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IN THE HIGH COURT OF DELHI AT NEW DELHI

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WP (C) 7277/2015

Reserved on:06th September, 2018.

Date of decision:20th December, 2018.

***SDL AUTO PVT. LTD THROUGH ITS DIRECTOR SHRI
H.S. BANGA & ANR. Petitioner***

Through Mr. A.K. Prasad and
Ms. Priyanka Goel, Advocates.

versus

***COMMISSIONER OF CENTRAL EXCISE, FARIDABAD,
DELHI-IV & ANR. Respondents***

Through Mr. Sanjeev Narula,
Sr. Standing Counsel with Mr. Abhishek
Ghai, Mr. Rajat Gava and Mr. Shravan
Kumar Shukla, Advocates for CBEC.
Mr. G. Tushar Rao, Advocate for UOI.

WP (C) 8939/2015

ICEBERG AQUA PVT LTD & ORS. Petitioner

Through Mr. S.N. Thyagarajan,
Advocate.

versus

UNION OF INDIA & ORS. Respondents

Through Mr. Harpreet Singh,
Sr. Standing Counsel with Mr. Nitya
Sharma, Advocate for Central Excise.

WP(C) 10013/2016

K M G ROLLING PVT. LTD. & ANR. Petitioners

Through Mr. Shubhankar Jha and
Mr. Akhil Krishan Maggo, Advocates.

versus

**COMMISSIONER (INVESTIGATION) CUSTOMS,
CENTRAL EXCISE AND SERVICE TAX & ANR.**

..... Respondents

Through Mr. Harpreet Singh, Sr. Standing
Counsel with Mr. Nitya Sharma, Advocate
for Central Excise.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

This common order and judgement would dispose of the aforesaid captioned writ petitions impugning orders passed by the Customs and Central Excise Settlement Commissioner ('Settlement Commission' for short) under Section 32-F(5) of the Central Excise Act, 1944 ('Act' for short).

2. The facts in the three writ petitions are different and have been independently noticed and dealt with below. The reason we are disposing of these writ petitions by a common order and judgement is the commonality and similarity in the legal issues involved.

3. Primary common legal issue raised is; whether the Settlement Commission can after holding that the applicant has failed to make full and disclosure of his duty liability and the manner in which such liability was derived, act as an adjudicating authority to decide the show cause notice issued by the Central excise Officer and determine the demand raised?

4. The prayer of the writ petitioners in the W.P (C) No. 10013/2016, ***K.M.G. Rolling Private Limited and Another versus***

Commissioner (Investigation) Customs, Central Excise and Service Tax and Another and the W.P (C) No. 8939/2015, ***Iceberg Aqua Private Limited and Others versus Union of India and Others***, is that the order of the Settlement Commission should be set aside and quashed and the matter may be remitted to the adjudicating authority to pass an appropriate order in accordance with law. The prayer made by the petitioner in W.P (C) No. 7277/2015, ***SDL Auto Private Limited Through its Director Shri H.S. Banga and Another versus Commissioner (Investigation) Customs, Central Excise and Service Tax and Another*** is that the matter should be remitted to the Settlement Commission for fresh adjudication.

5. Before we examine the factual matrix, it would be appropriate and proper to examine the statutory provisions on the scope and ambit of jurisdiction of the Settlement Commission. Provisions for settlement under the Act were introduced w.e.f. 1st August, 1998, almost two decades after provisions for settlement of income tax cases were introduced on 1st April, 1976 by way of Chapter-XIX-A in the Income Tax Act, 1961, pursuant to partial implementation of the Wanchoo Committee Report. Settlement in tax matters is a compromise measure as the tax evader making ‘full and true’ disclosure and paying taxes seeks forgiveness to avoid rigors of prosecution and penalty for himself, and the State benefits by accelerated recovery of taxes due without protracted litigation and cumbersome recovery proceedings. This act of atonement by the repentant assessee requires satisfaction of twin statutory requirements, which are a check on the possibility of misuse by descriptors.

Applicant must disclose 'full and true' hidden duty liability and the manner in which such liability was derived.

6. In ***Commissioner of Income Tax (Central) versus B.N. Bhattacharjee and Another***, (1979) 4 SCC 121, referring to essential requirement for seeking settlement under the Income Tax Act, the Supreme Court had emphasised that an assessee to take benefit of the benevolent provisions must make 'full and true' disclosure of the undisclosed income and also the manner in which the said income was earned. Mandate of 'full and true' disclosure was necessary to ensure that tax evaders to escape perils of prosecution and penalty must admit one's sins and tell the truth to come out clean. Half way declarations and partial deception were unacceptable for the disclosure of earlier undisclosed duty liability must be true and full. Solemn command of the twin conditions requiring 'full and true' disclosure and the manner in which undisclosed income had been derived was again highlighted by the Supreme Court in ***Ajmera Housing Corporation and Another versus Commissioner of Income Tax***, (2010) 8 SCC 739, as all-important pre-requisite for a valid application under Section 245-C(1) of the Income Tax Act. Therefore, unless the Settlement Commission records its satisfaction on the jurisdictional pre-conditions, they would not have jurisdiction to pass an order recording settlement. In the context of the Income Tax Act, it was held that the question of 'full and true' disclosure and the manner in which the undisclosed income was derived, can be examined at three different stages, namely, sub-Section (1), sub-Section (3) and sub-Section (4) of Section 245-D of the Income Tax Act. Applicant assessee cannot be permitted to make multiple

disclosures or take benefit of the provisions for settlement if he has failed to comply with the full statutory mandate. Even if the Settlement Commission decides to proceed with the application, it is not denuded of the power to examine the said question at the subsequent stage under sub-Section (3) and sub-Section (4) of Section 245D of the Income Tax Act. In the case of *Ajmera Housing Corporation* (supra), it was observed:-

“35. It is plain from the language of sub-section (4) of Section 245-D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the Commissioner under sub-section (1) or sub-section (3) of the said section. A “full and true” disclosure of income, which had not been previously disclosed by the assessee, being a precondition for a valid application under Section 245-C(1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against Item 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, Section 245-C(3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said section is instructive inasmuch as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly which he cannot otherwise achieve directly and in the process rendering the provision of sub-section (3) of Section 245-C of the Act otiose and meaningless. In our

opinion, the scheme of said Chapter is clear and admits no ambiguity.

36. It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. (See *Cape Brandy Syndicate v. IRC* [(1921) 1 KB 64] and *Federation of A.P. Chambers of Commerce & Industry v. State of A.P.* [(2000) 6 SCC 550]) In interpreting a taxing statute, the court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. (Also see *CST v. Modi Sugar Mills Ltd.* [AIR 1961 SC 1047 : (1961) 2 SCR 189])

37. As aforesaid, in the scheme of Chapter XIX-A, there is no stipulation for revision of an application filed under Section 245-C(1) of the Act and thus the natural corollary is that determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said section in the prescribed form.”

7. The Gujarat High Court has examined and dealt with the requirement of ‘full and true’ disclosure and manner in which the undisclosed income was derived, in ***Vishnubhai Mafatlal Patel versus Assistant Commissioner of Income Tax***, Special Civil Application Nos. 12060, 12061, 12063 of 2012 decided on 4th December, 2012. Relevant paragraph of the said judgement reads:-

"12. The twin requirements for an assessee making an application for settlement under section 245C(1) of the Act, of containing full and true disclosure of income which has not been disclosed before the

Assessing Officer and the manner in which such income has been derived, are thus of considerable importance and would be open for the Settlement Commission to examine the fulfilment thereof at several stages of the settlement proceedings. If therefore, while at the threshold, considering the question whether such application should be allowed to be proceeded with or be rejected, the Commission examined such questions on the basis of disclosure made by the applicants and the supporting material produced along with the applications, we do not see that the Commission committed any legal error. As already noted, it was well within the jurisdiction of the Commission at the stage of sub-section(1) of section 245D of the Act to examine whether application for settlement fulfills the statutory requirements contained in sub-section(1) of section 245C of the Act. At this stage we may refer to the decision of the Supreme Court in case of *Ajmera Housing Corporation and another(supra)*. It was a case in which the assessee had made certain disclosures in the initial application under section 245C(1) of the Act. Such disclosures were however, revised and additional income was disclosed in the revised annexures. The Apex Court held that the assessee had no right to revise an application under section 245C(1) of the Act and further that such revised annexure making further disclosure of undisclosed income alone was sufficient to establish that the initial application made by the assessee could not be entertained as it did not contain true and full disclosure of the undisclosed income and the manner in which such income had been derived".

8. We would now turn to the provisions of the settlement under the Act and begin by referring to Sections 32E, 32F, 32I, 32K, 32L, 32M, 32N and 32O of the Act:-

" Section 32E. Application for settlement of cases.

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(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, undervaluation, 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 thereof, allow the applicant to make 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 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 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).

(5A) The Settlement Commission may, at any time within three months from the date of passing of the order under sub-section (5), amend such order to rectify any error apparent on the face of record, either suo motu or when such error is brought to its notice by the jurisdictional Principal Commissioner of Central Excise or Commissioner of Central Excise or the applicant:

Provided that no amendment which has the effect of enhancing the liability of the applicant shall be made under this sub-section, unless the Settlement Commission has given notice of such intention to the applicant and the jurisdictional Principal Commissioner of Central Excise or Commissioner of Central Excise as the case may be, and has given them a reasonable opportunity of being heard.

