

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.03.2019

Delivered on: 14.03.2019

C O R A M

The Honourable Mr. Justice SENTHILKUMAR RAMAMOORTHY

Writ Petition No.46479 of 2006

M/s.SCM Textile Processing Mills,
Rep. by its Partner Mr.N.K.Nandhagopal,
No.29, Marapalam Road,
KAS Nagar, Karungal Palayam East,
Erode- 638 003. Petitioner

Vs

- 1.Union of India,
Rep. by its Secretary to Government,
Ministry of Finance,
Department of Revenue,
New Delhi.
- 2.Customs and Central Excise Settlement Commission
Bench at Chennai,
No.33, Rajaji Salai,
Customs House, Chennai-1.
- 3.Commissioner of Central Excise,
Foulks Compound, Anai Road,
Salem - 636 001,
Salem District.
- 4.The Superintendent of Central Excise,
Office of the Superintendent of Central Exice,
Erode II Range, No.81, Bharathi Nagar,
Soolai, V.Chatram,
Erode - 638 005. Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorarified Mandamus to call for the records relating to the final order passed by the Second Respondent in Settlement Application No.S.A.(E)No.92-95 98-110 and 123 of 2004 SC in final order No.59/2006-C.Ex. dated 31.10.2006 and quash the same and to direct the Second Respondent to pass order on the application submitted by the Petitioner declaring that the

Petitioner is entitled to exemption for the Polyvastra for the period from the year, 1996 to 2002 as per the KVIC Certificate issued to M/S.Majestic Dyers and Printers which is the branch of the Petitioner.

For Petitioner : Mrs.P.Jayalakshmi
for M/s.K.Magesh

For Respondents : Mr.V.Sundareswaran
CGSSC for R1 to R4

O R D E R

This Writ Petition has been filed praying for a writ of Certiorari and Mandamus to call for the records relating to the final order passed by the Second Respondent in Settlement Application No.S.A.(E)No.92-95 98-110 and 123 of 2004 SC in final order No.59/2006-C.Ex. dated 31.10.2006 and quash the same and to direct the Second Respondent to pass orders on the application submitted by the Petitioner declaring that the Petitioner is entitled to exemption for the Polyvastra for the period from 1996 to 2002 as per the KVIC Certificate issued to M/S.Majestic Dyers and Printers which is the branch of the Petitioner.

2.The Petitioner is a Partnership Firm that was engaged in the processing of hosiery fabric and woven fabric at the units established at No.29, Marapalam Road, KAS Nagar, Karungalpalayam East, Erode-3. According to the petitioner, its branch, namely, M/S.Majestic Dyers and Printers (MDP) had obtained a certificate from the Khadi and Village Industries Commission(KVIC) on 14.02.1995 for the purpose of processing a fabric known as Polyvastra. Based on the said certification, the Petitioner states that it carried out processing of Polyvastra at the above mentioned unit during the period extending from November 1996 to March 2002 and that, thereafter, with effect from April 2002, the approval from KVIC was obtained in the name of the Petitioner.

3.In respect of the processing of polyvastra between November 1996 and 2002, the Petitioner availed the benefit of Notification No.8/96 CE dated 23.07.1996(Notification No.8/96) which grants complete exemption from payment of duty in respect of Polyvastra and Khadi. In these facts and circumstances, pursuant to an inspection by the Central Excise Department on 22.09.2000, show cause notice dated 24.10.2001 was issued by the Office of the Commissioner of Central Excise, alleging inter alia, that the exemption notification both in respect of Polyvastra and Khadi had been erroneously availed of in

contravention of law. Therefore, the Petitioner was called upon to show cause as to why an aggregate sum of Rs.6,51,36,779/- should not be levied as excise duty for the period November 1996 to September 2000 under the proviso to Section 11-A(1) of the Central Excise Act, 1944 (hereinafter referred to as the Act) and as to why penalty and interest should not be imposed under applicable provisions of the Central Excise Act and the Rules issued thereunder.

4. The Petitioner states that three further show cause notices were issued on 02.01.2002, 02.08.2002 and 02.05.2003 in respect of wrongful availment of exemption in respect of processing of Khadi and polyvastra fabrics. The show cause notice dated 02.01.2002 is in respect of the period December 2000 to January 2001 and calls upon the Petitioner to show cause as to why the duty of Rs.18,08,361/- should not be demanded under the said Act with interest and penalty. The show cause notice dated 02.08.2002 is in respect of the period July 2001 to February 2002 and calls upon the petitioner to show cause as to why the duty of Rs.18,76,467/- should not be demanded under the said Act with interest and penalty. Likewise, the show cause notice dated 02.05.2003 is in respect of the period April 2002 to September 2002 and calls upon the petitioner to show cause as to why the duty of Rs.12,20,801/- should not be demanded under the said Act with interest and penalty from the Petitioner.

