IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.02.2021
PRONOUNCED ON : 31.03.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.10324 of 2008
and M.P.Nos.1 & 2 of 2008

M/s.E.s.Mydeen & Co.
Units - I & II
Represented by its Managing Partner
E.S.M.P.Kaleel
No.20, Pothamarai & Co
Kumbakonam 612 001. .. Petitioner

vs

1.The Customs & Central Excise
Settlement Commission
Narmada Block, Custom House
33, Rajaji Salai,
Chennai 600 001.

2.The Commissioner of Central Excise
No.I, Williams Road,
Trichy 620 001.

3.The Superintendent of Central Excise
No.14-A/16, Noor Nagar, Pidarikulam Road,
Kumbakonam. .. Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus to call for the impugned proceedings of the 1st respondent passed in Final Order No.07/08 CEX dt.28.2.08 in FC.No.V/15/67-68/05-SC and quash the same to the extent that it fails to recognize actual drayage at 24% as between the raw tobacco and the chewing tobacco and further direct the 1st respondent to rework the admitted duty liability towards clandestine removal of MBCT by taking into consideration drayage (as between Raw Tobacco and the Chewing Tobacco) at 24%.

For Petitioner : Mr.P.R.Renganath
For Respondents : M/s.Hema Muralikrishnan
Sr.Standing Counsel.

O R D E R

The petitioner has challenged the impugned order dated 28.02.2018 passed by the 1st respondent / Settlement Commission insofar as seeks to direct the petitioner to pay a sum of Rs.1,06,65,657/- as additional duty liability by restricting the loss due to the drying of tobacco leaves (driage of tobacco leaves) to 10% as against 24% claimed by the petitioner.

2. The operative portion of the impugned order passed by the 1st respondent Settlement Commission which reads as under:

> "(i) The case is settled for Rs.2,63,90,492/-. The applicant has already paid the admitted duty of Rs.1,57,24,835/-. The balance amount of Rs.1,06,65,657/- should be paid by them within 30 days from the date of receipt of this order and compliance of the same should be reported to the Bench;
>
> (ii) The Bench imposes a penalty of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) on the applicant. Immunity from imposition of penalty in excess of this amount is granted to the applicant;
>
> (iii) The co-applicant is however granted immunity from imposition of penalty;
>
> (iv) The applicant shall pay a simple interest of 10% per annum on the settled amount from the date of clearance to the date of actual payment of duty. Immunity from imposition of interest over and above this rate is granted to the applicant. The Revenue, after the applicant pays the balance duty and reports compliance calculate the interest and communicate the same to the applicant within 15 days to the applicant. The applicant shall within 15 days of receipt of the communication pay the interest due and report compliance to the Bench.
>
> (v) Applicant and co-applicant are granted immunity from prosecution under the Central Excise Act, 1994".
>
> 15. The above immunities are granted in terms of Section 32K(1) of the Central Excise Act, 1944. The immunities granted above are liable to be withdrawn, if at any time it comes to the notice of the Bench that in obtaining this order of settlement any material particulars have been withheld or any false evidence has been given. The attention of the applicants is also drawn to sub-sections (2) and (3) of Section 32 K ibid.

3. In para 13 of the impugned order, it has been further observed as under:-

13. The Department's representative had no objection for following the raw material route for arriving at the quantum of manufacture of MBC tobacco. It is observed that the applicant has calculated the quantity taking into account of 24% loss. However, this Bench has fixed the loss to be allowed as 10% as discussed in para 12 above, a revised worksheet for calculation of duty has been prepared and is placed as Annexure to this Order".

