IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No: 7877 of 2016
DATE OF DECISION: 19.03.2018

M/s Asianlak Health Foods Ltd. …Petitioner

versus

Union of India and others …Respondents

CORAM:- HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN, JUDGE

Present: Mr. Sudhir Malhotra, Advocate for the petitioner.

Mr. Saurabh Goel, Advocate, for the respondents.

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S.J. VAZIFDAR, CHIEF JUSTICE:

The petitioner has challenged an order dated 23.12.2015 passed by the Customs and Central Excise Settlement Commission dismissing its application for settlement on the ground that it is not maintainable in view of section 32(O)(1)(i) of the Central Excise Act, 1944 (for short 'the 1944 Act').

2.(A) The petitioner manufacturers mineral and aerated water which fall under Chapter-22 of the Central Excise Tariff Act, 1985. The Commissioner Central Excise, Commissionerate, Ludhiana served a notice dated 28.04.2015 calling upon the petitioner to show cause why Central Excise duty amounting to about ₹1.35 crores should not be recovered; Central Excise duty amounting to ₹ 30 lacs already paid be not adjusted against the said duty; central excise duty amounting to ₹ 56,251/- be not recovered and an amount of ₹ 56,251/- already deposited be not appropriated against this duty; CENVAT credit of ₹ 57,000/- be not recovered and an amount of ₹ 57,290/- already debited be not appropriated and interest be not recovered from the petitioner. For the purpose of this petition, it is necessary to note that the petitioner was also called upon to show cause why penalty should not be imposed under section 11AC of the 1944 Act and rule 15 of the CENVAT Credit Rules, 2004. The petitioner by its letter dated 25.05.2015 informed the Commissioner that it had deposited duty of about ₹ 1.35 crores along with interest and penalty @ 15% under section 11 AC(d) of the 1944 Act and requested that the proceedings pursuant to the show cause notice be concluded as per the amended section 11AC(d) of the 1944 Act.

(B) The petitioner filed an application dated 11.07.2015 under section 32E for settlement of the case in respect of the said show cause notice dated 28.04.2015. The Customs and Central Excise Settlement Commission by the impugned order dated 23.12.2015 rejected the application holding that it had no jurisdiction to entertain the application as it was barred under section 32(O)(1)(i) of the 1944 Act as a previous settlement application dated 15.04.2013 was disposed of by an order dated 31.01.2014 which besides settling of duty at about ₹ 1.82 crores imposed a penalty of ₹ 50,000/-. Sections 32 (E)(F) & (O) of the Central Excise Act, 1944 read as under:-

“Section 32E. Application for settlement of cases. -

(1) An assessee may, in respect of a case relating to him, make an application, before adjudication, to the Settlement Commission to have the case settled, in such form and in such manner as may be prescribed and containing a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction, the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by him and such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification, under-valuation, inapplicability of exemption notification or Cenvat credit or otherwise and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless, -

(a) the applicant has filed returns showing production, clearance and Central excise duty paid in the prescribed manner;

(b) a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant;

(c) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and

(d) the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AA :

Provided further that the Settlement Commission, if it is satisfied that the circumstances exist for not filing the returns referred to in clause (a) of the 1st proviso to sub-section (1), may after recording the reasons therefor, allow the application to may such application:

Provided also that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending with the Appellate Tribunal or any court:

Provided also that no application under this sub-section shall be made for the interpretation of the classification of excisable goods under the Central Excise Tariff Act, 1985 (5 of 1986).

[(1A)****]

[(2)****]

(3) Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.

(4) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

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 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 Principal Commissioner of Central Excise or 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 Principal Commissioner of Central Excise or 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 Principal Commissioner of Central Excise or Commissioner of Central Excise having jurisdiction to be heard, either in person or through a representative duly authorized 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 Principal Commissioner of Central Excise or the Commissioner of Central Excise and Commissioner (Investigation) under sub-section (3) or sub-section (4).

(6) An order under sub-section (5) shall not be passed in respect of an application filed [****] after nine months from the last day of the month in which the application was made, failing which the settlement proceedings shall abate, and the adjudicating authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

Provided that the period specified under this sub- section may, for reasons to be recorded in writing, be extended by the Settlement Commission for a further period not exceeding three months.