5. Upon receipt of the show cause notices, the Petitioner made advance deposits of Rs.60,00,000/- on 07.11.2003 and Rs.44,43,063/- on 03.12.2004 (i.e. an aggregate sum of Rs.1,04,43,063/-) and thereafter filed an application for settlement under Section 32-E of the Act. The application shows that the aggregate amount of duty involved in the case is Rs.7,00,42,408/- and that the application relates to all the four show cause notices, which were adverted to earlier. On scrutiny of the application, the Customs and Central Excise Settlement Commission (the Settlement Commission) by order dated 03.03.2005, recorded that the application of the Petitioner fulfills the conditions for admission thereof under Section 32-E of the Act and that, therefore, the Settlement Commission shall have exclusive jurisdiction in respect of the subject matter of the application as per Section 32-I(2) thereof.

6. This was followed by Order dated 27.06.2005, whereby the Settlement Commission directed the Commissioner (Investigation) to investigate and submit a report on the factual aspects relating to inter alia, the availment of exemption under Notification No.8/96 dated 23.07.1996. Pursuant to the above mentioned order, the investigation was carried out by the Commissioner (Investigation) and Investigation Report dated 26.05.2006 was submitted. In paragraph 7 of the Investigation Report, it is

stated that MDP obtained approval from KVIC on 14.12.1995 and that KVIC approval was obtained in the name of the Petitioner in April 2002. With regard to the critical question as to whether the Petitioner can avail the benefit of the exemption notification on the basis of the KVIC approval of MDP, the Investigation Report states as follows:-

"The objection of revenue appears to apply the letter of law rigorously whereas the spirit of law would probably advocate a liberal approach as KVIC themselves appear to have adopted. Since this is a matter that requires application of principles of jurisprudence, the Hon'ble Commission may take appropriate decision."

7. Upon receipt of the Investigation Report, the Settlement Commission heard the parties concerned, who were represented through counsel, and pronounced the final order No.59/2006 - C.Ex dated 31.10.2006. After examining the rival contentions, the Settlement Commission recorded that it is difficult to accept the plea that MDP is a branch of the main company (i.e., the petitioner herein). More importantly, the Settlement Commission recorded that only because MDP is a separate organization with an independent identity, the partners of the said organization were able to obtain approval from KVIC so as to avail applicable exemptions. The Settlement Commission adverted to the fact that the exemption notification extends the benefit only to fabrics processed by an organization approved by KVIC whereas the processing of Polyvastra was admittedly done by the petitioner and not by MDP. On this basis, the Settlement Commission held that the exemption notification had been erroneously availed of by the Petitioner and that therefore the Petitioner was liable to pay the duty demanded in this regard. In this manner, after examining the duty demanded under various heads aggregating to a sum of Rs.7,00,42,408/-, the Settlement Commission fixed the total liability of the applicant/the petitioner herein at Rs.4,64,72,058/-. In view of the fact that the Petitioner had already paid a sum of Rs.1,04,43,063/-, the petitioner was directed to pay the balance amount of Rs.3,60,28,995/-. Keeping in mind the fact that the Petitioner had voluntarily applied for settlement, the Settlement Commission awarded simple interest at 10% per annum by waiving further interest and also granted waiver from penalty and prosecution.

8. The Order dated 31.10.2006 of the Settlement Commission is impugned (the Impugned Order) in this Writ Petition. By Order dated 30.11.2006 in M.P.No.1 of 2006, this Court granted an interim injunction restraining the respondents from taking further steps in pursuance of the final order dated 31.10.2006 and the consequential Order dated 16.11.2006 on condition that the petitioner pays a sum of Rs.1,00,00,000/- out of the

aggregate principal liability of Rs.3,60,28,995/- within a period of six weeks from the date of the order. The said order appears to have been complied with by the Petitioner and, therefore, as on date, the unpaid principal amount as per the Impugned Order is a sum of Rs.2,60,28,995/-.

