

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 8th November, 2019
Pronounced on: 19th November, 2019

+ WP(C) 822/2015

COMMISSIONER, CENTRAL EXCISE, CUSTOMS
& SERVICE TAX, SONEPAT & ORS Petitioners

Through: Mr. Satish Aggarwala,
Sr. Standing Counsel

Versus

AMIT DECORATIVE PLYWOODS PVT.
LTD. & ORS. Respondents

Through: Mr. Sudhir Malhotra,
Advocate

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T

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C. HARI SHANKAR, J.

1. These proceedings emanate from a Show Cause Notice, dated 16th January, 2013, issued by the Directorate General of Central Excise Intelligence (Petitioner No. 2 herein and referred to, hereinafter, as “the DGCEI”) to the respondents, whereby it was alleged that Respondents No.1 and 2 (M/s. Amit Decorative Plywoods Pvt Ltd and M/s Amit Densified Doors Pvt Ltd) had indulged in clandestine removal and undervaluation of goods manufactured by them. The Show Cause Notice required the respondents to show cause as to why

- (i) Central Excise duty (hereinafter referred to as “duty”), of ₹ 11,43,09,554/–, evaded on goods cleared clandestinely, either without payment of duty or on short payment of duty, during the period 1st April, 2010 to 15th July, 2012, be not demanded and recovered, under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as “the Act”),
- (ii) interest, on the said amount, be not demanded from them under Section 11AA of the Act,
- (iii) penalty be not imposed on them under Section 11AC of the Act and Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as “the Rules”),
- (iv) redemption fine, in lieu of confiscation of the excisable goods, clandestinely removed by Respondents No.1 and 2, during the period 1st April, 2010 to 15th July, 2012, valued at ₹107,56,15,784/–, be not imposed under Section 34 of the Act, as the goods themselves were not available for confiscation,
- (v) the amount of ₹ 70,00,000/–, deposited by Respondents No.1 and 2 be not appropriated towards the aforesaid duty liability,
- (vi) duty of ₹ 10,32,559/– be not demanded, and recovered, from Respondents No.1 and 2 , under Section 11A of the Act, on the goods found short in the factory premises of Respondent No.1, which appeared to have been clandestinely removed,
- (vii) duty of ₹ 26,86,992/–, on goods allegedly clandestinely removed by Respondents No.1 and 2 and seized from the godown, be not demanded from them under Section 11A of the Act,

(viii) the goods, valued at ₹ 2,17,39,417/–, allegedly manufactured and clandestinely removed by Respondents No.1 and 2 , and seized from the godown on 19th July, 2012, be not confiscated under Rule 25 of the Rules,

(ix) excisable goods, valued at ₹ 21,09,928/–, seized from the premises of Respondent No.1, be not confiscated under Rule 25 of the Rules, as they appeared to have been stored for the purpose of clandestine clearance without payment of duty, and redemption fine be not charged thereon, as the said goods had already been provisionally released to Respondent No.1, and

(x) cash of ₹ 58,50,000/–, seized at the residence of the directors of Respondents No.1 and 2, and cash of ₹ 10,70,000/–, seized from the office premises of the said respondents, be not confiscated under Section 121 of the Customs Act, 1962, as made applicable to Central Excise by virtue of Notification 68/63-CE dated 4th May, 1963, as the said amount appeared to represent sale proceeds of plywood, clandestinely removed from the factories of Respondents No.1 and 2 .

2. Additionally, the Show Cause Notice required the remaining respondents to show cause against imposition of penalty, under the Rules, for having aided and abetted Respondents No. 1 and 2 in the aforesaid contraventions.

3. Instead of proceeding to adjudication of the aforesaid Show Cause Notice, the petitioners chose to have the matter settled, by

moving the Customs, Central Excise and Service Tax Settlement Commission (hereinafter referred to as “the Settlement Commission”), under Section 32E of the Act. *Vide* Final Order dated 2nd September, 2014, the Settlement Commission settled the case, on condition of payment of duty, by Respondents No. 1 and 2, of ₹ 1,56,11,930/–, along with interest of ₹ 44,17,956/–, and penalties of

- (i) ₹ 5 lakhs each by Respondents No. 1 and 2,
- (ii) ₹ 2 lakhs by Respondent No. 3,
- (iii) ₹ 1 lakh each by Respondents No. 5, 6 and 13,
- (iv) ₹ 50,000/– each by Respondents No. 4, 7, 8, 9, 10, 11, 12 and 16, and
- (v) ₹ 20,000/–, each, by Respondents No.14, 15 and 17.

Additionally, the Settlement Commission has given Respondents No.1 and 2 the option to redeem the seized goods, on payment of redemption fine of ₹ 5,00,000/-.

4. Subject to compliance with the above directions, for payment, the Settlement Commission has, *vide* the aforesaid Final Order dated 2nd September, 2014, granted immunities, to the respondents (i.e. the applicants before the Settlement Commission), under Section 32K(1) of the Act which reads thus:

“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.”

(Emphasis supplied)

5. Aggrieved thereby, the DGCEI, and the Commissioner of Central Excise, Customs and Service Tax, have filed the present writ petition before this Court.

Facts

The Show Cause Notice

6. As already noted hereinabove, the Show Cause Notice, dated 16th January, 2013, which stands settled by the impugned Final Order of the Settlement Commission, alleged clandestine removal of finished excisable goods, and undervaluation thereof, by Respondents No. 1 and 2. These allegations were, in turn, founded on the following evidence/assertions:

(i) Govind Pareek, Assistant, who was present at A-90, 3rd floor, Saraswathi Vihar, Pitam Pura, Delhi-110034, which was used as an office by Respondent No.1 and Respondent No.2 , stated that the details of the actual sales and purchases effected

by the said respondents were entered in the computers, and in some pen drives. Printouts, from the said computers and pen drives were taken in the presence of independent witnesses and in the presence of Govind Pareek and Dharmendra, who was stated to have been making entries in the said computers.

(ii) Cash, totalling ₹ 58,50,000/-, was recovered from the office-cum-residence premises of Respondents No. 1 and 2 at 246, Gate No. 1, Deepali, Pitampura, Delhi. Raghunath Prasad Kedia, director of Respondents No. 1 and 2, informed that the said cash represented the proceeds against the sale of plywood. *Prima facie*, it appeared that the removal and sale, against which the cash was received, was clandestine in nature.

(iii) Indian currency, totalling ₹ 10,70,000/-, was found in a cupboard in the premises at 2909, Gali No. 4, Chuna Mandi, Paharganj, New Delhi. Shyam Joshi, who was present in the premises, informed that this amount was collected by him, and represented the sale proceeds of unaccounted goods sold by Respondents No.1 and 2.

(iv) On comparison of the physical stock of finished goods, found in the premises of Respondent No.1, vis-à-vis the recorded balance in the RG-1 register, a shortage of 9166.16 sq. mtrs. of commercial block board, of thickness 19 mm, was found.

(v) Persons, who were found in the premises of Respondent 2, which was situated across the street from Respondent No.1, informed that unbranded finished goods and veneer were being sent to, and received from Respondent No.1, which was its sister unit, against *kachcha parchis* (rough slips). Respondent No.2 was not registered with the Central Excise authorities.

(vi) Flush doors, and plywood, which were unaccounted, were found in a godown, located at 548/4, Swarn Park, Udyog Nagar, Mundka, Delhi, of Respondents No.1 and 2. Mr. Amit Mittal, caretaker of the said godown, clarified that no stock register, or purchase bills, relating to the said flush doors and plywood, was available.

(vii) Scrutiny of documents revealed that Respondents No.1 and 2 were raising invoices, against goods cleared and sold by them, of lesser amounts, and receiving the differential payment in cash. These documents were recovered, *inter alia*, from the office at A-90, 3rd floor, Saraswathi Vihar. Para 3 of the Show Cause Notice reproduces a sample of such evidence, in the form of a computer printout. Mr. Govind Pareek, in his statement dated 19th July, 2012, deposed that the entries in the computers were being made using FCA software. He decoded the aforesaid sample computer printout as depicting the total amount received against sale of finished products, as well as the amount received in cash. He further clarified that the amounts written in the said computerised records were required to be multiplied by 100, in order to arrive at the actual figures. For

example, he stated, if an amount was written as ₹ 1313.75, it actually represented the figure of ₹ 1,31,375/-. He stated that the accounting program, as entered in the computer, was adjusted to reflect the amounts thus. He also stated that all other printouts, resumed by the visiting team, could be decoded in the same manner.