(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 32 I. Powers and procedure of Settlement Commissions. -

(1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in a Central Excise Officer under this Act or the rules made thereunder.

(2) Where an application made under section 32E has been allowed to be proceeded with under section 32F, the Settlement Commission shall, until an order is passed under sub-section [(5)] of section 32F, have, subject to the provisions of sub-section [(4)] of that section, exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise Officer, under this Act in relation to the case.

(3) In the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission.

(4) The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

Section 32K. Power of Settlement Commission to grant immunity from prosecution and penalty. -

(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 32E has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act [and also either wholly or in part from the imposition of any penalty and fine] under this Act, with respect to the case covered by the settlement :

Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section 32E.

[xxx]

(2) An immunity granted to a person under sub-section (1) shall stand withdrawn if such person fails to pay any sum specified in the order of the settlement passed under [sub-section (5) of section 32F within the time specified in such order] or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted.

(3) An immunity granted to a person under sub-section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person had, in the course of the settlement proceedings, concealed any particular material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would

have been liable, had no such immunity been granted.

Section 32L. Power of Settlement Commission to send a case back to the Central Excise Officer. -

(1) The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

(2) For the purpose of sub-section (1), the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him.

(3) For the purposes of the time limit under section 11A and for the purposes of interest under section 11BB, in a case referred to in sub-section (1), the period commencing on and from the date of the application to the Settlement Commission under section 32E and ending with the date of receipt by the Central Excise Officer of the order of the Settlement Commission sending the case back to the Central Excise Officer shall be excluded.

Section 32M. Order of settlement to be conclusive. -

Every order of settlement passed under sub-section [(5)] of section 32F shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this

Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

Section 32N. Recovery of sums due under order of settlement. -

Any sum specified in an order of settlement passed under sub-section [(5)] of section 32F may, subject to such conditions if any, as may be specified therein, be recovered, and any penalty for default in making payment of such sum may be imposed and recovered as sums due to the Central Government in accordance with the provisions under section 11 by the Central Excise Officer having jurisdiction over the person who made the application for settlement under section 32E.

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 "

Sub-Section (1) to Section 32-E of the Act states that an assessee may in respect of a case related to him make an application 'before adjudication' to the Settlement Commission to have the case 'settled'. Sub-Section (1) uses the expression 'adjudication' with reference to proceedings pending before the Central Excise Officer on issue of show cause notice for recovery and 'settled' with reference to the application made by an assessee before the Settlement Commission. The settlement application, the provision postulates, must be filed in the form prescribed and contain a 'full and true' disclosure of the duty liability not hitherto disclosed before the Central Excise Officer and the manner in which the liability was derived. Additional amount of duty accepted as payable and such other particulars which the applicant admits regarding short levy on account of misclassification, under-valuation, inapplicability of exemption notification, CENVAT credit or otherwise have to be stated. As per proviso to section 32-E(1) of the Act the application would not be maintainable unless returns showing production, clearance and Central excise duty paid in the prescribed manner have been filed; a show cause notice for the recovery of duty has been issued by the Central Excise Officer and the same has been received by the applicant; the additional amount of duty accepted as payable by the applicant exceeds Rs.3 lacs and the additional amount of excise duty accepted by the applicant along with interest due under Section 11-AA has been paid. We need not refer to sub-Section (3), but sub-Section (4) is important and states that an application once made under sub-Section (1), shall not be allowed to be withdrawn.

9. At this stage itself, we may refer to Section 32-O which prohibits and bars a person from filing a second application for settlement where an order of settlement provides for imposition of penalty on the person who made the settlement application under Section 32-E; the applicant is subsequently convicted of any offence under the Act in relation to that case; or the applicant's case has been sent back to the Central Excise Officer on the ground of concealment of particulars of his duty liability. It is, therefore, clear that the provisions of settlement can be invoked by the assessee/applicant by making 'full and true' disclosure and not with the mala fide intent to defuse and obstruct impending prosecution and penalty proceedings by approaching the Settlement Commissions with incomplete disclosures. When a case has been sent back by the Settlement Commission to the Central Excise Officer, the assessee is barred and cannot apply for settlement in relation to any other matter. Thus, notwithstanding the prescription in Sub-Section (4) to Section 32-E that the applicant cannot withdraw the settlement application once filed, the Settlement Commission has to send the case to the Central Excise Officer where the disclosure of unpaid duty liability is not 'full and true' and concealed. Thereupon the assessee/applicant is barred and cannot again approach the Settlement Commission in another case.

10. Section 32-F deals with the procedure on filing of the application under Section 32-E and prescribes a strict time line of seven days for issue notice to the applicant from the date of the receipt of the application to explain why the application should be allowed to be proceeded with. The Settlement Commission is thereafter required

to pass an order within fourteen days from the date of notice, allowing the application to be proceeded with or rejecting the application. On rejection, the proceedings before the Settlement Commission abate. Rejection order can be passed after notice and taking into consideration the explanation provided by the applicant. Proviso to this sub-section states that where no notice has been issued or no order has been passed within the time stipulated, the application shall be deemed to have been allowed. Every order under Sub-Section (1) of Section 32-F of the Act is required to be communicated to the Principal Commissioner of Central Excise or Commissioner of Central Excise having jurisdiction. Where an application is allowed or deemed to have been allowed to be proceeded with, the Settlement Commission is required to within seven days call for a report and relevant records from the Principal Commissioner/Commissioner of Central Excise having jurisdiction. Report has to be submitted within thirty days of the receipt of the communication from the Settlement Commission. This period of thirty days cannot be extended as the proviso states that where the report is not received within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report from the Principal Commissioner/Commissioner of Central Excise. Where a report is received within the prescribed time, the Settlement Commission may after examination of the report if it is of the opinion that any further enquiry or investigation in the matter is necessary, for reasons to be recorded in writing within fifteen days of the receipt of the report, direct the Commissioner (Investigation) to make or cause to be made such further enquiry/investigation and furnish consequential report

within a period of ninety days of receipt of the communication from the Settlement Commission on the matters covered by the application and any other matter relating to the case. As per proviso, when the Commissioner (Investigation) does not furnish their report within the aforesaid period, the Settlement Commission has to proceed to pass an order under sub-Section (5) without such report. These provisions with regard to the Commissioner(Investigation) in the Act are somewhat at variance with the provisions of Section 245D(3) of the Income Tax Act, which permits the Settlement Commission under the Income Tax Act to direct further enquiry or investigation in the matter through the jurisdictional Principal Commissioner or Commissioner, who would then furnish a report on the matters covered by the application or any other matter relating to the case within a period of ninety days of receipt of communication from the Settlement Commission. Sub-Section (5) states that the Settlement Commission, after examining the records and the report of the Principal Commissioner/ 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 the Principal Commissioner or Commissioner of Central Excise having jurisdiction of being heard and after examining such further evidence as may be placed before it or obtained by it 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 the Principal Commissioner or Commissioner of Central Excise and

Commissioner(Investigation). Sub-Section (6) to Section 32-F requires the Settlement Commission to pass an order under Sub-Section (5) in respect of the application within nine months from the last date of the month in which the application was made, failing which the settlement proceedings would abate and the adjudicating authority before whom the proceedings, at the time making of the application were pending, is required to dispose of the case in accordance with the provisions of the Act as if no settlement application under Section 32-E was filed. Proviso states that the period can be extended by the Settlement Commission for a further period not exceeding three months.

11. Sub-section (7) clarifies that 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 provisions of Section 32-D would accordingly apply. Sub-Section (8) states that the order passed under Sub-Section (5) to Section 32-F would provide for terms of settlement which may include any demand by way of duty, penalty or interest and the manner in which the said amount would be paid and all other matters to make the settlement effective and in case of rejection contain the reasons thereof and it shall also provide that the settlement should be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts. The proviso states that the amount settled as ordered by the Settlement Commission shall not be less than the duty liability admitted by the appellant in his application under Section 32-E. Sub-section (9) states that 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 remain unpaid shall be recovered along with interest due thereon as per provision of Section 11 of the Act. Sub-section (10) provides that where the proceedings become void on account of sub-section (8), proceedings before the Central Excise Officer shall be deemed to have been revived from the stage at which the application for settlement was allowed to be proceeded with.

12. Aforesaid provisions manifest that the Settlement Commission's satisfaction on the assessee's 'full and true' disclosure of the undisclosed duty liability, the manner in which the liability has been derived, and payment of such duty liability with interest are the sine qua non legislative commands that form the jurisdictional pre-conditions to obtain an order of settlement. Each condition must be satisfied without failure. Settlement Commission has the power while passing an order under Sub-Section (5) to Section 32-F to enhance the duty liability, but it has no power to dispense with and waive the pre-conditions of 'full and true' disclosure, the manner in which liability is derived and pre-payment of taxes/duty with interest on the disclosure made. Settlement Commission must record its satisfaction on the jurisdictional pre-conditions for only when the jurisdictional pre-conditions are satisfied that an order 'settling' the case can be passed. In-eligible cases, where jurisdictional pre-conditions are not satisfied, must be returned to the board of the Central Excise Officer for adjudication of the show cause notice on merits. An order under Sub-Section (5) to section 32-F can enhance the duty liability as declared in the application but only when condition of 'full and true'

disclosure of undisclosed duty liability and the manner in which the liability was derived are satisfied. Satisfaction of the jurisdictional pre-conditions cannot be waived by the Settlement Commission. The Act has not been conferred on the Settlement Commission the power to adjudicate and to pass an order-in -original as a Central Excise Officer in the form of a settlement order. Settlement Commission is not an adjudicating authority or an *incognito* Central Excise Officer. Settlement Commission does not pass an order on merits deciding duty as demanded in the show cause notice.

