

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.03.2019

Delivered on : 26.03.2019

CORAM:

THE HONOURABLE MR. **JUSTICE SETHILKUMAR RAMAMOORTHY**

W.P.No.37808 of 2006
and
M.P.No.1 of 2006

Commissioner of Central Excise,
Chennai II Commissionerate,
No.692, M.H.U. Complex,
Anna Salai,
Chennai - 600 034.

... Petitioner

Vs.

1.M/s.Kanishk Steel Industries Ltd.,
Plot No.B/27 (M) SIPCOT Industrial Complex,
Gummidipoondi - 601 201.

2.Customs & Central Excise Settlement Commission,
Additional Bench,
rep. by Vice Chairman and Member,
Department of Revenue,
Narmada Block, 2nd Floor,
Customs House, No.33, Rajaji Salai,
Chennai - 600 001.

... Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records of the impugned Final Order No.35/2006-C.Ex. dated 14.07.2006, on the file of the Second Respondent and quash the same.

For Petitioner : Mr.K.S.Ramasamy CGSC
for Central Excise, Customs and
Service Tax.

For Respondents : Mr.R.Swarnavel
for M/s.S.Venkatachalam for R-1

ORDER

This Writ Petition is filed for a Writ of Certiorari to quash the Order Dated 14.07.2006 of the Second Respondent. The short issue that arises for consideration in this Writ Petition is whether the Impugned Order of the Customs and Central Excise Settlement Commission, the Second Respondent herein, contains errors apparent on the face of the record and is therefore liable to be interfered with under Article 226 of the Constitution of India.

2.The brief facts that are necessary to decide this case are set out before dealing with the contentions of the two parties. The First Respondent is a company that manufactures steel re-rolled products. These products are cleared both from the factory gate as well as on stock transfer from depots situated at Bangalore and Ernakulam. It appears that the First Respondent filed returns with regard to factory gate clearances. However, with regard to sales from their depots, the First Respondent was unsure about the method of valuation thereof for

purposes of calculating the differential duty on such sales. Accordingly, by letter dated 10. 10. 2001, the First Respondent requested the Superintendent of Central Excise, Gummidipoondi Range, to advise as to the method to be adopted for depot sales on stock transfer from the First Respondent's factory so as to arrive at the differential duty.

3.The Superintendent of Central Excise does not appear to have responded to this request for advice. Thereafter, by letter dated 03.01.2002, the First Respondent informed the Superintendent of Central Excise that it had removed excisable goods on stock transfer basis from its depots at Bangalore and Ernakulam and that duty had been paid on the said goods at a price nearer to the depot price because the same was not ascertainable at the time of removal. The First Respondent further set out the assessable value at the factory gate and depot both in respect of sales at the Bangalore and Ernakulam depots, respectively, with regard to the period April to November 2001. On the basis of the aforesaid assessable values, the first respondent paid the aggregate differential excise duty of Rs.2,35,616/- and requested the Superintendent of Central Excise to consider the above mentioned payment of differential duty for the months of April to November 2001 along with the return submitted for assessment. This practice of paying the differential duty, separately, in respect of goods

removed from the depots continued in the following assessment years. From the documents on record, it appears that by letters dated 15. 11. 2003, 08.12.2003, 06.12.2004, 14.02.2005 and 30.08.2005, the First Respondent communicated to the Superintendent of Central Excise that differential duty was being paid in respect of clearances on stock transfer basis from the two depots.

4. In these facts and circumstances, the Petitioner issued Show Cause Notice No. 2/06 dated 17.01.2006 to the First Respondent wherein it was stated that the First Respondent had been clearing goods on stock stock transfer from the depots at Bangalore and Ernakulam from 2001 onwards. It was further stated that the First Respondent had not requested the jurisdictional Assistant/Deputy Commissioner of Central Excise for a provisional assessment of the value adopted by the First Respondent for such clearances and that therefore the first respondent had contravened Rule 7 of the Central Excise Rules. The First Respondent was informed that the officers of the Central Excise Department visited the factory and office of the first respondent on 18.10.2005 and recovered certain records for verification. On the basis of such verification, it was pointed out that the differential duty had not been calculated correctly. More importantly, it was pointed out that the differential duty had been