9.The learned counsel appearing for the Petitioner submitted that MDP was a branch of the Petitioner until the year 2002 and that, therefore, the KVIC certification that was issued to MDP could be relied upon by the Petitioner in order to avail the exemption. In this connection, the Partnership Deed dated 01.04.1996 of the Petitioner was relied upon. It was further contended that all the partners of the Petitioner previously carried on business in partnership under the name and style of M/s.Madurai Tex and that the said M/s.Madurai Tex had branches under the name and style of M/S.Majestic Dyers and Printers (MDP), M/S.SCM Textile Processing Mill and M/s.SCM Printing Works. In order to substantiate this submission, the registration certificate issued by the Commercial Tax Officer, Tiruppur(South), on 06.10.1980, in the name of M/s.Madurai Tex was referred to and relied upon. Therefore, it was contended that the Petitioner is entitled to complete exemption from the payment of excise duty as per Notification No.8/96. In this regard, the learned counsel for the Petitioner invited the attention of the Court to entry 52.09 and entry 52.10 of the said exemption notification which relate to exemption for Khadi and Polyvastra respectively. After referring to Notification No.8/96, the learned counsel contended that the Settlement Commission agreed that the exemption was validly availed of in respect of Khadi but refused to apply the same principle in respect of Polyvastra. In addition, the learned counsel for the Petitioner made reference to the Investigation Report wherein it is mentioned that MDP is a branch of the applicant and that the objection of the revenue appears to be on the basis of the letter of law rather than the spirit of law. It was the further contention of the learned counsel for the Petitioner that the Settlement Commission did not take the above mentioned observation in the Investigation Report into consideration while pronouncing the Impugned Order.

10.The learned counsel for the Petitioner also relied upon case law, namely, an un-reported Judgment of this Court in M/S.SAS ENGINEERING PVT. LTD. Vs. COMMISSIONER OF CENTRAL EXCISE in W.P.No.7604 of 2008(the SAS Engineering case) wherein, by order dated 18.09.2018, this Court allowed the Writ Petition on the ground that the report of the Commissioner(Investigation) was referred to in the impugned order of the Settlement Commission but there was no discussion on the report while rejecting the application filed by the Petitioner. Two other Orders of this Court in GOLD SOAP COMPANY Vs. THE CUSTOMS AND

EXCISE SETTLEMENT COMMISSION in W.P.(MD)No.11295 of 2009(the Gold Soap case) and in BOND STORES PVT LTD., Vs. CUSTOMS AND EXCISE SETTLEMENT COMMISSION reported in 2011 (272) E.L.T. 366 (Mad.) (the Bond Stores case) were referred to and relied upon to support the contention that the orders of a Settlement Commission may be interfered with if the said orders did not take into account the findings of the preceding Investigation Report.

11.Per contra, the learned counsel for the Respondents submitted that the Writ Petition is not maintainable because the Petitioner applied to the Settlement Commission and derived substantial benefits by doing so and has, thereafter, assailed the unfavourable portion of the Impugned Order. In specific terms, the learned counsel for the Respondents submitted that as against the original demand of Rs.7,00,42,408/-, the Petitioner was directed to pay an aggregate sum of Rs.4,64,72,058/ and that the Petitioner was granted exemption from penalty and prosecution. Consequently, the learned counsel for the Respondents contended that the Order of the Settlement Commission cannot be assailed partly by a party that has obtained substantial benefits by approaching the Settlement Commission instead of contesting the demand by resorting to the regular dispute resolution process under the Act. In order to substantiate this submission, the learned counsel for the Respondents referred to the Judgment of this Court in STANDARD SHOE SOLE AND MOULD (I) LTD Vs. CUSTOMS AND CENTRAL EXCISE SETTLEMENT COMMISSION, CHENNAI, reported in 2018 (360) E.L.T. 866 (Mad.), wherein, the Division Bench of this Court, in paragraph 8, referred to the Judgment of the Hon'ble Supreme Court in SINGHVI RECONDITIONERS PRIVATE LTD., Vs. UNION OF INDIA AND OTHERS, reported in 2010 (251) E.L.T.3, wherein it was held that "the appellant cannot be permitted to dissect the Settlement Commissioner's order with a view to accept what is favourable to them and reject what is not." In the same Paragraph of the said Division Bench Judgment, another Judgment of the Hon'ble Supreme Court in UNION OF INDIA Vs. IND-SWIFT LABORATORIES LIMITED is also referred to, wherein it was held that "an order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act." In addition, the learned counsel for the Respondents relied upon the Judgment of this Court in M/S.FITNESS ONE GROUP INDIA LTD., Vs. CUSTOMS, CENTRAL EXCISE AND SERVICE TAX SETTLEMENT COMMISSION, reported in 2016 - TIOL -3097 -HC-MAD-CX, wherein it was held that the Petitioner cannot selectively accept portions of the order passed by the Settlement Commission and dispute the correctness of the other portions of the order that are not fully favourable to the Petitioner. The learned counsel for the Respondents also relied upon the judgment of this Court in HI-DESIGN Vs. COMMISSIONER OF