13. We are conscious that the provisions for settlement can be misused to delay adjudication proceedings before the Central Excise Officer, and by accepting the legal position as canvassed by the petitioners' the Settlement Commission would be denied power to 'adjudicate' and completely self-deal with such devious and conniving applicants, but this is a matter of jurisdiction. To accept legal authority and jurisdiction of the Settlement Commission to pass settlement order even in cases where there is lack and failure on the part of the applicant to make 'full and true' disclosure would be contrary to the legislative mandate. In many-a-case the Revenue would be aggrieved and would raise the same legal challenge to the order passed by the Settlement Commission. This would create uncertainty and confusion. In matter of jurisdiction it does not matter whether the aggrieved party is the assessee or the Revenue. The consequences when an applicant does not make 'full and true' disclosure are provided in the provisions of the Chapter. Strict timelines with stage by stage hearing ensures a timely disposal and effectively checks machinations and delaying tactics. Such applicants have to be dealt

with in the expeditiously, albeit in accordance with the statute. Settlement order is not an alternative to an order in original passed by the Central Excise Officer deciding a show cause notice on merits.

14. The provisions of Section 32-F do not stipulate and over-ride the conditions mentioned in Section 32-E that the assessee who has approached the Settlement Commission should and must make 'full and true' disclosure of the duty liability which has not been hitherto disclosed. It is only when this condition and other requirements are satisfied that the Settlement Commission can pass an order of settlement. Reference to the report of the Principal Commissioner or Commissioner of Central Excise pursuant to the enquiry and investigation or even to the report of the Commissioner (Investigation) under sub-section (4) and (5) is to ensure that the Settlement Commission ascertains and satisfies itself on full, true and correct disclosure of the duty liability. Legislature conscious that there could be kaleidoscope of cases and situations that cannot be always visualised has recognised that there could be cases where the jurisdictional pre-conditions are satisfied yet the Settlement Commission may have to decide issues and thereby the duty liability as disclosed may get enhanced. The provisions made in this regard do not intend to override and undo the statutory pre-conditions for invoking jurisdiction of the Settlement Commission.

15. On the said legal position, i.e. on scope and ambit of settlement order, we would now refer to the decision of this Court in W.P.(C) No.1495/2007, ***Picasso Overseas and Ors. versus The Director General of Revenue Intelligence and Anr.***, decided on 3rd August, 2009, wherein it has been held:-

“4. The Senior counsel for the petitioners has contended before us that the Settlement Commission cannot make adjudication of highly contested and disputed question of facts. He has argued that the basic purpose of the Settlement Commission is to settle the matter and not to decide the questions of fact on which there is a wide variance between the parties. For this purpose, the Senior Counsel has relied upon the scheme of Chapter XV A of the Customs Act which contains the provisions from Section 127A to 127N. The Senior Counsel has more particularly drawn our attention to various sub sections of Section 127B and 127C and finally laid emphasis on Section 127I to contend that in a case of not arriving at a settlement, the Settlement Commission was bound to refer the matter back for adjudication to the concerned officer of customs. The Senior counsel has also on the basis of record contended that the Settlement Commission was in any case bound to look at the 68 cases referred to by the petitioner where the rates of MPEG Cards were accepted by the customs at Hong Kong \$ 17 and which Bills of Entries for this amount were duly accepted by the customs authorities and no cases have been instituted against such parties for any differential duties. The Senior counsel has also contended that by making an adjudication, the Settlement Commission has deprived the petitioner of his right of appeal which he would have had in case the matter was adjudicated by the Adjudicating Officer in the first instance.

9. We find from the reading of the relevant Sections of Chapter XVA of the Customs Act that the Settlement Commission cannot substitute itself for the Adjudicating Officer by deciding complicated

and highly disputed/contentious question and issues of facts. That this is not the purpose of the Settlement Commission, is clear from the following:

- (i) The expression “settlement” is in contradistinction to “adjudication”. The very scheme of the provisions of Chapter XV A is settlement and not adjudication:
- (ii) Various provisions such as Section 127B (1) uses the expression “accepted to be payable by him”, meaning thereby that on applicant before the Commission is bound basically only to the duty approximately in an around the amount accepted to be payable by the applicant and not the duty amount, which may be considerably or vastly different from the amount which he thought would be one at which he seeks to get the matter settled by making a full and complete disclosure. This very sub section of Section 127 B again uses the expression “to have the case settled”, again indicating that the scope of the Settlement Commission is to have the case settled on a duty which an applicant accepts to be payable by him. In the form it has been prescribed under these Chapter of settlement, in para 12 it is stated “additional amount of duty disclosed and accepted as payable”. In fact, Annexure 11 to such form in para 4 states “full and true disclosure of the facts regarding the issues to be settled, including the terms of settlement sought for by the applicant.”

10. All the abovesaid provisions and the paragraphs of the forms make it abundantly clear that what is required is a decision when there are terms of settlement which are agreed to by an applicant and a liability of duty which is accepted by

him. Thus, it cannot be said that when an applicant comes for settlement he can be fastened with a liability which he never intended as accepted to be payable by him. We may further hold from subsection (1) of Section 127 C which uses the expression “complexity of the investigation” meaning thereby a Settlement Commission would not in cases of complexity of the investigation have jurisdiction to decide and admit such an application. Therefore, when there are highly complex and contentious questions of fact, a Settlement Commission would not ordinarily even admit the application in as much as the scope and object of scheme of Sections of Chapter XVA is settlement and not adjudication of highly complex questions of facts. Section 127 I also throws further light by entitling Settlement Commission to refer the case back to the proper officer who shall dispose of the case in accordance with the provisions of the Act as if no application for settlement has been made under Section 127B. ”

The aforesaid decision interprets *parimateria* and similar provisions of Section 127F of the Customs Act, 1962. This decision had upheld and accepted the contention of the petitioner therein that the Settlement Commission cannot adjudicate highly contested and disputed questions of facts, for the basic purpose of Settlement Commission is to settle the matter and not to decide and adjudicate the issue on which there is wide variance and difference between the stand of the assessee and the Revenue. Referring to the provisions of settlement, it was observed that these are in contradistinction to adjudication and requirement to make payment of tax and interest and the expression ‘accepted as payable by the applicant’ means the applicant before the Settlement Commission is bound basically to declare the duty evaded, which may be approximate or in and around

the amount accepted to be payable by him. There should not be any difference between the amount of duty which he accepts as due and payable and the amount on which the matter is finally settled. This is because of the pre-condition that every applicant, in order to invoke the jurisdiction of the Settlement Commission must make 'full and true' disclosure to have the case settled. It is in this context that in paragraph 10 of the aforesaid quotation in the case of ***Picasso Overseas & Ors.***(supra), it has been observed that when an applicant comes for settlement, he cannot be fastened with a liability which he never intended as accepted to be payable by him. Therefore, when there are highly complex and contentious questions of fact, the Settlement Commission would not ordinarily admit the application inasmuch as the scope and object of the proceedings is settlement and not adjudication of highly complex questions of facts. We do note that the expression "complexity of investigation" used in Section 127C has been deleted from the Customs Act and from sub-section (1) of Section 32-F of the Act, i.e. Central Excise Act, with effect from 1st June, 2007. Legislation has undergone a change. We have referred to the decision as it expounds clear demarcation between 'adjudication order' and 'settlement order' and explains the contour and ambit of power to 'settle', an exclusive and sole jurisdiction exercised by the Settlement Commission, which is different and not a power to adjudicate the show cause notice on merits as a Central Excise Officer. Omission of the expression "complexity of investigation" though material as the Settlement Commission would examine complex and difficult factual and legal issues, does not mitigate and omit the requirement and condition of 'full and true' disclosure of the

undisclosed tax liability. This requirement remains in the statute as an essential jurisdictional pre-condition to be satisfied for any order under Sub-Section (5) to section 35-F of the Act.

16. We would now reproduce paragraph 12 of the decision in *Picasso Overseas & Ors.*(supra), which reads as under:-

“12. In fact, we feel that in a case where at an admission stage under Section 127 (C) (1) the case throws a high degree of variation between the facts and contentions of both the parties before the Settlement Commission, then in such a case the Settlement Commission should not even admit an application because it is clear that the Department of customs does not accept the duty which an applicant feels is payable by him and therefore is bound to enquire into highly disputed question of facts. Of course, we may hasten to add in certain cases in spite of a huge variation and dispute which may be sought to be raised by the Department, it can be found that the disputes raised by the Department as to rates or other relevant facts may not be supported by other admitted facts which may appear from the records or the report which is called for by the Commission or such enquiry if the Commission may want to perform under Section 127F (2) and in such a case the Settlement Commission in spite of a contentious stand of the Department of Customs may still choose to go ahead and accept the figure of duty as acceptable by the applicant to the Commission as the said duty would be clearly born out from records of the Department of customs itself.”