4. These observations were made after recording the submission of the 2nd respondent Commissioner in para - 12 which reads as under:-

"In this application, the applicant had claimed 24% driage of tobacco from the stage of procurement of raw material to the stage of manufacture of the MBC tobacco. The following chart was given by the applicant and reproduced in the Commissioner (Investigation)'s report is given below:

S.No	Stage	Wastage in grams	Percentage
1	Weight loss due to "Ambaram Thirupudhal" in the godowns and due to removal of sand and other particles etc	50	5
2	Evaporation loss during the transport of processed tobacco from godown to factory and the weight of gunny bags and ropes etc.	100	10
3	Wastage during the cutting of semi-processed into pieces by a electrical operated machine	10	1
4	Wastage during the AmbaramThirupudhal of the cut tobacco (in factory) for 12 days	25	2.5
5	Wastage of cut tobacco on account of drying in the sun for 8 hours, prior to addition of essence.	25	2.5
6	After packing in pottalams, the dust tobacco is sorted out, which is a waste that cannot be further used	30	3
	Total	24	24

The department claimed that the driage shown is onthe higher side and the same should be limited 15 to 19% in view of repeated processes the raw tobacco is subjected to as enlisted above. The applicant for every consignment of 7500 kgs transported claims driage of 1800 kgs and takes into account the remaining quantity. The applicant cited the provisions contained in the Tobacco Excise Manual which was prevalent when un-manufactured tobacco was an excisable item. According to him, the percentage prescribed for wastage in these instructions is 30% and what he claimed was less than that. However, the Bench considers that allowance of 10% driage in toto for all the processes listed out by the applicant would be reasonable and fair. Accordingly, the Bench fixes the driage at 10% in this case".

5. Mr.P.R.Renganath, learned counsel for the petitioner submits that even as per the investigation report filed before the 1st respondent by the office of the 2nd respondent, it was acknowledged that in the Tobacco Manual upto 30% can be condoned and a hierarchy was prescribed to condone the wastage when un-manufactured tobacco was an excisable item and excise duty was payable on it.

6. The learned counsel for the petitioner submits that the impugned order passed by the 1st respondent was not only contrary to the Tobacco Manual which was earlier in force but also contrary to the defence of the 2nd respondent Commissioner of Central Excise before the 1st respondent Settlement Commission.

7. It is submitted that even if the claim of the petitioner for 24% loss on account of drying of tobacco leaves (driage) was not acceptable the 1st respondent Settlement Commission, the loss should have been fixed between 15% to 19% as was represented by office of the 2nd respondent.

8. It is therefore submitted that the 1st respondent Settlement Commission has instead of arbitrarily fixed the loss at 10% only to arrive at the additional duty liability of Rs.1,06,65,657/-.

9. Defending the impugned order, Ms.Hema Murali Krishnan, learned Senior Standing Counsel for the Central Excise Department submits that the writ petition filed by the petitioner was without jurisdiction, inasmuch as the impugned order passed by the 1st respondent Settlement Commission was a final in all respect under Section 32 M of the Central Excise Act, 1944 and cannot be subjected to judicial review under Article 226 of the Constitution of India.

10. She submits that scope of judicial review under Article 226 of the Constitution of India was very limited and question of facts arrived by the 1st respondent Settlement Commission cannot be disturbed by the Court in the exercise of power of judicial review under Article 226 of the constitution of India. She submits that the 1st respondent has arrived at the question of facts regarding the quantum of loss due to drying of the tobacco leaves and therefore, this question of fact cannot be subjected to judicial review.

11. The learned counsel for the respondent relied on the decision of the Hon'ble Supreme Court in Union Of India & Others vs Ind-Swift Laboratories Ltd., (2011 (4) SCC 635) in para 22, wherein the Hon'ble Supreme Court has held as follows:-

> " 22. 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. So far as the findings of fact recorded by the Commission or question of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court. In the present case the order of the Settlement Commission clearly indicates that the said order, particularly, with regard to the imposition of simple interest @ 10% per annum was passed in accordance with the provisions of Rule 14 but the High Court wrongly interpreted the said Rule and thereby arrived at an erroneous finding. So far as the second issue with respect to interest on Rs. 50 lakhs is concerned, the same being a factual issue should not have been gone into by the High Court exercising the writ jurisdiction and the High Court should not have substituted its own opinion against the opinion of the Settlement Commission when the same was not challenged on merits".