(7) Subject to the provisions of section 32A, the materials brought on record before the Settlement Commission shall be considered by the Members of the concerned Bench before passing any order under sub-section (5) and, in relation to the passing of such order, the provisions of section 32D shall apply.

(8) The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective and in case of rejection contain the reasons therefore and it shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts :

Provided that the amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant under section 32E.

(9) Where any duty, interest, fine and penalty payable in pursuance of an order under sub-section (5) is not paid by the assessee within thirty days of receipt of a copy of the order by him, the amount which remains unpaid, shall be recovered along with interest due thereon, as the sums due to the Central Government by the Central Excise Officer having jurisdiction over the assessee in accordance with the provisions of section 11.

(10) Where a settlement becomes void as provided under sub-section (8), the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the Central Excise Officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the date of the receipt of communication that the settlement became void.

Section 32O. Bar on subsequent application for settlement in certain cases. -

(1) Where-

(i) an order of settlement [xxxx] 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

Explanation - In this clause, the concealment of particulars of duty liability relates to any such concealment made from the Central Excise Officer.

(ii) after the passing of an order of settlement [xxxx] 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) Omitted."

3. This petition requires a consideration of the explanation to section 32(O)(1)(i) of the 1944 Act.

4. It is if not admitted clearly established that prior to the settlement application in question, the petitioner had filed a settlement application dated 15.04.2013 which was

disposed of by an order of the Customs and Central Excise Settlement Commission dated 31.01.2014 under section 32F(5) of the 1944 Act. This order inter-alia held that the officer had recovered parallel invoices and incriminating documents showing unrecorded clearances for excisable goods without payment of duty; that two show cause notices were issued alleging that the petitioner was engaged in conscious and wilful suppression of production of its excisable goods for which it floated two trading firms and the raw material required for such clandestine sales was procured through one of them and that the notices required the petitioner to show cause why goods of the value of about ₹ 19 lacs be not confiscated under Rule 25 of the Central Excise Rules, 2002 and penalty under Rule 26 of the Rules be not imposed upon the petitioner. The order also records that the petitioner had accepted the allegation of clandestine clearance of goods and disputed only the quantum thereof and that the petitioner had accepted the duty liability of ₹ 1.50 crores out of the total demand of ₹ 2.02 crores and had also accepted interest of about ₹ 30.12 lacs on the admitted liability.

Mr. Sudhir Malhotra, the learned counsel appearing on behalf of the petitioner relied upon the observations in the order that the petitioner had made true disclosure of its duty liability and cooperated in the proceedings before the Settlement Commission. The operative part of the order of the Settlement Commission recorded that the Settlement Commission settled the case on the terms and conditions mentioned therein namely duty was settled at about ₹ 1.82 crores. The revenue was granted liberty to recalculate the interest and a fine of ₹ 50,000/- in lieu of confiscation was imposed. The operative part of the order insofar as it is relevant for this case reads as under:-

> "In view of the facts and circumstances of the case, the Bench hereby settles the case on the following terms and conditions:-
>
> Penalty:- The Bench imposes a penalty of ₹ 50,000/- (fifty thousand only) on the applicant firm under the provisions invoked in the SCN. The Bench imposes a penalty of ₹ 25,000/- (Rs. Twenty five thousand) on each of the co-applicants and grants them immunity from penalty in excess of the above amount.
>
> Prosecution: Subject to payment of above fine and penalties, the Bench grants immunity to the applicant and co-applicants from prosecution under the Act and the Rules framed thereunder as applicable in so far as this case is concerned. (emphasis supplied)."