17. Identical provisions vide Section 32-I of the Act, dealing with powers and procedure of the Settlement Commission state that in addition to powers conferred on the Settlement Commission under Chapter V, the Settlement Commission shall have all powers that are vested in the Central Excise Officer under the Act or the Rules made there under. Sub-section (2) states that when an application has been allowed to be proceeded with under Section 32-F, the Settlement Commission shall have, until an order is passed under sub-section (5) to Section 32-F and subject to the provisions of sub section (4) of that section, exclusive jurisdiction to exercise the powers and perform the functions of a Central Excise Officer in relation to a case. Sub-section (4) states that the Settlement Commission shall, subject to the provisions of the Chapter, have power to regulate its own procedure and the procedure of Benches while dealing with matters.

18. We have not quoted Section 32-J of the Act. However, we would record that the provision stipulates that no person shall be entitled to inspect or obtain copies of any report made by a Central Excise Officer to the Settlement Commission, but the Settlement Commission in its discretion may furnish copy thereof on an application made in this behalf and on payment of prescribed fee. Proviso states that certified copy of such report or part thereof, which is relevant, can be furnished to the person whose case is under consideration to rebut evidence brought on record.

19. Under Section 32-K, the Settlement Commission has the power to grant immunity from prosecution and penalty under the Act. Such immunity can be either in whole or in part. However, no immunity can be granted except in cases where prosecution has been instituted

before the date of receipt of the application under Section 32-E. Further, as per sub-Section (2) immunity granted under sub-section (1) can be withdrawn if the person fails to pay the sum specified in the order of the settlement passed under sub-section (5) to Section 32-F. Immunity can also be withdrawn if the Settlement Commission is satisfied that such person had in the course of the settlement proceedings concealed any particular material or had given false evidence and thereupon, the person may be tried for the offence in respect of which immunity was granted or for any other offence of which he appears to have been guilty.

20. Section 32-L states that if the Settlement Commission is of the opinion that if the applicant has not cooperated with the Settlement Commission in the proceedings before it, the case may be sent back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of the Act as if no application for settlement had been made. Thus, the provision states that the Settlement Commission has the power and authority to remit the case to the Central Excise Officer when the applicant has not cooperated. Sub-section (2) to Section 32-L is equally important for it states that the Central Excise Officer shall be entitled to use all materials and other information produced by the applicant/assessee before the Settlement Commission or the result of the inquiry held or the evidence so recorded in the course of the proceedings before it. Thus, the Central Excise Officer can use the material and information produced by the applicant/assessee before the Settlement Commission or the result of the inquiry held or the evidence recorded in the course of the proceedings before it as there is no bar or prohibition against

use of the said material. Admission made by the applicant/assessee in the settlement application and evidence and details collected/ascertained can be used by the Assessing Officer when an order is passed remitting or sending the case back to the Central Excise Officer. The provision is another check on malevolent and devious applications with partial disclosure to deviate and prolong adjudication proceedings and recovery of duty and interest. These provisions of settlement reflect the vast powers given to the Settlement Commission when they verify and ascertain whether or not the applicant/assessee has made 'true and full' disclosure of undisclosed income and decides the issues and *lis* that arise on the statements made in the settlement application, but they fall short and do not give jurisdiction to the Settlement Commission to reject the settlement application on the ground of lack of 'full and true' disclosure of undisclosed income and then proceed to pass an order in original adjudicating the show cause notice on merits as a Central Excise Officer. This is impermissible and beyond jurisdiction of the Settlement Commission.

21. The Delhi High Court in W.P. (C) No.9104/2009, ***Ashwani Tobacco Co. Pvt. Ltd. versus Union of India***, dated 29th January, 2010, has held:-

“9. An order of settlement is obviously distinct from an adjudication order of a Central Excise Officer, who has no power to accord immunity from prosecution while determining duty liability under the Excise Act. The order of settlement is in the form of a package and takes into consideration all the aspects of the case in a holistic manner before determining the issues of penalty and interest as well as the extent of immunity therefrom. It is in this

context that Sub-section 5 of Section 32F confers on the Settlement Commission the powers to “pass such order as it thinks fit on the matters covered by the application.....”. It is, therefore, observed that the scheme of settlement as contained in Chapter-V of the Excise Act is distinct from the adjudication undertaken by a Central Excise Officer under the other Chapters of the Excise Act. Therefore, once the Petitioner has adopted the course of settlement he has to be governed by the provisions of the said Chapter. Resultantly, the benefit under the proviso to Section 11AC of the said act which could have been availed when the matter of determination of duty was before a Central Excise Officer is not attracted to the cases of a settlement undertaken under the provisions of Chapter-v of the Excise Act.”

This decision had also referred to the decision in the case of ***Picasso Overseas & Ors.***(supra).

22. In W.P. (C) No. 6569/2017, ***Shree Flavours LLP versus Government of India &Ors.***, decided on 1st September, 2017, a decision relating to the Act, it has been held that the power of settlement requires an element of cooperation by the parties i.e. the assessee, which is a pre-requisite and an essential condition. Therefore, the reference to the term "not cooperated" in Section 32-L of the Act has been made. Thus, the Settlement Commission has the power to examine and arrive at the opinion that the dispute is one which cannot be settled, and which on eventuality it has to refer the matter to the adjudicating authority. This judgment refers to an earlier decision of this court in ***Komal Jain versus Union of India***, 2014 (304) ELT 675 (Del.), which holds as under:-

“16.The Court finds this argument unpersuasive. Clause (c) to the first proviso mandates a pre-condition to approaching the Settlement Commission. The duty “accepted by” the applicant must be paid, before the matter can even be considered by the Settlement Commission. The Settlement Commission is, in essence, a safe haven for applicants who are otherwise at risk of punishment under the penal provisions of the Customs Act. The Settlement Commission can – if it considers it prudent – grant immunity from prosecution, but may not condone the liability amount or interest. Those must be paid nonetheless, as an applicant approaching the Settlement Commission cannot receive better treatment than those who do not. That limited obligation falls on all articles imported into Indian territory. Thus, in order to approach the Settlement Commission, and avail of the beneficial regime of limited immunity, the applicant must – as a reciprocal statutory good faith measure – pay the liability duty (i.e. at least the minimum tax effect possible from the wide range of measures that may be exercised under the Customs Act.) The argument advanced by the petitioner in this case seeks to excuse the applicant to pay this minimum amount, but still avail the beneficial regime of Chapter XIVA. This cannot be the case. Neither does the text support such an argument. Sub-clause (c) bars an application till “the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB.” The applicant must therefore, first, pay the duty “accepted by him”, along with the “interest due under Section 28AB.” Section 28AB simply says that in case “any duty has not been levied or paid or

has been short-levied or short-paid or erroneously refunded”, such a levy must include interest. In other words, a levy under Section 28 – which authorizes a show-cause for duties not levied earlier – includes interest under Section 28AB. Thus, on a textual reading, clause (c) requires that the applicant must deposit the duty he accepts to be the liability, along with interest. This means that it is not necessary for the show cause notice to propose a liability amount for it to be "due" under clause (c). This would include cases where a duty demand exists in the show-cause notice, but is not exhausted by this limited circumstance alone. In cases where the show-cause notice does not contain a figure, the applicant must use a best-judgment standard to determine the amount, and at the very least, deposit that amount. The use of the words “accepted by him” clearly include such a situation, and support the use of a self assessment to require the applicant to deposit what he or she thinks is the duty payable, since that in any case, is due in law, and cannot be waived by the Settlement Commission. Indeed, the Court notices that the self-assessment standard is also prescribed in Section 28(b), as an alternative to the duty ascertained by the Revenue.

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20. There is one more reason as to why we think that the petitioner’s contention is untenable. The opportunity to approach the Settlement Commission is a sort of concession given by the government to errant assesseees to enable them to come clean. This opportunity is hedged in by certain conditions, one of which is that the assessee shall pay the additional amount of customs duty accepted by him along with interest due under Section 28AB.

What the petitioner contends is that the interest under Section 28AB does not become due once a show-cause notice is served under Section 124 and, therefore, the petitioner should be allowed to approach the settlement commission without satisfying the condition. The legislative intention, however, appears to us to be otherwise. If one of the many conditions prescribed by the first proviso to Section 127B cannot be complied with, albeit because of statutory disability – even assuming the petitioner is right in its contention that there is a statutory disability in calculating the interest due under Section 28AB – the result would be that such a case was not intended to be covered by the section; it is not open to the petitioner to argue that because of the statutory disability (whatever that may be) one of those conditions cannot be complied with but yet the petitioner should be permitted to approach the Settlement Commission. As already pointed out, an assessee is permitted to approach the Settlement Commission subject to inviolable conditions, the proper and complete compliance with which cannot be compromised or condoned in any manner. Even on this score the petitioner is to fail.”