(viii) Certain handwritten notebooks were recovered from the office of Respondent No.1. Shyam Joshi, in his statement dated 19th July, 2012, confirmed that these notebooks were mostly in his handwriting, and further clarified that they contained details of date-wise payments received and payments made by Respondents No.1 and 2. He further confirmed that the amounts reflected in the said cash books were in hundreds, rather than the exact amounts. He also stated that the names of the parties, in these cash books, were written in abbreviated form, and he decoded the names of some of the said parties. The show cause notice sets out, in paras 4.2.1 to 4.2.3, in detail, how the figures were explained by Mr. Shyam Joshi.

(ix) Investigation further revealed that one Surendra Pareek was also closely associated with Manish Kedia, the Director of Respondents No.1 and 2. Surendra Pareek, in his statement dated 23rd July, 2012, also decoded the entries made in the cash book maintained by them while transacting cash, and confirmed that the figures, in the said book, were entered after dividing the actual amounts by 100. He further deposed that, at times,

Respondents No.1 and 2 used to receive and deliver cash by *hawala*, between Delhi and Mumbai. He explained, in detail, the *modus operandi* adopted by Respondents No.1 and 2 to evade duty. He informed that, before effecting any clearance from the factories, challan was prepared, with a challan number, assigned on fortnightly basis. Correspondingly, excise invoice was also prepared. In case the goods reached the destination, the invoice was destroyed and a new invoice was prepared. On several occasions, instead of destroying the invoices, the invoice, as originally prepared, was prepared for a lower value, and the balance consideration was received in cash. He explained how cash entries were made in the computer, and also provided a detailed methodology of the manner in which Respondents No.1 and 2 undervalued their clearances. The rate was entered on “per square metre” basis, instead of “per square foot”. Effectively, the rate entered in the excise invoice was far lower than the actual rate of the goods, resulting in huge undervaluation. The actual amount received, against each consignment, he deposed, was recorded in the sales register and the sales summary. Surendra Pareek further elaborated that the cash books, which were written in hand, contained the dates and amount of cash received and the dates and amount of cash delivered. Even while doing so, the entries were not made in full, but after dividing the actual amounts by 100. He also identified the cash books resumed from the Paharganj office on 19th July, 2012, as the cash books which they used to maintain. He also deposed that the entries, in the said cash books were

made either by Shyam Joshi or by him. By way of example, he explained the entries made in one of the pages of one of the cash books resumed from the Paharganj office on 19th July, 2012. He also pointed out that handwritten entries, representing *hawala* payments, were also contained in the said cash books, only for record purposes.

(x) Proceeding from the statements of Shyam Joshi and Surendra Pareek, detailed scrutiny of the cash books was made, and it was found that the explanation given by both these persons matched with the entries in the cash books.

(xi) It was also found, during investigation, that Respondent No.1 was paying a lower amount of duty even in cases where Central Excise invoices were issued for the consignment. For this purpose, comparison and correlation, between the challans used for clearance of the goods, the Central Excise invoices and the sales summary, was undertaken. They were found to be corroborating each other, insofar as the number of pieces were concerned. However, the quantity of sales did not tally. The total amount collected was also different. On converting the quantity from “square metres”, as entered in the invoice, to “square feet”, and reworking the quantity sold and the amount recovered, it was found that the quantity matched with that mentioned in the sales register. Worked out on square foot basis, it was found that the amount recovered, by Respondents No.1 and 2 was much higher than the amount on which duty was paid.

(xii) The fact of clandestine removal and undervaluation was also admitted by Manish Kedia, director of Respondent No.1, in his statement dated 19th July, 2012. He admitted that the amount received, against sale of the finished goods, over and above the price reflected in the invoices, was collected in cash, for which “No. 2 records” were maintained in the computers, using the FCA software. He admitted that the entire detail of amounts received against finished products, clandestinely removed by the petitioner, were contained in the computer records. Needless to say, the amounts were entered after dividing the correct amounts received, by 100.

(xiii) Manish Kedia also expressed his agreement with the statements of Shyam Joshi, Gobind Pareek and Dharmendra, dated 19th July, 2012. He also admitted that the cash, recovered from his residence and from the Paharganj office of Respondent No.1 on 19th July, 2012, were the proceeds of clandestine removal and sale.

(xiv) Dhanraj Purohit, Production Supervisor of Respondent No.1, deposed, on 19th July, 2012, that the quantity of finished goods found short in the factory, vis-à-vis RG-1 entries, had been clandestinely removed, under the directions of Manish Kedia. He further admitted that finished goods, produced between 13th and 18th July, 2012, were not entered in the RG-1 register, and that no production slip, in respect thereof, had been prepared.

(xv) The statement of Amar Aggarwal, Senior Accountant of Respondent No.1, was also recorded on 3rd October, 2012, wherein he acknowledged that he was managing all accounts of Respondents No.1 and 2. He admitted that the challans, contained in File 131, resumed from A-90, 3rd Floor, Saraswati Vihar, related to sales effected from the factories of Respondents No.1 and 2. He acknowledged that production, in these factories, was carried out, without bifurcating the production, factory-wise, in the records, and that no separate accounts and stocks were kept for the said factories. He agreed with the statement, dated 19th July, 2012, of Manish Kedia, and admitted that the office at A-90, 3rd Floor, Saraswati Vihar, was a secret office of Respondents No.1 and 2. He further admitted that the full value of the goods was not reflected in the invoices issued by Respondents No.1 and 2, and that the differential amount was collected, from the customers, in cash. He explained, in detail, the manner in which this subterfuge was effected, by deposing that

(a) before clearance from the factory, a challan was prepared, recording the part, date, vehicle number, type of material, size and quantity,

(b) on the reverse of the challan, the serial number of dispatched was mentioned, which was used for fortnightly clearances,

- (c) on the 16th day of the month, fresh serial numbers commenced, which continued till the last day of the month,
- (d) invoices were prepared on the basis of these challans,
- (e) if the consignment was not checked en route, the bill was destroyed,
- (f) on such clearances, in respect of which the bills were destroyed, no excise duty was paid, and
- (g) even in respect of the invoices which were retained on record, the price mentioned was lower than the actual price of the consignment.

He further confirmed that the quantity of goods was reflected, in the challans and excise invoices, in “sq m” whereas in the account slips, the quantities were shown in “sq ft”. In this manner, he explained, a lower value was reflected in the excise invoices and the differential price was recovered, from the customers, in cash. He submitted that his job was to collect cash payments from the customers and to make cash payments to suppliers, on the direction of Manish Kedia. He also acknowledged that these transactions were recorded in the computers, using FCA Software, in which the figures were reflected after dividing them by one hundred.

(xvi) Printouts, from the CPU, of the computers found in the premises as well as from the laptop, were taken by the officers in the presence of Amar Aggarwal. Amar Aggarwal deposed

that, in the said printouts, “ADP” and “ADFD” represented Respondents No.1 and 2, respectively. He confirmed that the printouts, taken on 3rd October, 2012, reflected the actual clearances from the respective factories, and deposed that the entire scheme of evasion was designed by Manish Kedia, who issued directions regarding the manner in which documents were to be prepared and transactions were to be reflected therein.

