that the end-use certificates with reference to the 64 bills of entry were issued by the competent Officer of the Department, therefore, the Department cannot contend that the end-use certificates are invalid. According to him, once the end-use certificates have been issued by the Department, the Department cannot project a case as if the said certificates were issued without proper verification.

10. It is also the contention of Mr.K.Jayachandran, learned counsel appearing for the appellant that the conclusion of the Settlement Commission that the appellant had not made a full and true disclosure before the Settlement Commission, he would point out that the petitioner/ appellant had admitted the liability regarding the duty of Rs.22,04,747/- and interest amounting to Rs.4,82,359/-. He would also point out that the Settlement Commission has solely relied upon the reports and comments of the Department without adverting to the reply as well as the original settlement proposals made by the appellant/ petitioner. He would also contend that in the absence of any proof, the Settlement Commission ought not to have accepted the claim of the Department that imported raw material was substituted with local purchase. He would also fault the Department for ignoring statutory documents and the verification done by the Regional Transport Officer. Therefore, according to the learned counsel, the Settlement Commission was not right in rejecting the settlement and remitting the matter to the jurisdictional Commissioner to be dealt with in accordance with law.

11. Per contra Mr.V.Sundareshwaran, learned Senior Standing Counsel appearing for the Department would raise a preliminary objection regarding the maintainability of the Writ Petition against the order passed by the Settlement Commission. He would submit that once the Settlement Commission had rendered a finding that the petitioner/ appellant has not made a full and true disclosure and on that ground rejected the application and directed adjudication by the concerned jurisdiction Assessing Officer, this Court cannot under Article 226 interfere with the said order of the Settlement Commission. The learned Senior Standing Counsel would also rely upon the judgment of the Hon'ble Supreme Court in the Commissioner of Income Tax, Jalpaiguri Vs. Om Prakash Mittal reported in (2005) 184 ELT 3 and Union of India and others Vs.Ind-Swift Laboratories Ltd., reported in (2011) 40 VST 1.

12. Arguing further, on the merits, Mr.V.Sundareshwaran, would submit that the import scrap registers seized from the factory premises of the appellant under magazars on 14.06.2006 disclosed the registration numbers of the vehicles under which the imported consignments were said to have been transported from the Port to the factory of the appellant. On verification of these vehicle numbers with the records maintained by the Transport Authorities, it was found that there were several discrepancies and certain vehicle numbers were inconsistent and also had variance. On clarification with the Regional Transport Authority, the Department discovered that the vehicle numbers shown to be that of the vehicles used for transporting MS Scrap from the port to the factory by the petitioner/ appellant were actually allotted to various two wheelers, cars and tankers which are incapable of transporting such goods. It is also the contention of Mr.V.Sundareshwaran that the Department had, as of fact, found diversion of the imported scrap by the appellant.

13. The learned counsel also refers to the findings of the Settlement Commission and submitted that the Settlement Commission has noted the nature of fraudulent activities indulged into by the appellant to avoid payment of duty and also had recorded the finding that the appellant had not made a true and full disclosure of the facts and thus the appellant is not entitled to move the process of Settlement Commission for settlement of the dispute.

14. We have considered the rival submissions. As rightly pointed out by Mr.V.Sundareshwaran, learned Senior Standing Counsel in order to invoke the process of settlement, the appellant/ petitioner must show utmost good faith and make a true and complete disclosure of all the facts and it is only with the object of establishing a procedure for settlement of cases arising under the Customs Act and Central Excise Act, the Settlement Commission was constituted conferring on it certain exclusive powers including grant of immunity from prosecution etc.

15. The learned Senior Standing Counsel would further argue that once it is found that there is an attempt to misuse the process of settlement, the Settlement Commission was absolutely justified in refusing to entertain the settlement proceedings and directing the matter to be referred back to the jurisdictional commissioner for further proceedings in accordance with law. The very fact that the scheme for settlement itself provides that the Settlement Commission need not entertain all settlement applications but the same has to be done after a scrutiny would show that if the assessee wants to make use of the procedure of the Settlement Commission, the

assessee must act with utmost good faith and even an element of bad faith would dis-entitle the assessee from invoking the process of settlement which also would pave the way for the assessee to avoid penal consequences and criminal prosecution.

16. Refuting the contentions of Mr.K.Jayachandran that the appellant had made a true and full disclosure since it has paid the additional duty accepted by the Assessee Mr.V.Sundareshwaran would submit that by itself would not amount to a true and complete disclosure of facts. Pointing out that such disclosure or payment of duty should have been done in good faith, the learned counsel would contend that a mere payment of additional duty cannot be construed as a full and true disclosure of the duty liability. The various allegations made against the petitioner including diversion of the imported scrap which was imported on a lesser customs duty with an undertaking that it will be used in manufacture of ingots by the petitioner/ appellant itself, the mismatch in the registration numbers of the vehicles would to a certain extent have a bearing on the decision as to whether the settlement commission was right in rejecting the proposal for settlement and directing the matter to be gone into by the jurisdictional Commissioner strictly in accordance with law.