23. Statute states that the Settlement Commission can deal with matters and issues not referred to in the settlement application. Sub-section (5) to Section 32-F empowers the Settlement Commission to examine the records and reports of the Principal Commissioner or the Commissioner of Central Excise or the report of Commissioner (Investigation) and thereupon after examining further evidence placed before them and which may be obtained by the Settlement Commission, pass an order on matters covered by the application or any other matters relating to the case not covered by the application but referred to in the report of the Principal Commissioner or the

Commissioner of Central Excise or even the Commissioner (Investigation). Powers of the Settlement Commission are indeed wide and by no means narrow or confine the limits only to the settlement application. These details could be necessary to ascertain satisfaction of the jurisdictional pre-conditions and in some cases 'settle' the matter as the applicant/assessee has satisfied the jurisdictional preconditions, albeit the additional and secondary aspects must be those that are required to be examined and decided to settle the case. Settlement Commission has the power to relegate the applicant to the proceedings before the Central Excise Officer. The provisions would also indicate that the duties of the Settlement Commission are not synonymous and an order passed by the Settlement Commission is not an adjudication order. The applicant, to invoke the jurisdiction of the Settlement Commission and to get favourable order under sub-Section(5) to Section 32-E, must meet the statutory mandate and pre-condition of 'full and true' disclosure of his duty liability and the manner in which such liability has been derived. The aforesaid pre-conditions must be satisfied before an order under sub-section (5) to Section 32-F of the Act is passed. If the said pre-conditions are not satisfied, the Settlement Commission should relegate the applicant to the regular and normal proceedings before the Central Excise Officer as delineated under Section 32-L of the Act.

24. Clearly, the Settlement Commission does not perform the adjudicatory functions as a Central Excise Officer when it deals with settlement of cases.

25. In *Agson Global Pvt. Ltd. &Ors. versus Income Tax Settlement Commission &Ors.*, 227(2016) DLT 226(DB), it was held

that the Settlement Commission has exclusive jurisdiction from the date the Settlement Commission steps into the shoes of the authority who was hitherto dealing with the case. The aforesaid ratio has to be read in the context in which they were made. The observations were not to hold that the Settlement Commission and Central Excise Officers perform same and identical functions. There could be cases where an assessee has made 'full and true' disclosure of the undisclosed duty liability and the manner in which such liability was derived, yet issues that arise would require finding and decision in respect of rate of tax, tariff entry applicable, scope of exemption notification, entitlement to CENVAT credit etc. Such issues have to be decided by the Settlement Commission to settle the case. It is in this sense that requisite power under various provisions of Chapter-V has conferred power on the Settlement Commission. However, the Settlement Commission is not a Central Excise Officer. It does not perform functions and duties and is not an alternative to the Central Excise Officer.

26. The Settlement Commission is an independent institution and, in a way, is a *quasi* judicial body, independent and different from the Central Excise Officer. The Central Excise Officer, in the form of the Commissioner or the Principal Commissioner, is a party appearing before the Settlement Commission. Further, the Settlement Commission has the power to grant immunity from prosecution under the Act etc. Proceedings before the Settlement Commission have to be detailed and examination thorough in the sense that hearings have to be held and reports etc. have to be filed. Settlement order has finality attached to it. These proceedings are vastly different from assessment

proceeding before the Central Excise Officer. The proceedings are confidential in nature, in the sense that confidentiality is maintained during the period the proceedings are in progress. It is in this context that in *Commissioner of Income Tax, Jalpaiguri versus Om Prakash Mittal*, (2005) 2 SCC 751, the Supreme Court had observed:-

“13. Section 245-F dealing with powers and procedure of Settlement Commission provides that in addition to the powers conferred on the Settlement Commission under Chapter XIX-A, it has all the powers which are vested in the income-tax authority under the Act. Sub-section (2) is of vital importance and provides that where an application made under Section 245C has been allowed to be proceeded with under Section 245D, the Commission shall until an order is passed under sub-section (4) of Section 245D, subject to the provisions of sub-section (3) of that section have exclusive jurisdiction to exercise the powers and perform the functions of the income-tax authority under the Act in relation to the case. In essence, the Commission assumes jurisdiction to deal with the matter after it decides to proceed with the application and continues to have the jurisdiction till it makes an order under Section 245D. Section 245D(4) is the charging section and sub-section (6) prescribes the modalities to be adopted to give effect to the order. It has to be noted that the language used in Section 245D is "order" and not "assessment". The order is not described as the original assessment or regular assessment or re-assessment. In that sense, the Commission exercises a plenary jurisdiction.”

Similarly, in *Brij Lal and Others. versus Commissioner of Income Tax, Jalandhar*, (2011) 1 SCC 1, it was held as under:

“23. Descriptively, it can be stated that assessment in law is different from assessment by way of settlement. If one reads section 245D(6) with section 245 I, it becomes clear that every order of settlement passed under section 245D(4) shall be final and conclusive as to the matters contained therein and that the same shall not be re-opened except in the case of fraud and misrepresentation. Under section 245F(1), in addition to the powers conferred on the Settlement Commission under Chapter XIX-A, it shall also have all the powers which are vested in the income tax authority under the Act. In this connection, however, we need to keep in mind the difference between "procedure for assessment" under Chapter XIV and "procedure for settlement" under Chapter XIX-A (see section 245D). Under section 245F(4), it is clarified that nothing in Chapter XIX-A shall affect the operation of any other provision of the Act requiring the applicant to pay tax on the basis of self-assessment in relation to matters before the Settlement Commission.”

27. Having examined the legal position, we will now revert to the facts in the writ petitions.

WP(C) No. 7277/2015

28. The petitioner, now renamed as M/s. Victora Auto Pvt. Ltd., was engaged in the business of manufacturing of sheet metal components for automobiles and was registered with the Central Excise Commissionerate, Delhi-IV, Faridabad.

29. Anti-Evasion Branch of the said Commissionerate had initiated investigation and conducted searches on 22.12.2010 at business and residential premises of the petitioner and their suppliers.

30. In the application for settlement filed the petitioner on 16.5.2014, they had accepted duty liability of Rs.60,54,752/- and interest liability of Rs.19,59,645/-.

31. On the other hand, the show cause notice dated 4.4.2012 served on the petitioner, based on the investigation conducted and material/evidence found by the Anti Evasion Team had raised a demand of Rs.2,16,70,002/- as undisclosed duty liability.

32. The contention of the petitioner was that the amount mentioned in the show cause notice was based upon surmises and not supported by cogent and relevant evidence.

33. Revenue had contested the allegation submitting that the petitioner had not made 'full and true' disclosure of the duty liability evaded by making wrong and fraudulent claim for CENVAT credit. Reliance was placed on the diary found and seized from Pawan Goyal, which as per the Revenue mentions/records a number of transactions which were quantified as Rs.5,23,80,000/-. This amount as per Pawan Goyal, who had filed a separate application for settlement which was also disposed of by the impugned order, was the total of the cheques issued by the petitioner company in respect of the invoices against which the goods were not supplied. Pawan Goyal has not challenged the order passed by the Settlement Commission.

34. The Settlement Commission observed that the question really was of quantification of the duty for the petitioner and the other co-applicants had admitted that the goods were not supplied and the money had flown back to the petitioner, who had made some payment under the table. Reference was made to *kaccha* documents and the statements of Ashok Rawat and P.L. Gupta, who had affirmed the said

flow back of cash and had also admitted that the documents seized relate to a short period, for the earlier document/*kaccha* paper had been destroyed. Reference was also made to the statement of Radhey Shyam, who had explained that on receipt of any raw material, entry was made in the inward register and when slips were produced, entries were made in raw material register. The said entries included manufacturer's name. The goods received were entered in the register as well as the raw material register as per the procedure laid down in the factory of the petitioner. Reference was also made to the statement of Satya Dev Mishra, security guard/advisor of the petitioner who was posted on the entry gate. He had stated that as a security guard/advisor, he was posted on the entry gate and that he would check entry of goods and enter the goods received in the computer and issue inward statement with serial number. He had never seen raw material procured from M/s Allied Strips Pvt. Ltd., M/s JV Strips Pvt. Ltd. and M/s AGR Steel Strips Pvt. Ltd. Similarly, Mr. Sanjay Kaushik, working with the petitioner and incharge of inspection of raw material, after examining the inspection register, had stated that they had not inspected any goods received from M/s Allied Strips Pvt. Ltd., M/s JVS Pvt. Ltd. and M/s Asian Colour Coated Ispat Pvt. Ltd. There were only 9 reports of M/s AGR Steel Strips Pvt. Ltd. and one recorded invoice from M/s MTC. Impugned order of the Settlement Commission refers to the show cause notice on the CR sheets, standard stainless sheets and aluminium sheets and the register maintained by the petitioner company regarding the raw material. Reference stands made to the statement of the drivers who had purportedly transported the material to the petitioner factory. These

drivers had denied having transported the goods to the petitioner unit at Faridabad. After referring to the evidence and material, the Settlement Commission has held:-

“23. The argument of the applicant is that Revenue has claimed that the entire quantities purchased from the co-applicant manufacturers are goods less. The Bench finds that the Revenue has limited the demand only to those incoming invoices where there is no evidence of goods being received as per SDL Auto's own internal records. Where the internal records support the receipt of goods, such invoices do not form part of the demand. The applicant has argued that the entire entries in the diary of Pawan Goel found as “MTC(MINTA)/ MTC (SDL)” for the total period are for Rs 5,23,80,000/-, and therefore the demand cannot be beyond -this amount. As explained above, the written record of flowback which was in the kuccha diaries is for transactions other than those found in the diaries of Pawan Goel. Those for the earlier period were destroyed. Hence secondary evidence is resorted to as long as it clearly establishes non receipt of goods on the basis of the applicant's internal records. As the fact of flowback is admitted, and once it is admitted that there is no one to one correlation between the amounts received and the invoices, it is for the applicants to connect the payments with the invoices concerned, if they contest the conclusion of the Revenue. Given the facts of the case and the manner of recording details of flowback in the diaries, it is not for the Revenue to establish this correlation. It is also stated that the name of MTC is not mentioned in any diary entries, nor is there any evidence that MTC has also supplied invoices without goods. The applicant claims that the revenue is presuming those receipts shown without the name of any company relating to MTC. As can be seen from the above exposition of

the SCN, the demand is calculated from the evidence of goods not having been received in the unit as per the unit's own internal records. The applicant has, in any case, admitted wrongly availed cenvat credit on the basis of goods less invoices up to the amount in the payment side entries recorded in the diary of Shri Pawan Goel only. They have not been able to convincingly controvert the evidence from their own internal record and statements of various employees, read with the entries in kaccha papers and the diaries

23.1 The applicant has contravened the provisions of the Cenvat Credit Rules by taking inadmissible Cenvat credit during the period 01.03.2007 to 21.12.2010 on the basis of invoices without receipt of goods with the intent to evade payment of Central Excise duty. They are, therefore, liable to penal action under Rule 15(1) and 15(2) of the Cenvat Credit Rules, 2004. Co-applicant no.1, Shri Hardeep Singh Banga, Director of the applicant himself received huge amounts of cash from Shri Purushotam Lal Gupta and Shri Pawan Goel as reverse payment of cheques. He, therefore, personally benefited apart from the applicant from the illegal activities which he was aware of. He is, therefore, liable to penal action under Rule 26 of the Central Excise Rules, 2002.