12. She further submits that the Hon'ble Supreme Court in Tata Cellular vs Union Of India, (1994 (6) SCC 651) held that the judicial review under Article 226 of the Constitution of India is confined to decision-making process and not to the decision. She submits that there is no infirmity in the decision-making process adopted by the 1st respondent Settlement Commission and therefore the writ petition filed by the respondent was misconceived.

13. By way of re-joinder, the learned counsel for the petitioner submits that the observation in para-13 of the

impugned order fixing the loss due to drying of leave at 10% was contrary to guidelines of the 1st respondent Settlement Commission and therefore calls for interference.

14. He therefore submitted that the impugned order was perverse to that extent inasmuch as the 2nd respondent Commissioner of Central Excise, had estimated the loss that can be accepted between 15 to 19%.

15. Finally, the learned counsel for the petitioner also submits that the impugned order of the 1st respondent Settlement Commission gives no reason as to why loss due to drying of tobacco leave cannot be accepted between 15% to 19% as was suggested by the 2nd respondent or why loss 24% as was claimed by the petitioner is liable to be rejected.

16. I have considered the arguments advanced by the learned counsel for the petitioner and the respondents. The petitioner is a manufacturer of chewing tobacco and had approached the 1st respondent Settlement Commission to settle the case under the provisions of the Central Excise Act, 1944 after a show cause Notice No.26/2004 dated 1.6.2004 was issued to the petitioner.

17. The said show cause notice called upon the petitioner why an amount of Rs.7,92,86,788/- should not be demanded from the petitioner for the period between 3.5.1999 and 19.8.2002 on the chewing tobacco manufactured and clandestinely removed without payment of tax duty and why Rupees One crore paid by the Petitioner during investigation should not be appropriated towards aforesaid duty liability and why penalty should not be imposed on the petitioner.

18. It was alleged that the petitioner had not accounted stock of tobacco leaves received which was used for manufacture chewing tobacco and cleared chewing tobacco without proper accounting and payment of appropriate Central Excise duty under the provisions of the Central Excise Act, 1944 during the period in dispute.

19. Under these circumstances, the petitioner approached the 1st respondent Settlement Commission and admitted a liability of Rs.1,57,24,853/-. While arriving at the quantum of raw tobacco leaf consumed in the manufacture of chewing tobacco, the petitioner claimed 24% weight loss due to drying (driage loss) based on the Tobacco Manual and the Guidelines of the Department which was in force when Tobacco leaves was an excitable commodity.

20. In support of the above stand, the petitioner relied on the extract from the Tobacco Manual which reads as under :-

153. Treatment of Losses and gains : (i)

Losses noticed on arrival of consignments at destination should be taken up for condonation or adjudication immediately. Storage losses should be taken up when the consignment is fully cleared. Losses in processing should be taken up on completion of individual operation.

The weight of a consignment of tobacco in bond may increase by (a) natural or (b) accidental absorption of moisture or of any other foreign matter during transit or storage or by deliberate addition of foreign matter during processing ……….

In this case of transports from curer's premises, the responsibility for losses must be fixed on the transporter who removed the goods from the curer's premises and who had signed the relative transport certificate or to whom the relative transport permit has been issued……

Since it is not practicable to draw up schedule of losses suitable for application throughout the country, Collectors should see that the table of losses drawn up by them takes into account the various local factors such as conditions of transit or storage, mode of transport and weather conditions.