C.EX. PONDICHERRY reported in 2017 (346) E.L.T. 90 (Mad.) wherein, after citing several judgments of the Hon'ble Supreme Court, this Court held that the Order of the Settlement Commission is conclusive and cannot be interfered with unless it is contrary to statutory provisions of the Act.

12. On the merits, the learned counsel for the Respondents submitted that the Petitioner is not entitled to avail exemption as per Notification No.8/96 because the KVIC certificate was obtained by MDP and not by the Petitioner. In this regard, the learned counsel for the Respondents referred to entry 52.10 of the exemption notification and contended that the benefit of the notification is only available to the organization approved by KVIC for processing of Polyvastra. He also compared and contrasted entry 52.09, which pertains to Khadi and is fabric - specific and not organisation - specific. In addition, the learned counsel for the Respondents submitted that an exemption notification is required to be construed strictly. In order to substantiate this submission, the learned counsel for the Respondents referred to the Judgment of the Hon'ble Supreme Court in COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI Vs. DILIP KUMAR & COMPANY reported in 2018(361), E.L.T. 577 (S.C.), wherein, at paragraph 38, the Hon'ble Supreme Court referred to the Judgment in HANSRAJ GORDHANDAS Vs. H.H.DAVE, ASSISTANT COLLECTOR OF CENTRAL EXCISE & CUSTOMS, SURAT AND OTHERS, reported in AIR 1970 SC 755, wherein it was held as follows:-

"The law is well-settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."

The learned counsel for the Respondents also referred to paragraph 21 of the Impugned Order, wherein the Settlement Commission recorded that the approval is only for MDP and that

the applicant/petitioner herein is not entitled to the benefit of the exemption notification.

13.This Court has carefully considered the affidavit, counter affidavit, documents and oral and written submissions of both sides.

14.It is evident that the Petitioner approached the Settlement Commission in respect of the demand made under the four show cause notices referred to supra for an aggregate sum of Rs.7,00,42,408/-. It is also evident from paragraph 27 of the Impugned Order that the Settlement Commission has fixed the total liability of the applicant/petitioner herein at Rs.4,64,72,058/- after accepting the contentions of the Petitioner herein with regard to certain heads of demand for excise duty by the Respondents. For example, the demand of Rs.1,17,86,457/- and Rs.63,26,829/- arising out of the denial of exemption under entry 52.09 of the exemption notification, which pertains to Khadi, was settled in favour of the Petitioner by holding in paragraph 22 that the applicant/petitioner herein is entitled to the benefit of the exemption under Notification No.8/96 in respect of Khadi fabric processed by them. It is also evident that the Petitioner has been provided immunity from penalty and prosecution and that the rate of interest has been fixed at the lower limit of 10% per annum.

15.Thus, it is clear that the Petitioner has derived substantial benefit by approaching the Settlement Commission. In the present Writ Petition, the Petitioner seeks to quash the Impugned Order of the Settlement Commission in so far as it denies exemption to the Petitioner from payment of excise duty for processing of Polyvastra for the period extending from the years 1996 to 2002. In effect, the prayer in the Writ Petition is confined to a portion of the order of the Settlement Commission whereby the demand of excise duty in respect of the processing of Polyvastra was held to be valid by the Settlement Commission.

16.Accordingly, this Court is of the view that the Petitioner cannot be permitted to approbate and reprobate. In this regard, it was held by the Hon'ble Supreme Court in R.N.GOSAIN Vs. YASHPAL DHIR reported in (1992) 4 SCC 683 at para 10 as follows:-

"10.Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See:

Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd., (1921) 2 R.B. 608, at p.612, Scrutton, L.J]. According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508).