17. Even though Mr.K.Jayachandran, learned counsel appearing for the petitioner would strenuously contend that the mismatch in the registration numbers of the vehicles is only of a very meager percentage compared to the total number of vehicles used for transport of scrap from port to the factory of the petitioner/ appellant the same cannot be made the basis for rejecting the validity of the end-use certificates. We are unable to accept the said submission since what we are concerned with is the entitlement of the appellant to invoke the process of settlement, thereby become eligible for certain benefits like waiver of penal duty, penal interest as well as criminal prosecution.

18. We have gone through the order of the Settlement Commission. We find that the Settlement Commission has considered the entire facts and has come to the conclusion that the petitioner/ appellant has not made a true and full disclosure in order to enable the petitioner/ appellant to invoke the process of settlement. Mr.V.Sundareshwaran would also draw our attention to the judgment of the Hon'ble Supreme Court in Shriyans Prasad Jain Vs. ITO reported in (1993) 204 ITR 616, wherein the Hon'ble Supreme Court was pleased to point out that the High Courts sitting under Article 226 cannot go into the question of facts recorded by the Settlement Commission. A Division Bench of this Court in S.V.Shankar Vs. Settlement Commission (Income Tax Wealth Tax) and another reported in

(2007) 292 ITR 633 had followed the judgment of the Hon'ble Supreme Court in Shriyans Prasad Jain Vs. ITO referred to supra. Therefore, the jurisdiction of the Writ Court is restricted to testing the validity of the order of the Settlement Commission on the touch stone of the procedure adopted by the Settlement Commission and the Writ Court cannot go into the question of fact and consider whether the Settlement Commission was right on facts or not.

19. On the whole, we find that the Settlement Commission had after giving opportunity to the appellant/ petitioner reached the conclusion that the appellant/ petitioner is not entitled to the benefits of the process of settlement and the learned Single Judge has rightly held that the appellant had not made out a case for interference with the conclusions of the Settlement Commission inasmuch as there was no violation of principles of natural justice, on the part of the Settlement Commission. We are therefore of the view that the dismissal of the Writ Petition in W.P.No.30162 of 2012 by the learned Single Judge does not call for any interference and accordingly the intra-Court appeal will stand dismissed. However, in the circumstances there will be no order as to costs.

W.P.No.15109 of 2018:-

20. This Writ Petition is posted along with the intra-Court appeal in W.A.No.358 of 2015 before us, pursuant to the order passed by the Hon'ble Chief Justice on the basis of the request made by the Writ Petitioner.

The challenge in the Writ Petition is to the order of the Commissioner of Central Excise, Salem dated 27.03.2018, in and by which, the Commissioner had taken up the process of re-assessment pursuant to the orders of the Settlement Commission dated 09.10.2012, whereby, the Settlement Commission had dis-allowed the settlement process and directed the matter to be remitted to the concerned jurisdictional commissioner for assessment in accordance with law. Admittedly, the order dated 27.03.2018 is an appealable order. An appeal will lie to the Central Excise and Service Tax Appellate Tribunal as against the order passed by the Commissioner. The petitioner had citing the pendency of Writ Appeal in W.A.No.358 of 2015, in which the order of the Settlement Commission dated 09.10.2012 was in question had chosen to approach this Court bye-passing the Appellate Tribunal. The said appeal in W.A.No.358 of 2015 has been dismissed by us, in view of the same the order passed by the Commissioner Central Excise, Salem does not suffer from any jurisdictional irregularities.

21. Therefore, we are of the view that the Writ Petition cannot be entertained in view of the fact that there is an efficacious alternative remedy available in the form of an appeal to the CESTAT. The Writ Petition is therefore dismissed on the ground of availability of alternative remedy and in view of the fact that the Writ Petition had been pending, we permit the Writ Petitioner to file an appeal within 30 days from the date of receipt of a copy of this order before the CESTAT. On such filing, we direct the CESTAT to entertain the appeal without going into the question of limitation.

22. The Writ Petition is disposed of with the above directions. The Registry is directed to return the original impugned order dated 27.03.2018 to the learned counsel for the petitioner to enable him to file an appeal against the said order. Consequently, the connected Miscellaneous Petitions are also closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar.

To

1.The Customs and Central Excise Settlement Commission,
Additional Bench, Narmada Block, Custom House,
II Floor, No.60, Rajaji Salai,
Chennai - 600 001.

2.The Commissioner of Central Excise,
Salem Central Excise Commissionerate,
Foulks Compound, Salem.

3.The Additional Director General,
Directorate General of Central Excise Intelligence,
Chennai Zonal Unit, Rajaji Bhavan,
Besant Nagar, Chennai - 600 090.

+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.52503
+1cc to Mr.Senthil Nathan, Advocate, S.R.No.52105

W.A.No.358 of 2015
and
W.P.No.15109 of 2018

RK(CO)
GSP(20/08/2018)