The powers of officers to condone and/or/adjudicate losses are given below:

SI.No.	Officer	Percentage and monetary limits on power of condonation	Limits upto which duty may be demanded	Remarks
1.	Inspector	Upto 5% in case of whole leaf tobacco and 3% in all other cases provided the duty on the total deficiency does not exceed Rs.100/-		All cases which exceed limits laid down in column 3 should be referred to the next higher officer

SI.No.	Officer	Percentage and monetary limits on power of condonation	Limits upto which duty may be demanded	Remarks
2.	Superintendent	Upto 20% in case of whole leaf tobacco and 10% in all other cases provided the duty on the total deficiency does not exceed Rs.500/-		-do-
3.	Assistant Collector	Upto 30% provided the duty on the total deficiency does not exceed Rs.4,000/-		- do-
4.	Deputy Collector	Above 30% provided the duty on the total deficiency does not exceed Rs.10,000/-		- do-
5.	Collector	Without percentage or monetary limits		-do-

NOTES: 1. For judging the competency of an officer to deal with a case of loss the entire deficiency without excluding the condonable quantity should be taken into account.

2. The limits laid down in col.3 should be observed even where the deficiencies ascertained are admissible in accordance with the schedule prescribed by the collector under paragraph 153(iii).

3. (Duty for this purpose means only the amount of basic Central Excise duty and does not include additional excise duty leviable under the Additional Duties of Excise (goods of special importance) Act, 1957, Special Excise (goods of special importance) Act, 1957, Special Excise duty and Auxiliary duty of excise.

21. The 2nd respondent on the other hand suggested the loss of weight due to drying of the leaves can fixed between 15% to 19% as against 24% claimed by the petitioner in the application filed before the first respondent. The response of the 2nd respondent before 1st respondent Settlement Commission and discussion in the impugned order of the 1st respondent Settlement Commission, reads as under :-

Department's Submission :

Claiming driage and process loss of 24% is not in order.

Comments* :-

> The revenue has contended that the applicant has maintained certain documents at P.Puliampatti, where they have accounted 7500 kg.(@125 bags), whereas they have accounted only 5700 kg. in Goods Transfer invoices. In this regard, the applicant has submitted a detailed reply furnishing the details of weight loss occurring during the various stages of processing, transport and manufacture of the product. The revenue has again gone by the yardstick of the mode of packing, i.e. gunny bags to derive their point. It is a common sense for a product like this, i.e. tobacco, the packing cannot be standardized, i.e. each bag containing so many Kgs. The gunny bags being only used for packing and sending the semi processed tobacco (SPT, in short), their number can never determine the quantity sent. The applicants were only concerned about the quantity (in Kgs.) of tobacco receipts at Kumbakonam and not on the number of gunny bags of tobacco received. Thus, the revenue's stand in this regard is incorrect and is not logical.
>
> As regards the revenue's contention that certain documents maintained by the applicant contained the quantity of semi-processed tobacco sent as 7500 Kg., it is submitted that the applicant has accounted the wet weight of SPT in those records and at Kumbakonam, where the manufacturing takes place, the applicant preferred to account the quantity of SPT consumed in the manufacture of final products. It is once again reiterated that the applicant has not claimed any kind of loss of raw tobacco in their statutory records maintained for excise purposes, which confirms the applicant's stand on this issue.
>
> Further, the revenue has contained that the SPT has been transferred to Kumbakonam after certain processes carried out at P.Puliampatti and hence this quantity cannot be again claimed

as wastage from the dispatched quantity of 7500 Kgs. In this regard, it is stated that though the applicant transfers SPT directly to their factories, the weight and driage loss to the tune of 24% are claimed as a whole, not at different stages/places i.e. at P.Puliampatti, Kumbakonam etc. As stated earlier, the losses starting from raw tobacco receipts to dust chewing tobacco are claimed totally and only the quantity of SPT consumed in the manufacture are accounted in the records. This has been the practice of the applicant company for several decades and has been approved and agreed upon by the revenue also, during several audits conducted. Hence, the revenue's argument on this issue is not acceptable.

Department's Submission:-

Department's instructions contained in the then Tobacco Manual cannot be applied.