(xvii) Investigations were also conducted, at the premises of the buyers of Respondents No.1 and 2, and relevant records were resumed therefrom. The details of the said investigations may be enumerated thus:

(a) Anil Mendiratta, proprietor of M/s Lakshmi Enterprises admitted, in his statement, dated 5th November, 2012, that the prices reflected in the invoices, received from Respondent No.1, were less than the actual value of the goods, and that the differential amount was paid, by him, in cash, to Surendra Pareek or Shyam Joshi. He stated that no record, of such payment in cash, was retained by him. He also agreed with the statement dated 19th July, 2012, of Manish Kedia, wherein undervaluation of the clearances, on invoices and bills, and receipt of the differential amount in cash was admitted. He further confirmed that goods were also received, by him, from Respondents No.1 and 2, under challans which did not reflect the value thereof. On his attention specifically

being invited to the documents, at pages 220 to 223 in File No. 5, resumed from his premises on 11th September, 2012, he confirmed that these documents covered the same consignment, to which the challans, at page no. 9 in file No. 131 resumed from A-90, 3rd Floor, Saraswati Vihar, Pitampura, pertained. The details of the cash amount, to be paid to Respondents No.1 and 2, he deposed, were contained in computer printouts, which were brought to their office by Shyam Joshi or Surendra Pareek and, after checking the figures, they used to make the payment in cash. He further confirmed that, in the said computer printouts, the actual amount payable i.e. the sum of the invoice prices and cash payment, was reflected. He further confirmed that he was issuing sale bills of plywood only to the extent of accounted purchases.

(b) Prabhat Kumar, of M/s KDL Mercantile Pvt. Ltd., also confirmed, in his statement dated 1st November, 2012, that, in the bills raised by Respondent No.1, the full value of the goods was not reflected and that the differential amount was paid, by him, to Shyam Joshi, in cash. He confirmed the correctness of the statement, dated 19th July, 2012, of Manish Kedia, including the admission therein, regarding underinvoicing and receipt of differential amount in cash.

(c) Nitin Aggarwal, partner of M/s Ply Palace, another buyer of Respondents No.1 and 2, similarly deposed, in his statement dated 1st November, 2012, that the prices reflected in the bills raised by Respondents No.1 and 2 were less than the actual value of the goods and that differential payment was made in cash to Shyam Joshi. He also agreed with the statement, dated 19th July, 2012, of Manish Kedia, regarding underinvoicing and receipt of differential amount in cash. He confirmed that, in the challans received from Respondent No.1, value was not reflected. He agreed with the statement, dated 23rd July, 2012, of Surendra Pareek, in which underinvoicing with respect to 1659 pieces of plywood, dispatched under invoice dated 3rd July, 2012, was admitted, inasmuch as, though the actual value of the consignment was ₹ 13,08,309/-, the billed value was ₹ 2,53,854/-. He admitted that the differential amount of ₹ 10,54,455/- was paid in cash to Respondent No.1 after 19th July 2012.

(d) Similarly, Deepak Gupta, proprietor of Balaji Industries, confirmed in his statement dated 30th October, 2012, that the invoices raised by Respondent No.1, on Balaji Industries, reflected a lower value and that differential amount was paid to Respondent No. 1 in cash, which was collected by Shyam Joshi or Surendra Pareek. He also agreed with the statement dated 19th July, 2012, of Manish Kedia, regarding underinvoicing and receipt of differential amount in cash.

(e) Dinesh Kumar Aggarwal, proprietor of M/s Amit Veneer & Plywood, similarly agreed, in his statement, dated 5th December, 2012, with the statement, of the same date, of Manish Kedia, in which underinvoicing and receipt of differential amount in cash were admitted. He, too, confirmed that the cash was collected by Surendra Pareek and Shyam Joshi.

(xviii) Investigation was also conducted at the end of raw material suppliers.

(a) Sonu Arora, of M/s Shree Rattan Timbers, who supplied core (a major raw material for manufacture of plywood), in his statement, dated 10th December, 2012, deposed that the bills, raised by him, on Respondents No.1 and 2, reflected a price lower than the actual value of the goods, and that, the differential amount was paid, to them, by Respondents No.1 and 2, in cash, of which they did not keep any account.

(b) Deepak Rawat, proprietor of M/s ISS Corporation, who supplied chemicals to Respondents No.1 and 2, similarly admitted, in his statement dated 10th December, 2012, that he was forced to supply chemicals to Manish Kedia either without invoices or under invoices which reflected lower values. He further confirmed that

differential amount was paid, to him, by Manish Kedia and his employees, in cash.

(xix) Manish Kedia, on being shown the aforesaid statements of the buyers, and the suppliers, of Respondents No.1 and 2, agreed with the contents thereof.

(xix) The computer printouts, taken on the date of search, i.e. 19th July, 2012, reflected combined clearances effected by Respondents No.1 and 2. Manish Kedia, in his statement recorded on the said occasion, while admitting that these figures reflected actual clearances with the actual values realized thereagainst, from 2010-2011 onwards, stated that it was impossible to bifurcate the clearances, as separate records, of the clearances effected by Respondents No.1 and 2, had not been maintained.

(xx) In his subsequent statement dated 2nd January, 2013, however, Manish Kedia reiterated the position, reflected in his earlier statement, dated 19th July, 2012, that Respondents No.1 and 2 were evading duty by not issuing invoices or issuing invoices reflecting prices lower than the actual value of the goods covered thereby.

(xxi) Inasmuch as it was acknowledged, by Manish Kedia that it was impossible to bifurcate the clearances, of Respondents No.1 and 2, as reflected in the computer printouts, Respondents No.1 and 2 could not be treated as separate units and

Respondent No.2 appeared, in fact, to be working as an extension of Respondent No.1 , in order to evade payment of duty by suppressing the actual production of both the units. Duty was, therefore, recoverable jointly and severally from Respondents No.1 and 2.

(xxii) Para 21 of the Show Cause Notice records, in this regard, thus:

“21. Shri Manish Kedia also went through the statements of various buyers and suppliers recorded during the course of investigation and agreed with the contents of the same. In the statement dated 19.07.2012 of Shri Manish Kedia and in the statements of some of his personnel, it was mentioned that M/s ADPL and M/s ADDP were clearing the finished goods i.e. plywoods and other articles either by undervaluing the goods or by clearing the finished goods under excise invoices which were later destroyed, when the goods reached to the designation thereby making such clearances without central excise invoice and without payment of duty. The investigation revealed that in most of the duty evaded by M/s ADPL and M/s ADDP was by way of undervaluation wherein lesser value is shown in the invoices and in some of the cases they clear the goods without accounting for the central excise invoice (which were destroyed after delivery of goods and same number of invoice was again prepared for another clearance) as admitted by various key personnel. The clearances made without bills were identified by tallying the party wise clearances shown in the computerized sheets and central excise invoices accounted for in the record.”

(xxiii) Tallying of the record revealed that, during the relevant period, finished goods valued at over ₹ 12 crores were clandestinely removed and sold, by Respondents No.1 and 2 , to

M/s Sunmica House, Paharganj, though summons, issued to the said buyer, did not meet with any response.

(xxiv) Raghunath Prasad Kedia, father of Manish Kedia and a Director in Respondents No.1 and 2, also admitted, in his statement dated 3rd January, 2013, the fact of evasion of duty, by Respondents No.1 and 2, under the directions of Manish Kedia, with his full knowledge. He confirmed that he was aware about the evasion of duty by these companies.

(xxv) In view of the above evidence, para 23 of the Show Cause Notice recorded as under:

“23. In view of the above it appears that M/s ADPL, M/s ADDP, Shri Manish Kedia and Shri Raghunath Prasad Kedia, had maintained a systematic system of account in coding/ decoding language, collection of amount with respect to the finished goods cleared without payment of duty or short payment of duty and all these accounts were maintained in his secret office at A-90, 3rd Floor, Saraswati Vihar, Pitampura, New Delhi. Huge amount of cash money was transacted and generated from the sale proceeds of sale of the clearances of plywoods and other articles clandestinely or by way of undervaluation of goods from the factory premises of M/s ADPL and M/s ADDP without payment of Central Excise duty or short payment of excise duty and without accounting in their statutory books of account. They had put in place the mechanism of selling their clandestinely manufactured and cleared goods in cash to their buyers. The cash and/ or sometimes cheques received as payment from buyers were recorded in codes, and same was going to Shri Manish Kedia and Shri Raghunath Prasad Kedia as is evident from the recovery of cash from the residence of the directors at 246, Deepali, Pitampura, New Delhi as well as from Shri Shyam

Joshi in their office at Paharganj, who was admittedly collecting cash from their buyers against clearance of finished goods from their both the units. Further, the cash so generated was also paid to suppliers of various raw materials which supplied the raw material again by undervaluing such raw material viz. veneer, chemicals etc.. This further appears to establish the willful and knowing involvement of M/s ADPL, M/s ADDP and Shri Manish Kedia and Shri Ragunath Prasad Kedia who are the masterminds of huge evasion of Central Excise duty by making sales in cash, which were never recorded in the books of account and the details were maintained in private records including computerized data in their secret office.”