calculated without taking into consideration the forwarding charge or freight charge for the movement of goods from the factory gate to the depots. It was pointed out that as per Explanation 2 to Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000, the cost of transportation from the factory to the place of removal should be included for purposes of determining the value of excisable goods. Accordingly, it was pointed out that there was an aggregate short payment of duty for the period 12/2001 to 7/2005 of Rs.87,24,986/-. It was further alleged that the assessable value was deliberately mis-declared by the First Respondent with intention to evade payment of duty. Therefore, it was alleged that the short paid duty is recoverable from the First Respondent under proviso to Sub Section 1 of Section 11 A of the Central Excise Act, 1944(the Central Excise Act). It was further alleged that the First Respondent is liable to pay interest and penalty under the relevant sections of the Central Excise Act.

5. On receipt of the aforementioned show cause notice, the First Respondent filed an Application under Section 32 E of the Central Excise Act before the Customs and Central Excise Settlement Commission on 10.04.2006. From the said Application, it is clear that the total amount of duty involved in the dispute is Rs.87,24,986/-,

which corresponds to the principal demand under the show cause notice. It is also clear from the Application that the additional amount of duty accepted as payable by the First Respondent is a sum of Rs.34,87,039/-. The said Application requests for waiver of duty to the extent of Rs.52,37,947/- and also requests waiver of interest, penalty and immunity from prosecution. In the annexure to the Application, the First Respondent has stated that the show cause notice was issued by invoking the extended period under the proviso to Sub-Section 1 of Section 11 A of the Central Excise Act and that the Central Excise Department was not justified in invoking the extended period in this case. This statement was made on the basis that the applicant therein/1st Respondent herein removed the excisable goods to the depots under proper Central Excise invoices on payment of duty and differential duty and also informed the Central Excise Department about the said payment of differential duty. In effect, it was pleaded by the first respondent that the Central Excise Department is aware of all the facts and that there was no suppression. It was further pointed out in the said Application that the Applicant therein/1st Respondent herein had requested clarifications from the Department about the method to be adopted in arriving at the assessable value for clearances from the depots even prior to the demand in the show cause notice. All the

letters relating to the request for clarification or payment of differential duty were expressly adverted to. Hence the First Respondent submitted that facts were not suppressed with the intent to evade payment of duty.

6. In response to the said Application of the First Respondent, the Petitioner submitted its response on 26.05.2006 wherein the Petitioner stated that the First Respondent chose to pay duty on excisable goods under self-assessment and therefore it should have paid differential duty on monthly or quarterly basis and provided the said information regularly to the Central Excise Department on monthly or quarterly basis. Therefore, the Petitioner submitted that differential duty was paid belatedly and the department was informed belatedly. Consequently, the Petitioner stated that it was justified in invoking the extended period of limitation. In respect of the letters addressed by the Petitioner regarding payment of differential duty, the Petitioner stated that it is clear from the letters that information was provided belatedly to the Central Excise Department and therefore the Department cannot be expected to initiate action for recovery of short payment of duty within the normal period of one year specified in the Central Excise Act. Therefore, the Petitioner requested the Settlement Commission to reject the application filed by the assessee.

7. At the hearing on 04.07.2006, the Settlement Commission heard both parties. With regard to the invocation of the extended period of limitation under the proviso to Sub-Section 1 of Section 11 A of the Central Excise Act, the Settlement Commission stated that excise duty can be demanded for the extended period only if there is misstatement or suppression of facts. In this regard, the Settlement Commission held that the Applicant therein/1st Respondent herein had been regularly writing to the Department seeking advice about the method to be adopted for arriving at the value of goods sold from the depots and that it was clear that the Department had not replied to those letters. The Settlement Commission also adverted to the fact that the applicant therein had informed the Department about the payment of differential duty and had enclosed detailed worksheets indicating as to how they had arrived at the differential duty. The Settlement Commission further held that the Applicant therein had cleared the goods under proper invoices and that merely because the calculation of differential duty was incorrect, it cannot be said that there was misstatement or suppression. In fact, the Settlement Commission has expressly stated that if it was the intention of the applicant therein to suppress information or evade payment of duty, the Department would not have been asked for advice and differential duty would not have

been paid. On the basis of the said analysis, the Settlement Commission concluded that there was no suppression or willful misstatement on the part of the applicant therein and that therefore the invoking of the extended period is not sustainable.