The Judgment of the Hon'ble Supreme Court in SANGHVI RECONDITIONERS CASE(cited supra) and relied upon by the learned counsel for the respondents would squarely apply to the instant case. Equally, the Judgment of the Division Bench of this Court in STANDARD SHOE SOLE AND MOULD (I) LTD CASE(cited supra) would also be applicable to the present case. In both the cases, as rightly contended by the learned counsel for the Respondents, it has been held that a party cannot be permitted to dissect the order of the Settlement Commission and accept only the favourable portions while assailing the unfavourable portions. This is precisely what the Petitioner has attempted to do in this Writ Petition. In addition, the petitioner has failed to establish that the Impugned Order is contrary to the Act. The Orders of this Court in M/s.SAS Engineering Case, Gold Soap case and Bond Stores case, all of which are cited supra are clearly distinguishable because those are not cases wherein the Order of the Settlement Commission was accepted in part and assailed in part. Besides, the investigation report was not considered by the Settlement Commission in those cases. On the contrary, in the instant case, the Settlement Commission specifically referred to the Investigation Report of the Commissioner (Investigation) and, in fact, accepted the submission of the applicant/the petitioner herein with regard to exemption under entry 52.09(i.e., exemption in respect of Khadi fabrics). The conclusion, in this regard, in paragraph 22 of the Impugned Order, records the fact that revenue did not dispute the fact that there is no system of KVIC approving each consignment of the fabric. As regards exemption under entry 52.10, the Investigation Report categorically stated that the Hon'ble Commission should take an appropriate decision because it is a matter that requires the application of principles of jurisprudence(Observation 7(2) at page 120 of the typed set of documents of the Petitioner). Thus, it cannot be said that the Settlement Commission disregarded the Investigation Report.

17.As regards the merits of the claim for exemption under entry 52.10 of Notification No.8/96, it is clear from the notification that the exemption is organization specific. In this regard, it is relevant to extract entry 52.10 which reads as under:-

"Poly Vastra, that is to say, any cloth containing cotton and polyester woven on handloom from yarns hand-spun in India and certified as Poly Vastra by an officer duly authorised in this behalf by the Khadi and Village Industries Commission and processed by a factory owned by the Khadi and Village Industries Commission or any organization approved by the Khadi and Village Industries Commission for the purpose of precessing of Poly Vastra."

There is no credible evidence on record to show that MDP is a branch of the Petitioner. On the contrary, the certificate dated 14.12.1995 of KVIC approving and recognizing MDP for the purpose of availing exemption from excise duty in respect of the processing of the Poly Vastra shows that MDP is a distinct entity. This position admittedly continued until April 2002 when KVIC registration was obtained in the name of the Petitioner. The exemption from excise duty has been claimed by the Petitioner for the period commencing from the year 1996 and ending in the year 2002. Admittedly, the Petitioner had not obtained a certificate from KVIC in respect of processing of Polyvastra during the above said period. Accordingly, the Petitioner would not be entitled to the benefit of exemption Notification No.8/96. In this connection, as rightly contended by the learned counsel for the Respondents, an exemption notification is required to be construed strictly as held by the Hon'ble Supreme Court in COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI Vs. DILIP KUMAR & COMPANY reported in 2018(361), E.L.T. 577 (S.C.), Applying the said rule of strict construction, it is abundantly clear that the Petitioner is not entitled to avail the benefit of exemption Notification No.8/96 because the Petitioner is unable to establish that MDP and the Petitioner constituted one organization. In this regard, it is also relevant to state that the Petitioner was constituted by Partnership Deed dated 01.04.1996 but the Petitioner did not apply for obtaining KVIC certification until March 2002.

18.In the result, the Writ Petition is dismissed and the Petitioner is directed to pay the unpaid principal amount of Rs.2,60,28,995/- with interest thereon at 10% per annum from the due date as per the Impugned Order of the Settlement Commission till the date of payment within a period of six weeks from the date of receipt of a copy of this order. There shall be no order as to costs.

rrg

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The Secretary to Government,
Union of India,
Ministry of Finance,
Department of Revenue,
New Delhi.

2.Customs and Central Excise Settlement Commission
Bench at Chennai,
No.33, Rajaji Salai,
Customs House, Chennai-1.

3.Commissioner of Central Excise,
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Salem District.

4.The Superintendent of Central Excise,
Office of the Superintendent of Central Exice,
Erode II Range, No.81, Bharathi Nagar,
Soolai, V.Chatram,
Erode - 638 005.

+lcc to Mr.S.Muthuvenkataraman, Advocate, SR.No.23903
(dated: 11/06/2019)

W.P.No.46479 of 2006

Kak(10/05/2019)

सत्यमेव जयते

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