7. It was, therefore, on the basis of the aforesaid evidence and material, which included statements of the employees and personnel of Respondents No.1 and 2 (including Manish Kedia and Raghunath Prasad Kedia), statements of their buyers and their raw material suppliers, *kachcha* slips which were recovered from the premises of the said respondents, details contained in the computer printouts recovered from the office of the said respondents in the presence of their authorised personnel, and a detailed exercise of comparison and tallying of these various records, that Show Cause Notice, dated 16th January, 2013, came to be issued, calling upon the Respondents to show cause, in the terms already set out in para 1 hereinabove.

8. As has already been noted hereinabove, the respondents chose, instead of submitting themselves to adjudication, to move the Settlement Commission, for settlement of the case arising from issuance of the aforesaid Show Cause Notice dated 16th January, 2013.

9. Out of the total duty demand of ₹ 11,80,12,105/-, along with interest, (being the sum total of the demands of ₹ 11,43,09,554/-, ₹ 10,32,559/- and ₹ 26,86,992/-) as demanded and proposed in the Show Cause Notice, the settlement application admitted duty liability of ₹ 1,56,11,930/- and interest of ₹ 44,17,956/-.

10. The grounds, on which the petitioner sought to limit its admission of duty liability of ₹ 1,56,11,930/-, as against the liability of ₹ 11,80,12,105/-, proposed in the Show Cause Notice, are contained in paras 18 to 21 of the settlement application, which are reproduced as under:

“18. The applicant most humbly submits that duty demand has been wrongly demanded on the basis of RUD-10. The figures in the said RUD do not correctly reflect the actual transactions of the applicant as they are highly inflated. This fact comes out of the following submissions:-

(a) The Revenue also lay hand 3 notebooks mentioned at S. Nos. 6, 7, 8 of punch, dated 19.07.2012 drawn at the Paharganj office of the applicant and diary No 47 recovered from premises located at Saraswati Vihar, New Delhi on 19.07.2012. These notebooks contained the entire payment receipt (by cash/cheque) for the period 28.03.11 to 17.12.2012. The entries of these notebooks/diary are tabulated in Annexure 2 (I) to 2 (VI) of show cause notice.

(b) As per the said notebooks the total payment receipt was ₹ 407,328,611/- whereas as per the RUD 10 during the said period total sale comes to ₹ 1,460,586,355/-.

(c) *As mentioned at para 2.4 of the SCN the total 4 nos. of pressing machines were installed in the premises of the applicant out of which 3 machines having size of 8 x 4 x 10 inches than one machine*

having size 6 x 4 x 7 inches and as per para 2.5 of the SCN, there were two delite process of 10 and 14 were installed. It has also been mentioned in the same para that the average production time for one lot is approximately one hour including loading and offloading. It is not possible for the applicant to manufacture such a huge quantity as mentioned in the RUD-10.

(d) The officers recorded statement from a number of buyers and also of the supplier of 'Core' and 'Veneer'. All of them, in their statements, have stated that they were purchasing/supplying goods from/to the applicant only against bills, however low value of the goods purchased/supplied were mentioned in the bills. Even in the SCN at para 21 it has been categorically mentioned that the investigation revealed that in most of the duty evaded by the applicant and M/s. ADDP was by way of undervaluation where a lesser value is shown in the invoices and in some of the case they clear the goods without accounting for the Central Excise invoices and in some of the cases they clear the goods without accounting for the Central Excise invoices (which were destroyed after delivering goods and same number of invoice was again prepared for another clearance) as admitted by various key personnel.

(e) Despite of this fact having revealed during investigation that the applicant, in maximum number of cases was issuing bills for the goods sold by them though for a lower value, the department to note this observation while calculating duty demand on the basis of RUC 10 which reflects the sale the approx. three times the invoices issued by the applicant.

(f) During the searches at the premises of the buyers know where the department noticed anomaly in the stocks as their stock was matching with the records and this fact mentioned in their respective panchnamas.”

(Emphasis supplied)

11. Consequent on receipt of notice from the Settlement Commission, regarding filing of the aforesaid settlement application by the respondents, the petitioners submitted detailed para-wise comments, before the Settlement Commission.

12. Apart from reiterating the various assertions contained in the Show Cause Notice, the parawise comments, furnished by the petitioners, to the Settlement Commission, contained, *inter alia*, the following assertions and submissions:

(i) The submission, of Respondents No.1 and 2, that they were also trading in plywood and veneer, was not acceptable, as this stand had been taken only first time, in the settlement application, and apart from the fact that it was not supported by any documents evidencing purchase or sales in the course of trading, was also contrary to the statements of Shyam Joshi, Govind Pareek and Surendra Pareek, none of whom ever stated that Respondents No.1 and 2 were engaged in trading.

(ii) The settlement application sought to contend that the goods seized from the premises of Respondent No.2 , and from the godown of Respondent No.1, were identical and that, owing to paucity of space, goods were stored in the godown of Respondent No.1. It was also sought to be contended, in the settlement application, that the prices adopted, in respect of the said goods, were incorrect and exorbitant. These submissions, as contained in the settlement application, were denied, as

factually incorrect. It was pointed out, in the para-wise comments, that the value of goods had been taken on the basis of available documents, and reference was invited, in this context, to *panchnama*, dated 19th July, 2012, which indicated that the prices had been adopted from the figures in the price list, dated 15th June, 2012, which had been resumed thereunder.

(iii) The assertion, in the settlement application, that the goods seized from the premises of Respondent No. 2, and from the godown of Respondent No.1, were identical, was unacceptable, as the goods seized from the godown of Respondent No.1 were clandestinely removed.

(iv) The settlement application further averred that no question had ever been asked to Respondents No.1 and 2 or to other concerned persons, during investigation, regarding the pen drive and computer printouts. This assertion was also incorrect, inasmuch as the pen drive and computer printouts had been recovered/obtained during search proceedings, under *panchnama*, drawn on the spot, which bore the signatures of independent witnesses. Regarding the admissibility and reliability of the computer printouts, reliance was placed, in the para-wise comments, on the judgment of this Court in *State v. Mohd. Afzal*¹ and of the Supreme Court in *State v Navjot Sandhu*² and *R.M. Malkani v. State of Maharashtra*³.

¹ 2003 (71) DRJ 178

² AIR 2005 SC 3820

³ (1973) 1 SCC 471

(v) The settlement application also sought to contend that the figures, in RUD-10, on the basis whereof duty demand had been worked out, did not reflect the actual transactions of Respondents No.1 and 2, and were highly inflated. This assertion was denied. It was pointed out, in the para-wise comments, that the collective clearances of Respondents No.1 and 2, for the period April, 2010 to 15th July, 2012 were recorded in the data contained in the printouts recovered on 19th July, 2012, from A-90, 3rd Floor, Saraswati Vihar. Reliance was also placed, in this context, on the statements of Manish Kedia, which already stand paraphrased hereinabove, and which were never retracted.

(v) For the same reason, the assertion, in the settlement application, that duty liability was required to be worked out on the basis of the figures contained in the note books recovered under *panchnama* dated 19th July, 2012, drawn at the Paharganj office of Respondents No.1 and 2, was also denied.

(vi) The settlement application also sought to contend that, with the equipment found in their premises, it was impossible for Respondents No.1 and 2 to manufacture the quantity of finished goods which, according to the Show Cause Notice, had been clandestinely manufactured and removed by them. The para-wise comments refuted this assertion, by pointing out that the position regarding number of machines was as recorded at the time of search of the premises of Respondents No.1 and 2 ,

whereas duty liability related to the period April, 2010 to July, 2012.