8.The Settlement Commission proceeded to take note of the fact that out of the admitted Excise Duty of Rs.34,87,039/-, a sum of Rs.25 lakhs had been paid prior to the receipt of the show cause notice and another sum of Rs.5 lakhs was paid on 20.01.2006, i.e. 30 days from the date of issue of the show cause notice. In view of the said facts, the Settlement Commission recorded that it is inclined to grant immunity from interest because the bulk of the admitted amount was paid before issue of the show cause notice. Accordingly, the Settlement Commission granted the Applicant therein/1st Respondent herein immunity from interest, fine, penalty and prosecution under the Central Excise Act.

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9.The learned counsel for the Petitioner submitted that the Order of the Settlement Commission is liable to be quashed because the Settlement Commission did not appreciate the fact that the First

Respondent herein should have opted for provisional assessment if it was in doubt as to the method of calculation of assessable value on depot sales on stock transfer basis. The learned counsel further submitted that the First Respondent did not include the depot sales on stock transfer basis in its regular returns and that the differential duty, in this regard, was paid belatedly. According to the learned counsel for the Petitioner, this amounts to suppression of facts with intent to evade duty and therefore the Central Excise Department is justified in invoking the extended period of limitation under Sub-Section 1 of Section 11 A of the Central Excise Act. On the merits of the case, the learned counsel for the Petitioner submitted that it is settled law that freight charges should be included in the assessable value. In order to substantiate the submission, he relied upon the judgement of the Hon'ble Supreme Court in **ESCORTS JCB vs. COMMISSIONER OF CENTRAL EXCISE (2002) 146 ELT 31 (SC)**. (the Escorts JCB case). He also relied upon the judgment of the Hon'ble Supreme Court in **PRABHAT ZARDA FACTORY LTD Vs. COMMISSIONER OF CENTRAL EXCISE (2002) 140 ELT 497** wherein the judgment in the **ESCORTS JCB** case was followed. With regard to the jurisdiction of the Settlement Commission, the learned counsel for the Petitioner relied upon the judgment of a Division Bench of the Karnataka High Court in

THE COMMISSIONER OF CUSTOMS Vs. A.MAHESHRAJ, 2006

(195) ELT261 Kar, wherein the Division Bench held that Chapter XIV A of the Customs Act cannot be relied upon in cases of mis-declaration wherein the applicant for settlement was a smuggler and the Settlement Commission had deemed fit to levy penalty of Rs.25,000/- on the Applicant.

10. In response, the learned counsel for the First Respondent submitted that it is an admitted fact that the First Respondent had repeatedly requested for clarification as to the proper mode of calculating the assessable value in respect of depot sales on stock transfer basis. He further pointed out that in respect of the assessment years in question, the First Respondent had admittedly calculated and paid differential duty in respect of depot sales, albeit belatedly. In these circumstances, he submitted that there was no suppression of facts or misstatement by the First Respondent. He further submitted that all these facts were duly pleaded before the Settlement Commission and that the Settlement Commission carefully analysed the relevant facts before concluding that it was not a case of suppression of facts with intent to evade excise duty. With a view to substantiate the said contentions, the learned counsel for the First Respondent referred to several authorities, which are set out below:

1)Tamil Nadu Newsprint and Papers Ltd., Vs. Settlement Commissioner, Chennai reported in 2017(356) E.L.T. 202 (Mad.)(the Tamil Nadu Newsprint case).

2)Maan Pharmaceuticals Ltd., Vs. Union of India reporteddc in 2014(307) E.L.T. 642(Guj).

3)Union of India Vs. Hognas India Limited reported in 2006(199) E.L.T.8(Bom).

