IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.09.2018
Pronounced on : 18.09.2018

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.7604 of 2008
and M.P.No.1 of 2008

M/s.SAS Engineering Pvt. Ltd.,
Represented by its Managing Director,
Chandrakumar Oliver,
No.5/1025, Old Mahabalipuram Road,
Kandanchavadi, Perungudi Post,
Chennai 600 096. .. Petitioner

.Vs.

1. The Commissioner of Central Excise
   Chennai IV Commissionerate, MHU Complex,
   692, Annasalai, Nandanam,
   Chennai 600 035.

2. The Customs & Excise Settlement Commission,
   (Additional Bench), II Floor, Narmada Block,
   Customs House, 60, Rajaji Salai,
   Chennai 600 001.

3. The Directorate General of Central Excise Intelligence
   South Zonal Unit, C-3, 'C' Wing,
   " Rajaji Bhavan", Besant Nagar,
   Chennai 600 090. .. Respondents

Prayer : Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorarified Mandamus calling for the records comprised in the impugned final order No.11/2018 dated 28.02.2008 on the file of the second respondent, quash the same and consequently direct the second respondent to hear the matter afresh on merits and pass suitable final orders on the application filed by the petitioner company in accordance with law.

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| For petitioner | : | M/s.Cynduja Krishnan for M/s.G.Rm.Palaniappan |
| For Respondents | : | M/s.T.L.Thirumalaisamy |

JUDGMENT

The petitioner is aggrieved by Final Order No.11/2008 dated 28.02.2008 passed by the second respondent and to quash the same and to direct the second respondent to pass a speaking order on merits after hearing the petitioner afresh.

2. The petitioner was issued a Show Cause Notice dated 21.9.2005 by the third respondent wherein a sum of Rs.1,21,38,364/-(Rupees One Crore Twenty One Lakhs Thirty Eight Thousand Three Hundred and Sixty Four Only) was demanded as duty evaded paid by the Petitioner during the period 2000-2003. The notice also sought to deny SSI exemption for the period 2003-2004. In the SCN the department alleged clandestine removal of goods.

3. The Petitioner was also called upon to show cause as to why an amount of Rs.22 lakhs already paid by the petitioner should not be adjusted towards the duty proposed to be demanded. The notice also called upon the Managing Director of the petitioner to show cause why penalty under Central Excise Rules, 2001 read with Section 38A of the Central Excise Act, 1944 (CEA, 1944) and Rule 26 of the Central Excise Rules, 2002 should not be imposed.

4. The Petitioner approached the 2nd respondent to settle the disputes under Section 32 E of the Central Excise Act, 1944.

5. The 2nd respondent directed the petitioner to pay the admitted amount of duty within a period of 30 days from the date of receipt of the order.

6. Thereafter, a joint sittings was held on 14.12.2006 and on 26.12.2006 as per the directions of the 2nd respondent with the petitioner's Managing Director, its Chartered Accountant and with the Superintendent of Central Excise for the 1st respondent. A copy of the deliberation is part of the record before the 2nd Respondent Settlement Commission.

7. On 17.4.2007 the 2nd respondent admitted the case under Section 32F of the CEA, 1944 and recorded payment of the admitted amount.

8. While admitting the case, the 2nd respondent also observed that in view of irreconcilable difference of opinion between the views of the petitioner and the department (revenue), the case was referred to the case to the Commissioner (Investigation) to give a report to the Bench.

9. The 2nd respondent also observed that it shall have exclusive jurisdiction in terms of Section 32 I (2) of the CEA, 1944 over the case to perform the functions of any Central Excise Officer so far as the case is concerned.

10. On 1.2.2008, the Commissioner (Investigation) gave detailed report consisting of 32 pages pursuant to the orders of the Second Respondent.

11. The 2nd respondent after the receipt of the report of the Commissioner(Investigation) passed the impugned order without discussing the findings contained in the said report. The impugned order refers to the report given by the Commissioner(Investigation)in para 7 which reads as under:-

> "The case was once again heard on 05.04.2007. The Revenue and Applicant stuck to their stand. In view of the irreconcible positions taken by the rival parties to the dispute, it was decided by the Bench, that the case would be admitted and the matter referred to Commissioner (Investigation) to go into the issue and submit his report to the Bench. The decision was pronounced at the time of hearing itself. In pursuance of the same, investigation was taken up and a report was submitted by the Commissioner Investigation stating that the applicant's submissions may be given appropriate consideration."

12. However, there is no discussion regarding the report of the Commissioner (Investigation). Under these circumstances, the petitioner has filed the present writ petition.

13. Heard M/s. Cynduja Krishnan for G.R.N.Palaniappan, learned counsel for the petitioner and Mr.Thirumalaisamy learned counsel for the respondent.

14. The learned counsel for the petitioner has reiterated the grounds in the affidavit filed in support of the above petition while the learned counsel for the respondent has referred to the detailed counter filed on behalf of the respondent.

15. According to the learned counsel for the petitioner at the time of hearing before the 2nd respondent, elaborate submissions were made by the petitioner drawing reference to the Report of the Commissioner(Investigation) However, the 2nd second respondent has completely ignored the report of the Commissioner(investigation). Therefore, the petitioner prayed that the case be referred back to the 2nd Respondent for passing a fresh order on merits after considering the report of the Commissioner (Investigation).