(vii) Ultimately, admission of duty liability, in the settlement application, was limited to the figures contained in diary numbers, 6, 7, 8 and 47, recovered during search of the premises at Chuna Mandi, Paharganj. It was contended, in the para-wise comments, that the total clearances effected by Respondents No.1 and 2, during the period April, 2010 to 15th July, 2012, were recorded in the printouts recovered on 19th July, 2012, from A-90, 3rd Floor, Saraswati Vihar, supported by the statement of Manish Kedia, who admitted that the duty payable by Respondents No.1 and 2 could be computed by deducting the value declared by them, in their ER-I returns, from the actual value of clearances as reflected in the computer printouts. It was on this basis that the differential duty of ₹ 11,43,09,554/-, had been worked out. The attempt, in the settlement application, to limit duty liability to the figures contained in the note books seized under Panchnama on 19th July, 2012 was, therefore, completely misconceived.

In view of the above submissions, it was prayed that the settlement application be rejected, as it did not contain a full and true disclosure of duty liability of Respondents No.1 and 2 .

13. The settlement application was allowed to be proceeded with, by the Settlement Commission, whereafter comments were invited, from the petitioners, regarding the manner in which duty liability had

been computed, as well as on certain other issues. Detailed submissions, in this regard, were furnished, by the petitioners, on 8th August, 2014 and 26th August, 2014.

14. For the purposes of adjudication of the present writ petition, it is not necessary to refer, in detail, to the said submissions. Suffice it to state that the petitioners disputed the case, sought to be set up in the settlement application, on each and every aspect, including the quantum of duty liability, the manner in which it had been worked out and the legal submissions advanced by the applicants in the settlement application.

15. *Vide* the impugned Final Order, dated 2nd September, 2014, the Settlement Commission has allowed the settlement application filed by the respondents and has, accordingly, settled the case arising from the aforementioned Show Cause Notice, dated 16th January, 2013, in the terms set out in para 3 hereinabove.

16. The impugned Final Order of Settlement Commission reflects the following submissions, as having been advanced, before it, on behalf of the applicants, i.e. the respondents in the present writ petition:

- (i) The Revenue had “produced no evidence for clandestine removal”. No evidence was “cited to establish purchase of raw material or consumption of electricity or other parameters to establish that finished goods of a quantity to match the value of ₹ 146 crores had in fact been manufactured”

(ii) The data contained in the computer printouts was not corroborated by any corresponding investigation. Investigation was primarily conducted in respect of the diary entries. The nature of investigation conducted, to establish authenticity of the data contained in the computer printouts was not forthcoming in the Show Cause Notice.

(iii) The data contained in the computer printouts was, in fact, vastly exaggerated.

(iv) The details contained in the computer printouts had not been corroborated or confirmed by buyer of the finished goods or by suppliers of the raw material.

(v) The statement, dated 2nd January, 2013, of Manish Kedia, did not accede to computation of demand by subtracting, from the value indicated in the computer printouts, the values declared by Respondents No.1 and 2 in their ER-1 returns.

(vi) In these circumstances, the duty liability had been worked out, on the basis of the entries in the diaries, which covered a period of 15 months, out of the total period of demand, and by working out the liability, for the remaining period, on pro-rata basis.

17. Reliance was also placed, by the respondents, on the fact that, during visits, physical stock found at various premises was seen to tally with the figures contained in the stock registers.

18. Having recorded the submissions advanced on behalf of the petitioners and the respondents, the Settlement Commission has proceeded, in the impugned Final Order, to return the following findings (in paras 24.1 to 24.4):

“24.1. The Bench observed that the investigation reveals that the bulk of the evasion by the applicant was through under invoicing and only a small part was on account of clandestine sale. However, in the SCN more than 80% of the demand is on account of alleged clandestine sale.

24.2. The Bench observed that the data obtained from computer printouts showing a higher value of goods cleared clandestinely has not been corroborated by any investigation. The entries in the computer printout could easily have been verified to establish clandestine manufacture and removal. This is to be seen particularly in the context of the enquiries with the buyers not revealing any supply of goods without invoice. In fact they have confirmed that the goods were being received against bills but that such bills were, showing a lower value. The difference between the value indicated in the bills and the actual value was being paid in cash.

Similarly, the suppliers of inputs have also indicated that all inputs were being supplied against bills. Again the value being declared was less than the real value. In the hearing held on 01.09.2014, the Representative of Revenue admitted that other than the entry in the computer printout there is no other evidence of clandestine removal.

24.3. The applicant also claimed that the installed capacity of their units was incapable of producing the quantity of goods alleged by Revenue. To this the response of Revenue was that the installed capacity indicated in the panchnama related to the situation obtaining on the date of search, whereas the alleged evasion covered a period from April 2010 to July,

2012. The implication being that there were more machines and higher manufacturing capacity at other times during the period of 27 months during which the alleged excess clearance took place. However, this claim of the Revenue is not supported by any evidence nor is it backed by higher quantities of inputs purchased clandestinely or higher quantities of unrecorded sales. The Bench observed that Revenue has, in their latest comments sent on 29.08.2014 submitted that the computer printout is a sales account whereas the diaries are a record of cash received from such buyers. Only in case of M/s. Sunmica is there a large volume of transaction for which bills were not found. However, M/s. Sunmica did not join the investigation and consequently this could not be verified. In any case, it is the only instance cited in the SCN.

24.4. A charge of clandestine removal needs to be backed up with evidence of acquisition of input and machinery as well as of clandestine manufacture and removal of final products. Without such confirmation, it is not possible to fasten duty liability of ₹ 11,43,09,554/- on the applicant.”

Rival submissions advanced before this Court

19. We have heard Mr. Satish Aggarwala, learned senior Standing Counsel appearing for the petitioners and Mr. Sudhir Malhotra, learned counsel appearing for the respondents, at length.

20. Mr. Satish Aggarwala submits that the Settlement Commission has, in passing the impugned Final Order, effectively acted as an adjudicating authority. He asserts that this was completely beyond the province of jurisdiction of the Settlement Commission, which could not have itself undertaken an analysis of evidence. He emphasises that there was wealth of material, in the Show Cause Notice, to support the demand proposed therein, and stresses the fact that the Settlement Commission could not have rejected the evidence in the form of

computer printouts, which were borne out by the statements, not only of the personnel of Respondents No.1 and 2 – including Manish Kedia and Raghunath Prasad Kedia – but also by the statements of buyers of the clandestinely removed finished products.

21. As a result of the faulty manner in which the Settlement Commission has proceeded, Mr. Aggarwala submits, the Respondents No.1 and 2 have got away with evasion of duty of over ₹ 10 crores, apart from the attendant liability by way of interest and penalty. A full and true disclosure of liability, Mr. Aggarwala emphasises, is the *sine qua non* for a settlement application to be maintainable, in the very first place, and this requirement is woefully lacking in the present case.

22. Arguing *per contra*, Mr. Sudhir Malhotra, learned counsel for Respondents No.1 and 2, submits that the computer printouts could not be relied upon, in view of Section 36-B of the Central Excise Act 1944, which sets out the circumstances in which electronic evidence could be admitted. He submits that the entire demand was, apart from the data contained in the computer printouts, limited to the figures contained in the diary seized on 19th July, 2012, which stood admitted, *in toto*, by his clients.

23. In these circumstances, Mr. Malhotra submits that no occasion arises for interference, by this Court, with the impugned Final Order of the Settlement Commission. He, therefore, prays that the writ petition be dismissed.

Analysis

24. We have set out, hereinabove, in somewhat excruciating detail, the allegations in the Show Cause Notice issued to the respondents, the submissions advanced by them in their Settlement Application, and the response, of the petitioners, thereto, only to ensure that the scope and ambit of the controversy, and the issues that arose for consideration therein, and which would have fallen for consideration by an adjudicating authority – had the matter proceeded to adjudication – are readily appreciated. We are required to assess whether these issues could have been settled, by the Settlement Commission, in the manner in which the impugned Final Order, dated 2nd September, 2014, proceeds to settle them, and on the terms recorded therein.

25. As would be apparent from the discussion that follows hereinafter, our view is that the answer to both these queries – though they overlap – is in the negative.