23.2 Shri Purushotam Lal Gupta, co-applicant no. 6 appears to have been the mastermind who organized the goods less Cenvat invoices on commission basis as he was the proprietor of M/s. Metal Trading Company for a long period. He stood as guarantee of illicit cash payment in respect of goods less invoices and directed Shri Ashok Rawat and Shri Pawan Goel to keep details of cash transactions. He therefore, abetted the applicant in taking inadmissible Cenvat credit and has rendered himself liable to penal action under Rule 26(2) of the Central Excise Rules, 2002. Shri Pawan Goel, co-applicant no. 5 was aware of the cash transactions and the availing of Cenvat credit wrongly and assisted the other co-applicants in evading Central Excise duty. He

is also, therefore, liable to penal action under Rule 26(2) of the Central Excise Rules 2002. Shri Ashok Rawat, Marketing Manager of M/s. Metal Trading Co., co-applicant no. 7, being an employee, did not make any personal gains from the illegal activities.

23.3 M/s. Allied Strips Ltd., co-applicant no. 2; M/s. AGR Steel Strips (P) Ltd. Co-applicant no. 8; M/s. Asian Colour Coated Ispat, co-applicant no. 11 and M/s. J.V. Strips Pvt. Ltd., co-applicant no. 13 were all involved in assisting the applicant in availing of wrongful Cenvat credit as they issued invoices without goods and returned cash to the applicant. They were well aware that these activities were illegal. They have also, therefore, rendered themselves liable to penal action under Rule 26(2) and Rule 27 of the Central Excise Rules, 2002. Shri Gaurav Aggarwal, Managing Director of M/s. Allied Strips, co-applicant no. 3; Shri Ravinder Gupta, Sr. Vice-President of M/s. Asian Strips, co-applicant no. 4; Shri Vikas Aggarwal, Director of M/s. AGR Steel Strips, co-applicant no. 9; Shri SVS Bhatti, Vice-President of M/s. AGR Steel Strips, co-applicant no. 10; Shri Pradeep Aggarwal, Director of M/s. Asian Colour Coated Ispat, co-applicant no. 12; Shri Jai Bhagwan Bindal, Managing Director of M/s. JV Strips, co-applicant no. 14 and Shri Ramesh Bhatti, CEO of M/s. JV Strips, co-applicant no. 15 were responsible for the day-to-day business of their companies and were concerned and aware of the issue of invoices without goods. They had directed their juniors to make huge cash payments to Shri Pawan Goel, Shri Purushotam Lal and Shri Ashok Rawat thereby abetting the applicant in evading Central Excise duty. These acts make them liable to penal action under Rule 26(2) of the Central Excise Rules, 2002.”

Thereafter the Settlement Commission held:

“24. The Bench on careful consideration finds that the different defences of the applicant are not at all convincing. Revenue has been able to show, on the basis of supplementary evidence, that the amounts flowing back were more than that appearing in the diaries and the few kaccha papers seized. Since a one to one co relation was not given by the applicants, who have admitted that there was some goods less invoices and that an amount did flow back without clearly giving which invoices and which amounts correlate, the Bench is unable to accept their contentions as to the quantum of goods less invoices. The Bench observes that the applicant has mostly cooperated with the investigation as well as in the proceedings before the Commission. They voluntarily paid a substantial part of the duty evaded during the investigation. In view of the facts and circumstances of the case, the Bench hereby settles the case on the following terms and conditions:

Duty:- The wrongly availed Central Excise cenvat credit is settled at Rs. 2,16,70,002/- against the applicant. An amount of Rs.80,14,397/- deposited by the applicant is ordered to be appropriated towards the settled amount of duty. The remaining amount is ordered to be paid within 30 days of receipt of this order.

Interest: An amount of Rs.19,59,645/- has been admitted and deposited by the applicant firm towards interest which is ordered to be appropriated against the applicant's interest liability. The Revenue is given liberty to re-calculate the interest on the settled duty amount within 15 days of the receipt of this order and inform the same to the applicant who shall pay the such amount within 15 days from the date of receipt of such intimation from Revenue under intimation to Revenue and the Commission.

Penalty: The Bench imposes a penalty of Rs 20 lakhs on the applicant firm under the provisions

invoked in the SCN and grants them immunity from penalty in excess of the above amount. The Bench further imposes a penalty of Rs. 1,00,000/- (Rupees one lakh only) on Shri Hardeep Singh Banga, co-applicant no. 1, Shri Purushottam Lal Gupta, co-applicant no. 6 is also imposed a penalty of Rs. 1,00,000/- (Rupees one lakh only) under the provisions invoked in the SCN. Shri Pawan Goel, co-applicant no. 5 is imposed a penalty of Rs. 50,000/- (Rupees fifty thousand only). Shri Ashok Rawat, co-applicant no. 7 is totally exempted from penalty. The Companies M/s. Allied Strips Ltd. co-applicant no.2; MIs. AGR Steel Strips (P) Ltd., co-applicant no. 8; M/s. Asian Colour Coated Ispat, co-applicant no. 11 and MIs. J.V. Strips Pvt. Ltd., co-applicant no. 13 are all imposed a penalty of Rs. 1,00,000/- (Rupees one lakh only,) each. Co-applicant nos.3, 4, 9, 10, 12, 14 and 15 are imposed a penalty of Rs. 25,000/- (Rupees twenty five thousand only) each under the provisions invoked in the SCN and exempted them from penalty in excess of that amount.

Prosecution: Subject to payment of above fine and penalty, the Bench grants immunity to the applicants from prosecution under the Act and Rules framed there under in so far as this case is concerned.”

WP(C) No.8939/2015

35. The petitioner, through its Managing Director, had filed an application for settlement in June, 2014, after they were served with a show cause notice dated 24.11.2011 in respect of evasion of central excise duty of Rs.3.51 crores. The petitioner was engaged in the manufacture of pet-preforms. The pet-preforms were supplied by the petitioner to M/s Iceberg Foods Ltd.(‘IFL’ for short), who was engaged in the manufacturing of various variants of packaged

drinking water of different brands, aerated water and carbonated drinks of various brands. Pet-preforms were used by IFL to manufacture pet bottles. Both the petitioner and IFL were subjected to search operations by the Director-General of Central Excise Intelligence and incriminating material and documents, including CPU, pen drives, laptops etc. were seized and statement of different persons were recorded.

36. Duty of Rs.3.51 crore demanded in the show cause notice for pet-preforms clandestinely removed from the factory of the petitioner during the period January, 2007 to August, 2009, was calculated on the basis of purchase of 2864.800 M.T. of pet resin procured through M/s Prayag Polymers, M/s Guru Kripa International and M/s.Bhaiji International. Petitioner had stated that the IFL and similar bottlers had filed settlement application, accepting their duty demand and interest liability. Some other bottlers were in the process of filing settlement applications. On the question of calculation of duty liability, the petitioner in the application for settlement had stated:-

“3. That pet performs are an intermediate product while PDW is the final product. Whatever duty is deposited by the applicant on pet performs, IFL and the other bottlers avail cenvat credit thereon.

4. If the admissibility of cenvat credit is considered, then, had the applicant deposited duty on pet performs, then IFL and other bottlers would have been entitled to avail cenvat credit thereon, which in turn, would have been utilized by them for payment of duty on their own finished goods. In the present case, since IFL and other bottlers have deposited the full amount of duty on PDW, the duty on pet performs should not be demanded from the applicant as it is only an intermediate product

which is used further for manufacture of PDW. On this basis, the applicant admits and has deposited duty of Rs. 3,04,001.39, only in respect of that much quantity of pet preforms which has been allegedly cleared by the applicant clandestinely as per the seized records, computer data etc. for which, duty has not been deposited by the manufacturer of PDW. Enclosed herewith and marked **Annexure 'H'** is a chart showing the details of the cenvat credit which would have been availed by IFL and all other bottlers to whom show cause notices have been issued along with details of pet preforms consumed by each bottlers as per the show cause notices issued to them.”