16. The learned counsel for the respondent mentioned that the scope of review against an order of the settlement commission is very limited and therefore prayed for dismissal of the present writ petition.

17. I have gone to the records of the case. I have also considered the arguments advanced on either side. The counter filed by the deals with the merits of the case without dealing with the reason as to why the report of the Commissioner (Investigation) cannot be relied upon.

18. Scope for interference against the orders passed by the second respondent is very limited particularly under Art.226 of the Constitution of India. An order of a Settlement Commission can be interfered only if it is passed contrary to the provisions of the Act.

19. In Union of India v. Ind-Swift Laboratories Ltd. 2011 (265) E.L.T. 3 (S.C.) it was held as follows:-

> "An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act. So far findings of the fact recorded by Commission or question of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court."

20. Section 32-F deals with Procedure on Receipt of an Application under Section 32E by a Settlement Commission. Under Sub-clause (5) of the the Settlement Commission is expected to pass such orders as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application. Sub Clause (5) to Section 32F reads as under:-

> " (5)After giving an opportunity to the applicant and to the Principal Commissioner of Central Excise or Commissioner of Central Excise having jurisdiction to be heard, either in person or through 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 orders 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 report of the Principal Commissioner of Central Excise or Commissioner of Central Excise and Commissioner (Investigation) under sub-section (3) or sub-section (4)."

21.In Commissioner Of Income Tax, Jalpaiguri Versus Om Prakash Mittal2005 (184) E.L.T. 3 (S.C.), the Hon'ble Supreme Court while dealing with the Income Tax Settlement Commission held as follows:-

"The Commission's power of settlement has to be exercised in accordance with the provisions of the Act. Though the Commission has sufficient elbow room in assessing the income of the applicant and it cannot make any order with a term of settlement which would be in conflict with the mandatory provisions of the Act like in the quantum and payment of tax and the interest. The object of the legislature, in introducing Section 245C is to see that protracted proceedings before the authorities or in Courts are avoided by resorting to settlement of cases. In this process an assessee cannot expect any reduction in amounts statutorily payable under the Act".

22. The Court further held as follows:

"The foundation for settlement is an application which assessee can file at any stage of a case relating to him in such form and in such manner as is prescribed. The statutory mandate is that the application shall contain "full and true disclosure" of the income which has not been disclosed before the assessing officer, the manner in which such income has been derived. The fundamental requirement of the application under Section 245C is that full and true disclosure of the income has to be made, along with the manner in which such income was derived."

23. The court further observed as under:

" On receipt of the application, the Commission calls for report from the Commissioner and on the basis of the material contained in the report and having regard to the nature and circumstances of the case or complexity of the investigation involved therein, it can either reject the application or allow the application to be proceeded with as provided in Section 245 D(1)."

24. The report of the Principal Commissioner of Central Excise or Commissioner of Central Excise and Commissioner (Investigation) under sub-section (3) or sub-section (4) is one of the document to be relied by the 2nd respondent while passing order under Section 32 F(S) of the CEA, 1944.

25. Though Section 32F if CEA, 1944 is not pari-material with Section 245 D of the Income Tax Act, 1961, nevertheless makes it clear that the order has to be passed after examination of the records and the report of the Principal Commissioner of Central Excise or 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).

26. The report of the Settlement Commission may have a bearing on the ultimate conclusion while passing an order by the 2nd Respondent .

27. In this case, the report of the Commissioner (Investigation) was referred in the impugned order. However, there is no discussion on the same while rejecting the application filed by the Petitioner. Thus, the order has been passed contrary to Section 32 F (s) of the CEA, 1944.

28. As there is no discussion in the impugned order regarding the report of the Commissioner (Investigation), it is liable to be set aside as having passed contrary to Section 32-F(5) of the CEA, 1944.

29. Accordingly, the writ petition is allowed and the impugned order passed by the 2nd respondent in No.11 /2008 dated 28.02.2008 is set aside and the case is remanded back to the 2nd Respondent for passing a fresh order on merits in accordance with law after considering the report of the Commissioner (Investigation) dated 1.02.2008 on the file of the 2nd respondent and after affording an opportunity of personal hearing to the Petitioner and the revenue within a period of eight weeks from the date of receipt of this order. No Cost.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar



kkd

To

1. The Commissioner of Central Excise
Chennai IV Commissionerate, MHU Complex,
692, Annasalai, Nandanam,
Chennai 600 035.

2. The Customs & Excise Settlement Commission,
   (Additional Bench), II Floor, Narmada Block,
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3. The Directorate General of Central Excise Intelligence
   South Zonal Unit, C-3, 'C' Wing,
   " Rajaji Bhavan", Besant Nagar,
   Chennai 600 090.

+1cc to Mr.Muthu Venkataraman, Advocate, S.R.No.64843
+1cc to Mr.T.L.Thirumalaisamy, Advocate, S.R.No.63032

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and M.P.No.1 of 2008

EV(CO)

rrs 09/10/2018