Nature of jurisdiction exercised by the Settlement Commission

26. The ambit of jurisdiction of the Settlement Commission has been examined, judicially, on several locations, and the issue may justifiably be said to be no longer *res integra*.

27. The provisions, relating to settlement of cases, are contained in Chapter V of the Act, comprising Sections 31 to 32P. Clause (c) of Section 31 defines “case” as meaning “any proceeding under this Act

or any other Act for the levy, assessment and collection of excise duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of Section 32E is made”. Sections 32 to 32D deal essentially with the constitution of the Settlement Commission, the Benches thereof, and the manner in which applications are to be distributed amongst Benches, etc., and are not of particular significance, insofar as the present proceedings are concerned. Section 32E deals with “Application for settlement of cases”. Sub-section (1), thereof, entitles an assessee to, in respect of a case relating to him, make an application, before adjudication, to the Settlement Commission, to have the case settled. The said sub-section requires, further, that the application contains, *inter alia*, a full and true disclosure of the duty liability of the assessee, the manner in which such liability has been derived, and the additional amount of excise duty accepted to be payable by him.

28. Section 32F deals with the manner in which the Settlement Commission is to deal with the application, preferred under Section 32E. Sub-section (1) thereof, requires the Settlement Commission to issue a notice, to the applicant, requiring him to explain, in writing, as to why the application be allowed to be proceeded with and, after taking into consideration the explanation provided by the applicant, to pass an order, allowing the application to be proceeded with, or rejecting the application. Where the order, passed under sub-section (1) allows the application to be proceeded with, sub-section (3) requires the Settlement Commission to, within 7 days of the order passed under sub-section (1), call for a report from the Principal

Commissioner, or the Commission of Central Excise. After examining the said report, the Settlement Commission is required, by sub-section (4) to, if necessary, direct further investigation by the Commissioner (Investigation) and, thereafter, proceed to pass an order, in terms of sub-section (5). Sub-sections (4) and (5) of Section 32F are reproduced herein below:

“32F. Procedure on receipt of an application under section 32E. —

(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 of the report of the Principal Commissioner of Central Excise or Commissioner of Central Excise received under sub-section (3), and the report, if any, of the Commissioner (Investigation) of the Settlement Commission under sub-section (4), 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, passed 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 of Central Excise, or Commissioner of Central Excise and the Commissioner (Investigation) under sub-section (3) or sub-section (4).”

29. We may note, here, that Section 32F was substituted, in its entirety, by Section 122 of the Finance Act, 2007. As it stood prior to substitution, sub-section (1) of Section 32F read thus:

“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 call for a report from the Commissioner of Central Excise having jurisdiction and on the basis of the materials contained in such a report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Settlement Commission may, by order, allow the application to be proceeded with or reject the application:

Provided that an application shall not be rejected under this sub-section, unless an opportunity has been given to the applicant of being heard:

Provided further that the Commissioner of Central Excise shall furnish such a report within a period of one month of the receipt of the communication from the Settlement Commission, failing which it shall be presumed that the Commissioner of Central Excise has no objection to such application; but he may raise objections at the time of hearing fixed by the Settlement Commission for admission of the application on the date of such hearing shall be communicated by the Settlement Commission to the applicant and the Commissioner of Central Excise within a period not exceeding 2 months from the date of receipt of such application, unless the presiding officer of the Bench extends the time, recording the reasons in writing.”

After substitution, Section 32F(1) reads as under:

“32F. Procedure on receipt of an application under section 32E. — (1) On receipt of an application under 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.”

30. Section 32I, which deals with the powers and procedure of the Settlement Commission, provides that, on an application being allowed, by the Settlement Commission, to be proceeded with, under Section 32F, the Settlement Commission would, during the pendency of the application, have, subject to the provisions of Section 32F(4), exclusive jurisdiction to exercise powers and perform functions of any Central Excise Officer, under the Act, in relation to the case. Sub-sections (1) and (2) of Section 32-I may be reproduced thus:

“32-I. Powers and procedure of Settlement Commission. — (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.”

The subjection, of the power so conferred, on the Settlement Commission, to don the mantle of a Central Excise Officer, qua the case before it by Section 32I(1) and (2), to Section 32F(4), is obviously intended to ensure that, buoyed by the said power, the Settlement Commission does not transmute itself into an adjudicating authority, in respect of the case before it. This aspect also stands clarified by judicial pronouncements on the issue, as would become apparent immediately hereinafter.

31. In *Picasso Overseas v. Director General of Revenue Intelligence*⁴, this Court held, *inter alia*, as under (in the context of parallel provisions, figuring in the Customs Act, 1962):

“... The expression “power to perform the function of an office of Customs,” as stated in Section 127F(2) of the Act, has to be read in accordance with the scheme of Chapter XVA and its object. Thus, it would mean that the Settlement Commission is to basically look at the evidence and call for such evidence in order to determine whether the Settlement Commission should or should not accept the additional custom duty which the applicant, says is acceptable to him.

(i) The expression “settlement” is in contradistinction to “adjudication” The very scheme of the provisions of Chapter XVA is settlement and not adjudication.

⁴ Judgement dated 3rd August, 2009, in WP (C) 4401/2007

11. We now refer to provision of Section 127F sub-Section (2) which has been relied upon by the counsel for the respondents. This provision states that Settlement Commission has the power to perform the function of an officer of customs under the Act, in relation to the case.

We feel that these words as found in sub-section must be read in accordance with the scheme of Chapter XVA and its object and on so reading the aforesaid words used in sub-Section (2) we find that they are basically to give finality to the order of the Settlement, Commission as an order under the provision of the Act and similar to what an Adjudicating officer does. In fact, the expression “exclusive jurisdiction to exercise the power and perform the function of any officer of customs” is basically to look at the evidence and call for such evidence in order to determine whether the Settlement Commission should or should not accept the additional custom duty which the petitioner says is acceptable to him. The aforesaid expression, therefore, appearing in Section 127F(2) has to be read in the context, of the scope and the object of the Settlement Commission being to settle the matter by accepting the duty amount in and around the figure which the petitioner feels acceptable to him.....”

(Italics and underscoring supplied)

The above extracted passages, therefore, clarify that the conferment, on the Settlement Commission, of the “powers of a Customs officer”, or the “powers of the Central Excise Officer” would not, *ipso facto*, result in the Settlement Commission metamorphosing into an adjudicating authority. The “powers of a Central Excise Officer”, or the “powers of the Customs officer”, conferred on the Settlement Commission, are so conferred to further its aims and objectives, i.e. to further the process of settlement, and assess whether there has, or has not, been full and true disclosure of liability by the applicant before the Settlement Commission. The Settlement Commission does not, by

the conferment of such power, become a parallel adjudicating authority, adjudicating the Show Cause Notice.

32. The above passages, from **Picasso Overseas**⁴, have been followed by this Court in more than one case. Relying on **Picasso Overseas**⁴, this Court, in **U.O.I. v. Dharampal Satyapal**⁵, held thus:

“The other principle which has been set down in several judgments of this Court is that the Settlement Commission is not a substitute for adjudication proceedings before the central excise authorities and where complex issues of fact and law are involved for which a detailed inquiry is necessary, settlement proceedings cannot act as a proper substitute for the adjudication proceedings. In **Picasso Overseas and Others v. Director General of Revenue (Intelligence) and Another**⁴ decided on 3-8-2009 by a Division Bench of this Court, the point directly arose for consideration. The issue posed before this Court was : “.....can the Settlement Commission substitute itself for the adjudicating officer and arrive at a decision on highly contentious issue requiring detail and complex investigation for arriving at an adjudication of such facts”. In paragraph 9 the following principles were set out :-

(i) The Settlement Commission cannot substitute itself for the adjudicating officer by deciding complicated and highly disputed or contentious questions and issues of facts themselves, because the expression “settlement” is used in the Customs Act in contra-distinction with “adjudication” and the very scheme of the settlement provisions is to settle and not adjudicate.