4)Commissioner of Central Excise, Jalandhar Vs. Royal Enterprises reported in 2016 (337) E.L.T. 404 (Mad.).

5)Muhammed Ismail Mills Vs. Gestat Chennai reported in 2015 (315)E.L.T. 404 (Mad),

6)Uniworth Textiles Ltd., Vs. Commissioner of Central Excise, Raipur reported in 2012(288) E.L.T.161[S.C].

7)Continental Foundation, JT Venture Vs. Commr of C.Ex. Chandigarh reported in 2007(216) E.L.T. 177 (S.C.).

8.Anand Nishkawa Co. Ltd., Vs. Commissioner of Central Excise, Meerut reported in 2005 (188) E.L.T. 149(S.C.) and

9.Pushpam Pharmaceuticals Company Vs.Collector of

Central Excise, Bombay reported in 1995 (78) E.L.T. 401 9S.C)(the Pushpam Pharmaceuticals case).

11. In particular, he referred to the judgment of this Court in the **TAMIL NADU NEWSPRINT CASE**, wherein, at paragraph 8, this Court held that the Petitioner had disclosed the admitted duty liability and therefore it cannot be taken as a case where full disclosure of the duty liability was not made because of the technical plea regarding limitation. He also invited the attention of this Court to the Division Bench judgment of the Bombay High Court reported in **2006(199) E.L.T.8(Bom)** wherein, at paragraph 44, it was held that the structure of Chapter XIV A of the Customs Act shows that the Settlement Commission has jurisdiction to entertain all kinds of applications for settlement provided they satisfy the mandatory requirements. Significantly, he relied upon the judgment of the Hon'ble Supreme Court in the **COMMISSIONER OF CENTRAL EXCISE Vs. ROYAL ENTERPRISES** (cited supra) wherein the Hon'ble Supreme Court held that the Tribunal was correct in concluding that there was no suppression of facts with intent to evade duty. In the said judgment, the Hon'ble Supreme Court adverted to other judgments, including the judgment in **PUSHPA PHARMACEUTICALS COMPANY Vs.**

COLLECTOR OF CENTRAL EXCISE, BOMBAY(cited supra) wherein it was held as follows:

“Section 11 A empowers the Department to reopen proceedings if the levy has been short levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different than what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done does not render it suppression.”

12.This Court has carefully considered the affidavit, counter

affidavit, documents, oral submissions and the written submissions of the First Respondent.

13. The limited question to be decided in this case is whether the order of the Settlement Commission is liable to be interfered with by this court. As regards the fact that freight charges ought to have been added for calculating the excise duty on depot sales on stock transfer basis, there is no dispute and the judgments of the Hon'ble Supreme Court in the **ESCORTS JCB** case and the **PRABHAT ZARDA FACTORY** case, which were adverted to by the learned counsel for the Petitioner, settle the issue. As regards the jurisdiction of the Settlement Commission, it is clear from Section 32-E that it covers cases of undervaluation. In this regard, the judgment of the Division Bench of the Karnataka High Court reported in **2006 (195) E.L.T. 261(Kar)** is in the context of a smuggler and is distinguishable. Therefore, the material issue in the instant case is whether the extended period of limitation could be justifiably invoked. From the order of the Settlement Commission, as adverted to earlier, it is clear that the Settlement Commission was apprised of the fact that differential duty had been calculated incorrectly. Therefore, one of the questions that the Settlement Commission was called upon to decide was whether the

extended period of limitation was justifiably invoked by the Central Excise Department. By taking into consideration the requests for clarification and the voluntary payment of differential duty in respect of depot sales on stock transfer basis, the Settlement Commission concluded that there was no suppression of facts. In fact, the Settlement Commission has expressly stated that the Applicant therein/First Respondent herein would not have requested for clarification or communicated with regard to payment of differential duty, which included the methodology adopted for calculation thereof, if it intended to suppress facts so as to evade payment of excise duty and that these communications were not responded to by the Central Excise Department.