5. If the explanation to section 32(O)(1)(i) applies, it is clear that the application for settlement dated 11.07.2015 which is the subject matter of the present petition is not maintainable in view of the order of settlement dated 31.01.2014 having provided for the imposition of penalty on the petitioner in respect of the settlement application dated 15.04.2013. In other words, the order of the Settlement Commission dated 31.01.2014 having provided for the imposition of a penalty on the petitioner on its application dated 13.05.2013 on the ground of concealment of particulars of its duty liability, the petitioner is not entitled to apply for settlement under section 32E in relation to any other matter which would obviously include the settlement application dated

11.07.2015 which was disposed of by the impugned order dated 23.12.2015. This is clear from the plain language of section 32(O). The explanation to section 32(O)(1)(i) expressly states that the concealment of particulars of duty liability relates to any such concealment made from the Central Excise Officer.

Thus, if in the earlier proceedings, the order of the Settlement Commission provides for imposition of penalty on the ground of concealment of particulars of his duty liability from the Central Excise Officer, it is irrelevant if there was no such concealment made from the Customs and Central Excise Settlement Commission.

6. Mr. Malhotra, however, submitted that the explanation does not apply to the present case i.e. to the petitioner's settlement application dated 11.07.2015. The submission is based on the fact that the explanation to section 32(O)(1)(i) was inserted with effect from 06.08.2014 whereas the earlier order on the basis of which the present settlement application is dismissed was passed prior thereto on 31.01.2014. He submitted that the explanation does not have retrospective effect.

7. It is not necessary to consider whether it can be said that the explanation has retrospective or retroactive effect. The Explanation to section 32(O)(1)(i) was proposed to be inserted by Clause 94 of Bill No. 35 of 2014- a Bill to give effect to the financial proposals of the Central Government for the financial year 2014-15. The Statement of Objects and

Reasons with respect to clause 94 of the Finance Bill reads as under:-

> "**STATEMENT OF OBJECTS AND REASONS:-**
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> The object of the Bill is to give effect to the financial proposals of the Central Government for the financial year 2014-15. The notes on clauses explain the various provisions contained in the Bill.
>
> Clause 94 of the Bill seeks to amend clause (i) of sub section (1) of section 32-O of the Central Excise Act so as to insert an Explanation therein to clarify that the concealment of particulars of duty liability relates to any such concealment made from the Central Excise Officer, to avoid confusion as to whether the concealment is from Central Excise Officer or Settlement Commission and making the provision clear." (emphasis supplied).

8. The Explanation is, therefore, clarificatory. This is clear from the Statement of Objects and Reasons. Being clarificatory, it has retrospective effect. In *Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited, 2015(1) Supreme Court Cases, 1,* the Supreme Court held:-

> "**32.** Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh [*Principles of Statutory Interpretation*, (13th Edn., LexisNexis Butterworths Wadhwa, Nagpur, 2012)] in the following manner:
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> "*Declaratory statutes*
>
> The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES [W.F. Craies, *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [**Ed.**: The reference is to *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, para 29] : 'For modern purposes a declaratory Act may be defined as an Act to

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> remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."
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> The above summing up is factually based on the judgments of this Court as well as English decisions. (emphasis supplied)."

9. Further even apart from the Statement of Objections and Reasons, it is clear that the explanation to Section 32(O)(1)(i) is clarificatory. Section 32(O)(1)(i) does not exclude from its ambit cases where penalty is imposed on the person on the ground of concealment of particulars of his duty liability before the Central Excise Officer. The plain language of the section does not warrant an interpretation to the effect that concealment of particulars only before the Settlement Commission and not before the Central Excise Officer is contemplated. The legislative intent is quite clearly to bar a

party from making an application under section 32E of the 1944 Act for settlement if he has concealed particulars of his duty liability. It is difficult to appreciate why concealment of particulars before the Central Excise Officer ought to be treated more lightly than the concealment before the Settlement Commission.

10. In the circumstances, the Explanation is clarificatory and applies retrospectively. Even absent the Explanation we would interpret Section 32(O)(1)(i) to include the orders of settlement which provides for imposition of penalty on the ground of concealment of particulars of duty liability from the Central Excise Officer. We do not express any opinion whether section 32(O)(1)(i) also includes concealment of particulars of duty liability from the Settlement Commission.

11. Accordingly, the petition is dismissed.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(AVNEESH JHINGAN)
JUDGE

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Whether speaking/reasoned √ Yes/No
Whether Reportable: √ Yes/No