(ii) All the provisions make it abundantly clear that what is required of the Settlement Commission is a decision when there are terms of settlement agreed to by the applicant and a duty liability which is accepted by him; he could not be fastened with the liability

⁵ 2013 (298) ELT 653 (Del)

which he never intended as accepted to be payable by him.

(iii) Section 127(1) as it stood then, used the expression “complexity of the investigation” which shows that highly complex and contentious questions of fact cannot even be admitted for processing.

50. It was thus held that if the case involves highly complex and disputed questions of fact for which detailed inquiry is necessary, the Settlement Commission should refer the matter back to the adjudicating officer to be taken up from the stage from which the matter was before such officer just before the making of the settlement application.”

(Underscoring supplied)

33. Dharampal Satyapal⁵ has been followed, more recently, by this Court in **Shree Flavours LLP v. Government of India⁶**.

34. We are aware that the specific statutory stipulation, in Section 32F(1) of the Act, providing for “complexity of the investigation”, as a specific ground for the Settlement Commission to decide or to reject the application filed before it, does not find place in Section 32F, as substituted by Section 122 of the Finance Act, 2007. This, however, does not, in our view, change the legal position, and amounts, basically, to deletion of a statutory superfluity. Complex issues of fact, or cases in which determination of the liability of the assessee is dependent on detailed appreciation of evidence would, by their very nature, stand excluded from the purview of jurisdiction of the Settlement Commission. We may, incidentally, note that **Dharampal Satyapal⁵** and **Shree Flavours LLP⁶** were both cases arising in the

⁶ 2018 (359) ELT 145

context of the amended Section 32F(1) of the Central Excise Act – or, correspondingly, Section 127 (1) of the Customs Act, 1962 – after the deletion, therefrom, of the reference to the “complexity of the investigation”.

35. A perusal of the case, predicated by the respondents before the Settlement Commission, reflects that they questioned the manner in which available evidence had been appreciated, in the Show Cause Notice, dated 16th January, 2013 (*supra*). The repeated refrain, of the respondents, before the Settlement Commission, was that the evidence in the Show Cause Notice was insufficient to make out a case of clandestine removal or undervaluation, to the extent alleged therein.

36. These very submissions, by themselves, indicate that the Settlement Commission ought not to have proceeded with the case, let alone settle it for less than one-tenth of the demand proposed in the Show Cause Notice. Having not chosen to submit themselves to adjudication, the contention that the Revenue had not been able to produce evidence, to support its case of clandestine removal and under valuation, against Respondents No.1 and 2 , to the extent alleged in the Show Cause Notice, was, in our view, entirely unavailable to the respondents.

37. It is required to be remembered that a Show Cause Notice is the *terminus a quo* of the adjudicatory process, and not the *terminus ad quem* thereof. Leading of evidence, by the Revenue, in support of the case sought to be made out in the Show Cause Notice, and production

of evidence, by the assessee, in reply thereto, are incidents of adjudication. The exercise of production of evidence, reliance thereupon, and appreciation thereof, would arise only in adjudication proceedings, by the competent adjudicating authority. Having, by moving the Settlement Commission, not allowed the adjudicatory process to take off, it was not open to the respondents to urge – or, for that matter, for the Settlement Commission to hold – that the Revenue had failed to produce evidence in support of its case.

38. On receipt of the Show Cause Notice, the respondents had, before them, one of two options. They could either subject themselves to adjudication, or could approach the Settlement Commission. There is no gainsaying the position, which is apparent on a plain reading of the Show Cause Notice issued to the respondents in the present case, that the case built up by the Revenue was dependent, to a large extent, on statements, recorded from various persons, including the Director of Respondents No.1 and 2 himself, during the course of investigation. Were the Show Cause Notice to be adjudicated, the relevance, of the statements, would fall to be examined in the light of Section 9D of the Act, which reads thus:

“9D. Relevancy of statements under certain circumstances. — (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, –

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse

party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.”

It has been held, by this Court, in **J & K Cigarettes Ltd v. C.C.E.**⁷, that sub-section (2) of Section 9-D results in the provisions of the said Section becoming applicable, *mutatis mutandis*, to proceedings before an adjudicating authority. Were, therefore, the respondents to subject themselves to adjudication, the competent adjudicating authority would have to examine whether the statements, recorded during investigation, were required to be admitted in evidence or not, and in case they were so admitted in evidence, the respondents would have the opportunity of testing the said evidence by cross-examination of the deponents of such statements or any other methods known to law.

39. Having not chosen to subject themselves to adjudication, the respondents could not wish away the effect of the statements recorded during investigation, and other evidence marshalled by the Revenue and cited in the Show Cause Notice. Expressed otherwise, the respondents, undoubtedly, had a right to question the reliability of the statements recorded during investigation, or of the computer printouts

⁷ 2009 (242) ELT 189, per A. K. Sikri, J. (as he then was)

and other evidence, which was vouchsafed by the said statements. The opportunity to exercise such a right would, however, present itself, to the respondents, during adjudication, and not in settlement proceedings. In an adjudicatory process, the adjudicating authority would have an opportunity to examine whether, in the context of Section 9-D of the Act, the statements, relied upon, by the Revenue, in the Show Cause Notice, were required to be admitted in evidence and, in case they were so admitted, the petitioners would have an opportunity to test the said material, by way of cross-examination of the deponents of the statements, or any other means known to law.

40. The Act does not contemplate any such exercise by the Settlement Commission. Wealth of evidence stands cited, in the Show Cause Notice, against the respondents, though, unquestionably, the bulk thereof relates to the data contained in the computer printouts, recovered from the premises of Respondents No.1 and 2 , and retrieved in the presence of the personnel of the said respondents. The reliability of the said printouts, and the fact that they pertained to clearances effected by Respondents No.1 and 2 , and payments received thereagainst, stands vouchsafed by the statements of the said personnel. The respondents do not dispute the position that, were the computer printouts to be treated as reflective of clearances effected by them, clandestine as well as undervalued, the demand, as computed in the Show Cause Notice, would become payable. The extent to which the effect of such evidence could be ignored, in the light of Section 36B of the Act, is also an aspect which could been examined if the respondents choose to subject themselves to adjudication.

41. The manner in which Respondents No.1 and 2 attempted to limit their liability, even while admitting the charge of under invoicing, to the data contained in Diaries Nos 6, 7, 8 and 47, recovered from the Chuna Mandi premises, ignoring, in the process, all the data contained in the computer printouts – duly vouchsafed by Respondents No.1 and 2 themselves, during investigation – was, in our view, totally impermissible in law.

42. Clandestine removal is, by its very nature, clandestine. Significantly, the expression “clandestine removal” does not find mention in the Act. The expression is one which has been felicitously coined, over a period of time, to represent clearances of excisable goods, from the factory or other place of removal, in violation of the law, without the knowledge of the authorities. By its very nature, therefore, oftentimes, the only evidence available with the Revenue, to support an allegation of clandestine removal, at the stage of issuance of Show Cause Notice, is oral in nature, in the form of statements of the assessee concerned, their buyers, transporters, and the like. It is precisely for this reason that Section 9-D of the Act empowers an adjudicating authority to admit such statements in evidence, whereafter the onus would shift, to the assessee, to discountenance the effect thereof, by means known to law. It is always open, however, to an assessee, not to choose to do so and, instead of subjecting himself to the rigours of adjudication, make a clean breast of its affairs, by moving the Settlement Commission. If it chooses to do so, however, the assessee must always act “in the spirit of settlement”. While it is

open to an applicant, before the Settlement Commission, to question the legality of the demand, proposed in the Show Cause Notice, on points of law, or the like, an applicant, before the Settlement Commission, cannot wish away the effect of the evidence, on which reliance is placed in the Show Cause Notice. Questioning of the value, or the quantum or sufficiency, of the evidence cited in the Show Cause Notice, necessarily requires subjection, of the assessee, to the adjudicatory process.