Comments*:

The revenue has contended that going by the Dept's instructions, there is every possibility to conclude that there may be only again in the weight of tobacco at the factory of the applicant for the reasons that deliberate addition of foreign matter during processing. In this regard, it is submitted that the major portion of the curing and processing are done at P.Puliampatti and Dharapuram godowns of the applicant company and any such increase in weight are likely to occur at the godowns only and not the factory. It is a known fact to the revenue also that the applicant company immediately consumes the SPT received from godowns in the manufacture of chewing tobacco, which fact can be confirmed from the mahazars drawn at the two factory premises of the applicant company, as there was no huge stocks of SPT reflected in the same. From the above, it is seen that the revenue themselves has acknowledged the fact of accumulation of losses on account of several factors as envisaged in the Board's instructions. Thus, the applicant's claim of wastage loss should be treated as genuine only, in line with the Board's instructions. However, while denying the wastage loss to the tune of 24%, the revenue has contended that there cannot be any losses at P.Puliampatti or in transportation etc, though the revenue has accepted the increase in weight of tobacco, addition of foreign matter etc. Thus, the revenue has contradictory versions on this and are not sure to defend the applicant's legitimate claim or losses occurring on the impugned product.

It is submitted that the revenue has not offered any new comments on the Commissioner's report, but have reiterated their earlier replies filed in response to applicant's submissions made before the Hon'ble Settlement Commission. It is thus appears that the revenue has no proper answers/justifications for the various inconsistencies pointed out by the applicants in their submissions and have been keeping on repeating their allegations made in the SCN.

In view of the above, the applicants begs to submit that the applicant's contentions brought out in the report of Commissioner (Investigation) may kindly be considered on merits."

22. Formerly Rule 233-A of the Central Excise Rules, 1944, the Central Excise Act, 1944 provided a method for determining the annual stock. The said Rule was for annual stock taking for Tobacco at the end of the year. The said Rule read asunder:-

Rule 223A:-Account of stock of goods in a factory or warehouse to be taken and balance to be struck. - As often as the Collector may deem it necessary or proper, and at least, once in every year, the stock of excisable goods remaining in a factory, warehouse or store room licensed or approved for the storage of such goods shall be weighed, measured, counted or otherwise ascertained in the presence of the proper officer, and if the quantity so ascertained is less than the quantity which ought to be found in such premises (after taking into account receipts and deliveries, and making such allowance for waste by evaporation, or other natural causes, as the proper officer may consider reasonable, and as may be in accordance with any instructions issued by the Central Board of Revenue) the owner of such goods or if the premises be a public bonded warehouse the keeper thereof, shall, unless the deficiency by accounted for to the satisfaction of the proper officer be liable to pay the full amount of duty chargeable on such goods as are found deficient and also a penalty which may extend to two thousand rupees."

23. Rule 94 of the Central Excise Rules, 1944, as it stood specifically provided a method for arriving at the daily account of the tobacco products manufactured. The petitioner however failed to maintain such records. Therefore, the quantity of tobacco leaves used for manufacturing chewing tobacco has to be based on some amount of guess work. Neither the estimates of the petitioner nor the estimate of the 2nd respondent can be accurate. It is therefore best left to the wisdom of the 1st respondent Settlement Commission which has the Senior Officers from the department having vast experience.

24. It should be also remembered that a remedy before the Settlement Commission is not a substitute for adjudication proceedings before the Central Excise Authorities. Therefore, complex issues of fact and law cannot be sorted before the Settlement Commission unlike in an inquiry in a quasi judicial proceedings before adjudicating and Appellate Authority under the Act. Proceedings before the Settlement Commission does not operate as a substitute for adjudication proceedings before such quasi judicial authorities under the Act as no complex question of facts and laws are settled there.

25. It should be also recalled that none of the authorities in the hierarchy of officers under the Customs Act, 1962 and the Central Excise Act, 1944 who adjudicate dispute as Quasi-Judicial Officer are not also required to base their findings based on strict rules of evidence. They give their findings based on the doctrine of preponderance of probability. The 1st respondent Settlement Commission is also certainly not governed by any strict rules of evidence and therefore the fact arrived by the Settlement Commission is not to be tampered in a writ petition as these findings and conclusion are final as per the decision of the Hon'ble Supreme Court in Union of India and Others vs. Ind-Swift Laboratories Ltd., (2011) 4 SCC 635.