37. The petitioner had referred to deposit of Rs.50,00,000/- made by them during investigation, a fact admitted in the show cause notice. The petitioner having disclosed duty liability of Rs.3,04,001.39/- as per settlement application were entitled to refund of Rs.46,16,958.25/- out of this deposit of Rs.50,00,000/-. Admission of undisclosed duty liability of Rs.3,04,001.39/- is also significant. Clause (c) to the proviso to Section 32-E(1) of the Act states that the application shall not be entertained unless additional amount of duty accepted by the applicant exceeds Rs.3,00,000/-.

38. The Settlement Commission, by the impugned order dated 18.3.2015, has held as under:

“9. The Bench has carefully considered the records and the submissions made by the Ld Advocate of the applicant and Revenue at the time of hearing. It is an admitted fact that the applicant has manufactured pet preforms clandestinely and has sold it to various manufacturers and bottlers of packaged drinking water (PDW) without proper invoice and without paying central excise duty. It is also true that the pet preforms have been used as

input by such manufacturers and bottlers of packaged drinking water (PDW), in their manufacturing process, and who have cleared their finished products clandestinely without proper invoice and without paying central excise duty. It is also not in dispute that some of such manufacturers and bottlers have approached the Settlement Commission and have had their cases settled by admitting their duty liability and have paid the same alongwith interest.

9.1 The Bench finds that the applicant has admitted, against a duty demand of Rs 3,51,82,322/- detailed in the SCN, to a duty liability of Rs 3,04,001/-, on such quantity of pet preforms which, as per the applicant, were clandestinely cleared and on which no manufacturer has paid duty. The applicant has contended that the rest of the demand is included in the demands made to manufacturers and bottlers. The Ld Advocate has argued that if the applicant is made to pay duty of Rs 3.51 crores demanded in the SCN, the facility to avail cenvat credit may also be extended to the manufacturers and bottlers of PDW. Once the receivers of Pet-preforms paid their duty liability based on value determined by Revenue, they in effect also paid the duty on Pet-prefons since the price of Pet-preforms was part of the assessable value of the Packaged Drinking Water (PDW). In effect therefore, demanding duty from the applicant would amount to double taxation on the same product and this was not permissible under the Law.

9.2 The Revenue has in turn argued that the applicant, being an independent entity, was required to pay duty on the pet preforms which was a finished product for them. The applicant did not do so. The conditions of Rule 9 of CCR 2004 which lists the documents on the basis of which cenvat credit can be taken, specifically excludes

taking of cenvat credit in such cases. The Revenue has also pointed out that the department had issued notices in this case to 18 firms and many of them had not come before the Settlement Commission and that some of these firms had also claimed SSI benefit in their responses to their respective SCNs.

9.3 The Bench finds force in the contention of the Revenue. The evidence gathered by the Revenue and detailed in the SCN and the modus operandi reflected from the evidence has not been controverted by the applicant or by other manufacturers and bottlers involved. The case is one of clandestine removal on a large scale involving several manufacturers and bottlers across the country. From the evidence adduced by the Revenue, from the detailed private records resumed from the various dramatis personae, it is clear, that from the procurement of pet resin by the applicant to the clearance of PDW by the manufacturers and bottlers, there has been a consistent effort to evade payment of duty and to deprive the government of legitimate dues. It can with good justification be called a detailed and deliberate conspiracy to evade central excise duty. But for detection by the Revenue, this evasion would have continued.

9.4 The objective of the Cenvat Credit scheme is to avoid cascading effect of duty. The scheme enables the receiver of duty paying goods to avail credit in terms of the procedure laid down in Cenvat Credit Rules 2004 as amended. This procedure has not been followed in this case. The scheme presupposes payment of duty first and availment of credit afterwards. The applicant has not paid the initial duty and has, in effect, argued that duty on the clandestinely removed pet preforms should not be demanded from him as the recipients of the pet preforms have paid duty on their finished goods i.e. PDW which includes the cost of the input pet preforms. The Bench also notes that none of the

manufacturers and bottlers who approached the Settlement Commission for settling their case, made any plea for allowing them the facility of availing cenvat credit on that part of the excise duty that was based on the value of petpreforms procured from the applicant. The applicant as a separate entity cannot make such a plea on their behalf.

9.5 As stated above, the applicant have not contested the SCN and as such it has to be held that they have accepted the allegations contained therein. As such they are liable to pay central excise duty demanded in the SCN. For the reasons discussed in the foregoing paragraphs, the Bench does not extend the facility of availing cenvat credit by the manufacturers and bottlers. Even in the case of any supplementary by the applicant, the exception in Rule 9 (1) (b) of CCR 2004 receivers of pet preforms to take any credit of duty paid by the paid by the applicant. So far as the culpability of the co-applicants is concerned, their roles in the evasion of duty is established by the detailed private records recovered by the Revenue and whose evidence has not been controverted. The co-applicant no 1 as the proprietor and controller of dummy firms was instrumental in procuring raw material for pet preforms and connived with the co-applicant no 2 in the evasion of duty. It is also clear that the co-applicant no 2 devised and masterminded the elaborate modus operandi to evade central excise duty. For their acts, penalty is imposable.”

39. Recording the above, the Settlement Commission held as under:-

“9.6 In view of the facts and circumstances of the case, the Bench hereby settles the case on the following terms and conditions:

Duty:-The Central Excise Duty in this case is settled at Rs.3,51,82,322/- (Rupees three crore fifty one lakh eight thousand three hundred twenty two only) against the applicant. An amount of Rs50,00,000/- already deposited by the applicant is ordered to be appropriated towards the settled amount of duty. The balance amount of Rs3,01,82,322/- may be paid within 30 days from the date of receipt of this order.

Interest: An amount of Rs 79,040/- paid as interest is ordered to be appropriated towards interest liability. The Revenue is however given liberty to check the correctness of the amount and in case there is any shortfall, they should inform the same within 15 days, to the applicant who shall pay the amount within 15 days from the date of receipt of such communication from Revenue under intimation to Revenue and the Commission.

Penalty: The Bench imposes a penalty of Rs. 30,00,000/-(Rupees thirty lakh only) on the applicant firm. The Bench also imposes a penalty of Rs 1,00,000/- (Rupees one lakh only) on co-applicant no1 and Rs 2,00,000/- (Rupees two lakh only) on co-applicant no 2, under the provisions invoked in the SCN. The Bench grants the applicant and the co-applicants immunity from penalty in excess of the specified amounts.

Prosecution: Subject to payments as above, the Bench grants immunity to the applicant and the co-applicants from prosecution under the Act and Rules framed thereunder as applicable in so far as this case is concerned.”

WP(C) No.10013/2016

40. The petitioner company was engaged in manufacture of Copper Ingots and Copper Wire Rods.

41. As per the Revenue, the petitioner had clandestinely removed finished goods, viz. copper ingots by suppressing production, with an intent to evade payment of duty. The petitioner had also wrongfully availed of CENVAT credit on in-admissible capital goods. The petitioner had been subjected to search by the officers of the Preventive Wing of the Central Excise on 22.5.2012. Records and evidence with regard to clandestine removal were seized. Thereafter, show cause notice date 16-18.3.2015 was issued for recovery of excise duty of Rs.57,05,370/-(as not paid on 98212.65 Kg. of Copper Wire Rods/Ingots); wrongful claim of CENVAT credit amounting to Rs.1,53,512/- and wrongful claim of CENVAT credit amounting to Rs.6,10,06,458/- as availed of without receiving the raw materials. Interest payable on the above amounts was demanded. The show cause notice had asked the petitioner to answer why the penalty should not be imposed. Show cause notice was also issued to the Director of the petitioner company to answer why penalty should not be imposed.

42. The petitioner had filed settlement application on 23.9.2015 alleging that the proposed demands in the show cause notice were one-sided and the petitioner as a law abiding citizen did not want to indulge in litigation. The petitioner, it was stated, was liable to pay Rs.48,13,658/- towards duty liability and interest of Rs.56,971/- thereon. The petitioner had denied its liability in respect of 3rd limb of the show cause notice for duty liability arising on account of wrongly availing of CENVAT Credit of Rs.6.10 crores.

43. The Settlement Commission, by the impugned order dated 29.09.2016, had recorded that none had appeared for the petitioner in

response to the notice of hearing fixed on 12.05.2016. The petitioner had earlier filed letter dated 9.5.2016 with a request to withdraw the application for settlement. This request was rejected in terms of Section 32-E(4) of the Act, which states that an application made before the Settlement Commission cannot be allowed to be withdrawn. Accordingly, the hearing was fixed on 8.6.2016 at 11:30 pm. The case was heard on 8.6.2016 and then again on 29.6.2016. The Settlement Commission while holding that Revenue cannot rely upon and refer to inquiry report of the Commissioner(Investigation) dated 23.8.2016 as it was beyond the time prescribed in the statute and was by the same officer who had issued the show cause notice; on the question of quantum held that there were discrepancies in the assertions of the petitioner as there was no evidence with regard to transport of goods from Gujarat to Bhiwadi, Haryana and re-transportation of the goods from Bhiwadi to Gujarat, covering a distance of more than 1000 km. It was held as under:

“41. In view of the above we have no hesitation in concluding that the applicant has deliberately manipulated records to show receipt of 1288.036 Mts of Copper Wire Rod B Grade from M/s Chandra Proteco Ltd (U- II), Silvassa to irregularly avail Cenvat Credit amounting to Rs 6.10 crores. The entire economics of cost of raw material, burning losses, the price of finished goods, three wheeler tempo with a rated payload of 560 Kg shown to have twice carried 19.93/20.04 MT under invoice no 834 dated 27.12.11 and 845 dated 29.12.11 of Copper Wire Rod B Grade over a distance of 1195 km from Silvassa to Bhiwadi, denial by eight other owners/drivers/caretaker of trucks to have ever carried goods from M/s Chandra Proteco Ltd (U- II), Silvassa to applicants premises leave no doubt that

the 1288.036 Mts of raw material on which applicant has availed cenvat credit M/s Chandra Proteco Ltd (U- II), Silvassa of Rs 6.10 crores, was never received by the applicant and therefore the cenvat credit of Rs 6.10 crores on the basis of invoices issued by M/s Chandra Proteco Ltd (U- II), Silvassa has been incorrectly availed by the applicant. The contention of the applicant that they had received the entire raw material as shown in the invoices of M/s Chandra Proteco Ltd (U- II), Silvassa and had used that raw material to manufacture finished goods stands totally demolished. Applicant has thus not come clean before the Settlement Commission and his admission of total liability of Rs 48,13,658/- is incorrect.