43. We are of the view that the Settlement Commission had no jurisdiction, under the Act, to return the findings contained in paras 24.1 to 24.4 of the impugned Final Order. In the said paragraphs, the Settlement Commission finds that

- (i) the data obtained from computer printouts had not been corroborated from investigations,
- (ii) the entries in the computer printouts could easily have been verified, particularly in the context of inquiries with the buyers, which did not reveal any supply of goods without any invoices,
- (iii) while the evidence, in the form of statements of the buyers, reflected under invoices of goods supplied by Respondents No.1 and 2 , there was no evidence of supply of goods without invoices,
- (iv) it had been admitted, by the departmental representative, that there was no evidence of clandestine removal, other than the computer printouts,

- (v) the Revenue had not produced any evidence to support its rebuttal, to the reliance, of the respondents, on the installed capacity of their units, though it was sought to be contended, by the Revenue, that the machinery position, as it existed at the time of search, necessarily indicative of the position as it existed during the period of dispute, and
- (vi) in the circumstances, the allegation of clandestine removal, which was required to be “backed up with evidence of acquisition of input and machinery as well as clandestine manufacture and removal of final products” without which it was not possible to fasten, on the respondents, the duty liability of ₹ 11,43,09,554/-, proposed in the Show Cause Notice.

44. In our considered opinion, the Settlement Commission could not have returned these findings, which could only have emerged from a formal adjudicatory process. The findings of the Settlement Commission, amount, in effect, to ignoring the statements of suppliers of raw material, the evidence of the buyers of the finished goods, admissions of various personnel of respondents, including their directors Manish Kedia and his father, Raghunath Prasad Kedia, as well as the computer printouts. The submission, of Respondents No.1 and 2 – which was, somewhat disquietingly, endorsed by the Departmental Representative who appeared before the Settlement Commission – that the only evidence of clandestine removal, without invoices, of excisable goods, by them, was contained in the computer printouts, is, on the face of it, incorrect. A bare reading of the Show Cause Notice reveals that, apart from computer printouts, the

allegation that Respondents No.1 and 2 were clearing the finished goods, unaccompanied by invoices, was supported by (i) the statements, amongst others, of Govind Pareek, Dhanraj Purohit, Amar Aggarwal, Manish Kedia and Raghunath Kedia, (ii) evidence of receipt of unaccounted raw material, in the form of the statements of the material suppliers, (iii) the recovery of unaccounted cash from the premises at 246, Gate No. 1, Deepali, Pitampura and 2909, Gali No. 4, Chuna Mandi, Paharganj, (iv) shortage of finished goods, in the premises of Respondent No.1, vis-à-vis the record and balance in the RG-1 register, (v) seizure of unaccounted finished goods, from the godown of Respondents No.1 and 2 at 548/4, Swarn Park, Udyog Nagar, Mundka and (vi) the recovery of *kachcha parchis*, whereunder such removals were allegedly effected. The impugned Final Order of the Settlement Commission completely ignores this evidence. Apropos the computer printouts, the Settlement Commission has also failed to note the fact that the figures in the computer printouts had been compared with other records and had been found to tally. The Settlement Commission could not have held that the Revenue had failed to adduce evidence – particularly in the context of production capacity of Respondents No.1 and 2 – as the occasion to produce any such evidence would have arisen only during adjudication proceedings.

45. We are also unaware of any law, which entitles Respondents No.1 and 2, to compute demand, for the period not covered by the diaries, on a “pro rata” basis. Removal of excisable goods does not take place on “pro rata” basis, but in actual fact, and duty, on such

removals has also, therefore, to be paid on actuals, and not on “pro rata” basis.

46. The error, in the perception of the Settlement Commission, regarding its jurisdiction, is, perhaps, most starkly underscored by the findings, returned by it, in the impugned Final Order, with respect to the production capacity of the units of Respondents No.1 and 2 . The production capacity of Respondents No.1 and 2 never constituted a part of the Show Cause Notice, dated 16th January, 2013, and was cited by Respondents No.1 and 2 in their defence. The onus to establish that, during the period of dispute, their production capacity was insufficient to maintain the allegation of clandestine removal and under invoicing, as contained in the Show Cause Notice, lay, therefore, squarely on Respondents No.1 and 2 . As no adjudication took place, neither did Respondents No.1 and 2 discharge this onus, nor did any occasion arise, for the Revenue to lead any evidence, or, in any other manner, seek to disprove the same. In these circumstances, we fail to appreciate how the Settlement Commission could have accepted, as gospel truth, the submissions, of Respondents No.1 and 2 , regarding their production capacity, especially as there is not an iota of evidence, cited by the said respondents, regarding the number of machines which were installed in their premises *during the period of dispute*.

47. The findings recorded in the impugned Final Order, as contained in paras 24.1 to 24.4 thereof (*supra*), in fact, amount to a truncated adjudication of the Show Cause Notice, without the

trappings of the regular adjudicatory process, which would have included admission of the evidence cited in the Show Cause Notice, rebuttal thereof by the respondents, adducing of evidence by the respondents in their favour and rebuttal thereof by the Revenue. Such a summary adjudication, as has been undertaken by the Settlement Commission, is unknown to the Act, or to any other law governing the field.

48. We reiterate that the Settlement Commission was never intended to operate as a parallel, summary adjudicatory forum, which could substitute the process of regular adjudication before the competent adjudicating authority. Detailed appreciation and analysis of evidence, or of the value of the evidence cited in the Show Cause Notice, is an exercise which the Settlement Commission is required to forebear itself from undertaking, such an exercise being contemplated, by the statute, only by a competent adjudicating authority, in accordance with the procedure prescribed in the Act, the relevant rules, and judicial precedents, in that regard.

49. We are, therefore, unable to sustain the impugned Final Order, or the findings of the Settlement Commission, as reflected in the paras 24.1 to 24.4 thereof. In our opinion, the Settlement Commission fell into serious error of jurisdiction, in settling the case arising from the Show Cause Notice, dated 16th January, 2013 *supra*, for an amount of ₹ 11,80,12,105/-, along with interest, as it has chosen to do.

50. Mr. Malhotra also sought to advance a faint submission that the Revenue, not having chosen to challenge the order, of the Settlement

Commission, allowing the application of the respondents to be proceeded with, was estopped from contesting the correctness of the Final Order of the Settlement Commission.

51. We are unable to agree. The order, allowing the application to be proceeded with, was an interlocutory order. While we do not dispute the entitlement of the Revenue to challenge such an interlocutory order, the inaction, on the part of the Revenue, to do so, cannot foreclose a challenge to the Final Order of the Settlement Commission.

52. We, therefore, unhesitatingly, reject this submission of Mr.Malhotra.

Conclusion

53. In view of the above discussion, the impugned Final Order dated 2nd September, 2014, of the Settlement Commission, is quashed and set aside.

54. The writ petition is, accordingly, allowed, with the following directions:

- (i) The respondents are directed to file their response to the Show Cause Notice, if any, before the appropriate adjudicating authority, within four weeks of pronouncement of this judgment in Court. No extension of time shall be granted, to them, for the said purposes.

(ii) In case the authority, to whom the Show Cause Notice was made returnable, has changed during the time that has lapsed since the date of issuance of Show Cause Notice, the designation and address of the competent authority shall be made known, by the petitioners, to learned counsel who has represented the respondents in this writ petition, within 2 days from the date of pronouncement of this judgment. Else, the reply to the Show Cause Notice shall be filed before the authority to whom the respondents have been directed to show cause, therein.

(iii) Consequent on receipt of the replies, if any, from the respondents, to the Show Cause Notice, dated 16th January, 2013, the adjudicating authority is directed to proceed to adjudicate the Show Cause Notice with all due expedition, and attempt to conclude the proceedings as early as possible and, in any event, within a period of six months from the date of pronouncement of this judgment.

(iv) Needless to say, the principles of natural justice shall be scrupulously followed by the adjudicating authority, and an opportunity of personal hearing shall also be extended to the respondents.

(v) The amounts deposited by the respondents with the petitioners shall be retained by the petitioners and shall remain subject to the outcome of the adjudication proceedings. If, on the conclusion of adjudication, any amount is found refundable,

such refund shall abide by the provisions governing refund, as contained in the law, including the principles of unjust enrichment, if applicable.

55. There shall be no order as to costs.

C.HARI SHANKAR, J.

NOVEMBER 19, 2019

dsn/HJ

CHIEF JUSTICE



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