26. The proceedings before the Settlement Commission proceeds on the principal of trust. An applicant who was admittedly an evader of tax is expected to make a clean breast of his tax sins before the Settlement Commission and atone for mistakes and should undertake to pay the tax by making true and full disclosure before it.

27. As an incentive to encourage such deviant assessee's who opt to alter their deviant ways, a golden chance is given to them for settling the case under the Act. In return such assessee's may be given immunity from prosecution and penalty under the scheme of the Act.

28. Settling dispute before the Settlement Commission was devised as an mechanism to bring an end to the dispute based on the recommendation of the Wanchoo Committee as a compromise measure of a statutory settlement machinery where a big evader could make a disclosure, discharge what the

Commission fixes as tax and thus buys quittance for himself and accelerates recovery of taxes in arrears by the State, although less than what may be fixed after long protracted litigation and recovery proceedings as was observed by the Hon'ble Supreme Court in CIT Central vs. B.N.Bhattacharjee and another (1979) 4 SCC 121.

29. Further, the 1st respondent Settlement Commission is manned by the senior officers drawn from the Central Excise, Customs and Service Department with vast experience. They have been given wide powers to not only accept the additional liability disclosed in the application for settlement but also give a deserving applicant a reprieve by granting immunity from prosecution and penalty. Earlier, this power also extended the power to grant waiver from payment of interest.

30. In SANGHVI Reconditioners Private Limited - 2010 (251) E.L.T.3 (S.C.), the Hon'ble Supreme Court held that the petitioner having opted for settlement is not permitted to dissect Settlement Commission's Order to accept what is favourable and reject what is not.

31. Settlement of a case implies a complete package and therefore it is open for an assessee to approbate a portion of the order giving relief and re-probate a portion that is not convenient to an assessee. Therefore, this Court is of the view that there is no merits in the present writ petition especially where it is a question of fact.

32. Though the 2nd respondent had suggested that drying loss could be estimated between 15% to 19%, the 1st respondent Settlement Commission arrived at 10% by tweaking on the concession of the 2nd respondent. This is perfectly within the jurisdiction of the 1st respondent Settlement Commission. This Court of the view that there was no perversity in the said conclusion, as the Settlement Commission is manned by persons having long experience who understand the practice of the industry.

33. The submission that there was no rational basis on which the 1strespondent Settlement Commission has unilaterally restricted the loss due to drying of the tobacco leaves to 10% as against 24% claimed by the petitioner cannot be entertained as it would also amount to interference with the finding of facts arrived by the 1st respondent Settlement Commission. Any interference would be contrary to the decision of the Hon'ble Supreme Court in Union of India and Others vs. Ind-Swift Laboratories Ltd., (2011) 4 SCC 635.

34. Further, Section 32 M of the Central Excise Act, 1944 puts a finality to the order of the Settlement Commission. It reads as under:-

> Section 32M. Order of settlement to be conclusive. - Every order of settlement passed under sub-section (5) of Section 32F shall be

conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

35. There is perversity in the impugned order, Therefore, scope for judicial review under Article 226 of the Constitution of India is to be eschewed. The present writ petition filed by the petitioner is therefore liable to be dismissed. Accordingly it is dismissed. No Costs. Consequently, connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

kkd

To

1.The Customs & Central Excise
Settlement Commission
Narmada Block, Custom House
33, Rajaji Salai,
Chennai 600 001.

2.The Commissioner of Central Excise
No.I, Williams Road,
Trichy 620 001.

3.The Superintendent of Central Excise
No.14-A/16, Noor Nagar, Pidarikulam Road,
Kumbakonam.

+1cc to Mr.R.Raghavan, Advocate, S.R.No. 21516
+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No. 21165

W.P.No.10324 of 2008

RSI(CO)
GN(04/06/2021)