42. In such a situation, where the evidence available on record clearly shows that the applicant is not admitting correct liability after having applied for settlement, we are confronted with the peculiar situation, to settle the case or to remand it for adjudication. Hon'ble High Court of Delhi dealing with a similar situation in WP No.219612008 has observed that:

"As already pointed out the petitioner had admittedly indulged in clandestine manufacture and removal of excisable goods without payment of excise duty. Obviously, there would be no record showing precisely the figure of excise duty sought to be evaded by the petitioner. But for that reason the central Excise authorities or the CCESC cannot throw up their hands and plead helplessness; they have to perforce arrive at a reasonable estimate of the Khaini that has been cleared without payment of excise duty."

In that case the petitioner Shri Loknath Prasad Gupta had admitted tax liability of Rs.18.26 crores before the Settlement Commission. However, the Settlement Commission had settled the duty liability at Rs.58.09 crores.

.....

45 To sum up the applicant has countered the allegations of non receipt of the raw material from M/s. Chandra Proteco Ltd (U-II). by repeatedly saying that they have received the entire raw material sent by M/s. Chandra Proteco Ltd. and the said raw material was used by them for the manufacture of finished goods which in turn were sold to M/s. Chandra Proteco Ltd.(U-II) and appropriate Central Excise duty was discharged on the same. The applicant has also alleged that the entire show cause notice is only based on the statements of some persons. In support of his contention the applicant has produced copies of the invoices for the goods sent by M/s. Chandra Proteco Ltd(U-II). as also copies of invoices of the finished goods alleged to be manufactured by him and sent to M/s. Chandra Proteco Ltd.(U-II) alongwith documents showing the transportation of the said goods from Silvassa to Bhiwadi and back from Bhiwadi to Silvassa. In view of the discussions above, we find the contentions of the applicant to be improbable and unbelievable for the simple reasons that the applicant has shown a three wheeler tempo with a payload capacity of 560 kgs. to have transported nearly 20 tons of Copper Wire Rods 'B' Grade from Silvassa to Bhiwadi over a distance of 1195 kms on two occasions. Further the applicant has shown dispatch of the finished goods days before the receipt of the raw material. The denial by the owners, driver and caretaker of 8 vehicles to have carried the goods from M/s. Chandra Proteco Ltd.(D-II) to the applicant's premises coupled with losses of Rs. 4 Crores approximately calculated on the basis of documents produced by the applicant leave no doubt in our minds that the applicant has not received any goods at all from M/s Chandra Proteco Ltd.(D-II) on which he has availed Cenvat credit of Rs.6.10 Crores.”

44. Thereafter, the Settlement Commission had passed the following order under Section 32F(5) of the Act:-

“46. In view of the above, and the facts and circumstances of the case, the Bench settles the case under Section 32F (5) of the Act on the following terms:-

Central Excise Duty:-The Central Excise Duty in this case is settled at:

(i) Rs 42,49,584/- in respect of clandestine removal of 73152.65 kg of Copper wire rods not received from job worker and sold without payment of duty.

(ii) Rs14,55,786/- in respect of difference in closing balance of Copper Scrap on 31.3.12, and opening balance as on 1.4.12.

(iii) Cenvat credit amounting to Rs1,53,512/- availed incorrectly on ineligible capital goods is ordered to be recovered from the applicant.

(iv) The wrongly availed Cenvat credit amounting to Rs6,10,06,458/- is ordered to be recovered from the applicant.

Out of the said, the applicant has claimed to have discharge duty liability of Rs. 48,13,6581 towards tax liability admitted by him. The said amount is ordered to be appropriated towards the settled amount of duty. The remaining amount should be paid by the applicant within 30 days of the receipt of this order.

Interest: The applicant has admitted and claimed to have deposited an amount of Rs1,24,224/- towards their interest liability and appropriate the same. The Jurisdictional Commissionerates should calculate the interest liability and inform to the applicant within 15 days of the receipt of this order. The applicant shall pay the remaining amount, if any, within 10 days from the date of receipt of such communication from the

Jurisdictional Commissionerate under intimation to the Commissionerate and the Commission.

Penalty: The Bench imposes a penalty of Rs. 200,00,000/- (Rupees two crores only) on the applicant and grants immunity to the applicant from penalty in excess of the above amount. The Bench also imposes a penalty of Rs50,00,000/- (fifty lakh only) on the co-applicant.

The settled amount of duty, penalty and interest should be paid by the applicant within 30 days of receipt of this order.

Prosecution: In view of extensive manipulation of records, evasion of substantial Central Excise duties, concealment and mis-representation of facts which the applicant continued to do even during the Settlement Proceedings, we reject the applicants' request for immunity from prosecution.”

45. A reading of the impugned orders would show that the Settlement Commission did not accept the claim of the three petitioners that they had made ‘full and true’ disclosure of the duty liability. It had also opined on the petitioners’ failure to disclose the manner in which the said duty liability was derived. Two essential pre-conditions for invoking jurisdiction of the Settlement Commission were therefore not satisfied. In the given facts, the Settlement Commission should have rejected the settlement applications and referred the case to the Central Excise Officer to decide the show cause notices issued to the parties on merits. However, notwithstanding the failure and non-satisfaction of the jurisdictional pre-conditions, the Settlement Commission proceeded to act as an adjudicating authority and has decided the show cause notice. This would be beyond the scope and power of the Settlement Commission,

for the Settlement Commission is not an adjudicatory authority substituting the Central Excise Officer. The Settlement Commission must function under the four corners of the powers conferred under Chapter-V of the Act. The Settlement Commission, after expressing and recording the finding on the failure of the petitioners to make 'full and true' disclosure of the duty liability and the manner in which it was derived, should have rejected the settlement application. The petitioners should have been relegated to suffer and undergo adjudication mechanism and procedure as per the provisions of the Act.

46. Learned counsel for the petitioners, *Iceberg Aqua Pvt Ltd & Ors* in WP(C) No.8939/2015 and *K M G Rolling Pvt. Ltd. & Anr.* in WP(C) No.10013/2016 had stated that the petitioners would have to face the adjudication proceedings pursuant to the show cause notice. Orders in this regard remitting the case to the Central Excise Officer may be passed. However, learned counsel for the petitioner *SDL Auto Pvt. Ltd.* in WP(C) No.7277/2015 had submitted that the matter should be remanded to the Settlement Commission. We would observe that once the Settlement Commission had concluded that the petitioner had not made 'full and true' disclosure of the evaded duty and the manner in which the duty was derived, we should relegate the petitioner to the normal procedure. Learned counsel for the petitioner in WP(C)No.7277/2015 had submitted that in case of associate enterprise and other cases, the Settlement Commission has accepted their duty liability at much lower and lesser figure. These cases were arising from the investigation conducted pursuant to the group search and seizure of diaries. We would only observe facts of each case and

the adjudication would depend upon the evidence and material collected in the investigation in each case. We are primarily concerned with the evidence and reasoning recorded by the Settlement Commission in the case of the petitioner in WP(C) No7277/2015. The findings recorded by the Settlement Commission are elaborate and detailed. Case for remand to the Settlement Commission is not made out. We therefore do not find any merit in the prayer for remand made by the learned counsel for the petitioner in WP(C) No.7277/2015.

47. Recording the aforesaid, the writ petitions are partly allowed, quashing the impugned orders passed by the Settlement Commission to the extent they 'adjudicate' and confirm the demand raised in the show cause notice. We do not disturb the impugned orders to the extent they hold that the petitioners had not made full and true disclosure of their duty liability and the manner in which it was derived. Legal consequences as postulate in law would follow.

48. Proceedings pursuant to the show cause notice before the Central Excise Officer would commence. Period from the date of filing of the applications for settlement till the present pronouncement would be excluded for the purpose of limitation. The adjudicating authority/Central Excise Officer would consider the defence and the contentions of the petitioners before passing the final order. Lest there be any confusion or ambiguity, we would observe that statements made in the settlement application, reports, settlement order etc. would be read and taken into consideration as per law. Show cause notices would be decided by the Central Excise Officer on merits after hearing the parties. Observations and findings recorded

by us in the present judgment are for deciding the writ petitions. We have not decided the show cause notice on merits. In the facts and circumstances of the case, there would be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(CHANDER SHEKHAR)
JUDGE

DECEMBER 20th, 2018/ssn

सत्यमेव जयते