14.As regards the legal issue, it is pertinent to refer to section 11-A of the Central Excise Act, which reads, inter alia, as follows:

Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty

which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

- (a) fraud; or
 - (b) collusion; or
 - (c) any wilful mis-statement; or
 - (d) suppression of facts; or
 - (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,
- by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

15. From the proviso to Section 11-A, it is clear that the extended period can be invoked only if there is fraud, collusion, wilful misstatement, suppression of facts or contravention of the Central Excise Act or the Rules made thereunder with intent to evade excise duty. In the instant case, there is no allegation of fraud or collusion. As regards wilful misstatement or suppression of facts, the question arises as to whether suppression of facts per se justifies invoking the extended period. However, this question is well settled in several judgments. For instance, it is very clear from the judgment of the

Hon'ble Supreme Court in the **PUSHPAM PHARMACEUTICALS Case** that the extended period can be invoked in respect of suppression of facts only if the nondisclosure was deliberate and aimed at evading payment of duty. In the instant case, the Settlement Commission expressly adverted to the fact that the First Respondent would not have sought for a clarification from the Central Excise Department as to the correct method of calculating duty on depot sales on stock transfer basis or paid the differential duty, with the method of valuation, if there was intention to evade excise duty. Thus, the order of the Settlement Commission does not suffer from any infirmities and is not liable to be interfered with by this court in the exercise of supervisory jurisdiction.

16. In view of the foregoing analysis, the Writ Petition is dismissed but there shall be no order as to costs. Consequently connected MP is closed.

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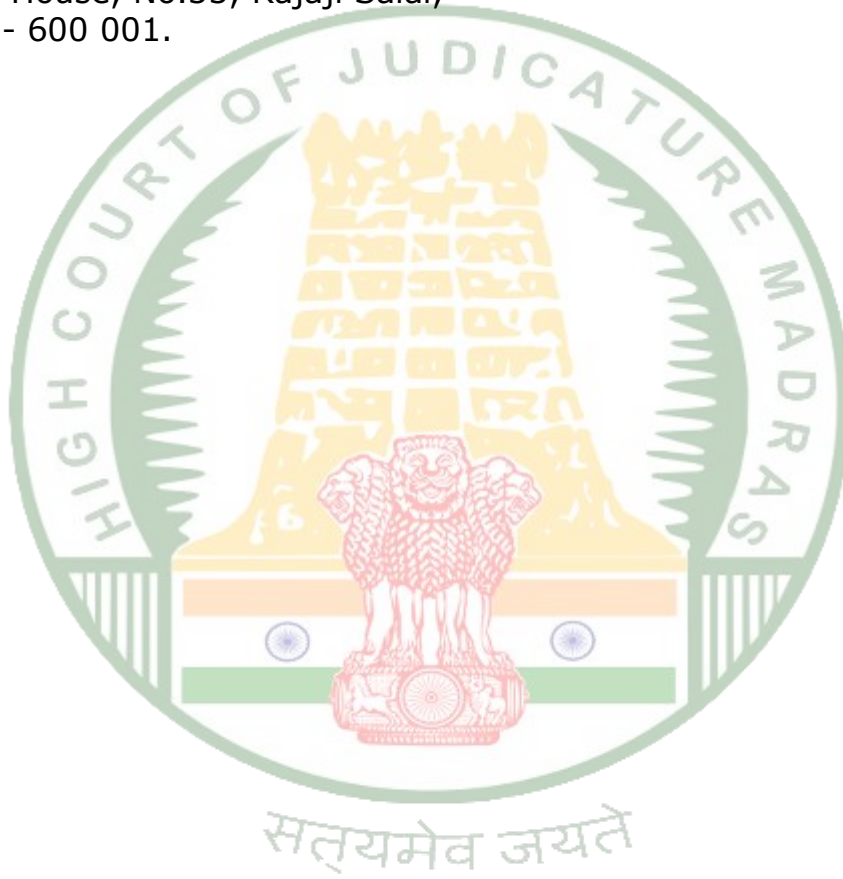
26.03.2019

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To

The Vice Chairman and Member,
Customs & Central Excise Settlement Commission,
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SENTHILKUMAR RAMAMOORTHY, J.,
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**Pre Delivery Order in
W.P.No.37808 of 2006**

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