IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2021

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THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.No.727 of 2018
and
W.M.P.No.888 of 2018

M/s.K & K Contech Engineering Ltd.,
Rep., by its Director,
No.3203, 1st Floor, U.K.Towers,
Mount Poonamallee Road,
Kattupakkam, Chennai-600 056. .. Petitioner

-vs-

1.Customs, Central Excise and Service Tax
Settlement Commission,
Additional Bench, II Floor, Narmada Block,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Commissioner of Service Tax,
Service Tax III Commissionerate,
Newry Towers, Plot No.2054,
12th Main Road, II Avenue, Anna Nagar,
Chennai-600 035.

3.M/s.Charoen Pokphand (India) Pvt. Ltd.,
F-2, No.40, II Street, Sparton Nagar,
Mogappair West, Chennai-600 037. .. Respondents

[R-3 impleaded vide order dated 08.01.2021 in
W.M.P.No.23158/2020 in W.P.No.727/2018]

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records relating to the Impugned Order No.64/2017-ST dated 29.09.2017 passed by the 1st respondent and quash the same insofar as it directs payment of interest of Rs.10,61,903/- taking the period for levy of interest from November, 2012 to 05.07.2014 instead of the period from 01-03-2014 to 05.07.2014 as claimed by the petitioner in their application for settlement before the 1st respondent.

For Petitioner	:	Mr.M.A.Mudimannan
For RR1 & 2	:	Ms.R.Hemalatha, Senior Standing Counsel
For R3	:	Ms.V.Pramila

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ORDER

The order dated 29.09.2017, passed by the first respondent, Customs, Central Excise and Service Tax Settlement Commission (for brevity "the Settlement Commission"), is under challenge in the present writ petition.

2.The case of the petitioner is that the petitioner holds valid service tax registration certificate for works contract service, construction service, other than residential complex, including commercial/industrial buildings or civil structures. The period of dispute relates to October, 2012 to December, 2013. During the said period, the petitioner rendered works contract service to M/s.Charoen Popkhand Pvt. Ltd., Pune (CPPL) and also charged applicable service tax in their invoices on CPPL, the service recipient, which was also a registered assessee under the very same jurisdiction as that of the petitioner. However, the recipient reimbursed only 50% of the service tax amounting to Rs.81,59,255/-, directly to the Government Account under Reverse Charge Mechanism. While questioning the action of the service recipient, the petitioner paid up the balance 50% of the service tax to the Government periodically, to ensure that the Government received the full service tax for the entire value of works contract service rendered by the petitioner to the service recipient.

3.The learned counsel for the petitioner, narrating the facts, made a submission that the petitioner has complied with the provisions of the

Central Excise Act, 1944 (hereinafter referred to as “the 1944 Act”) by paying the entire service tax as applicable. Show cause notice was issued on 13.04.2016 and an Order-in-Original was passed on 11.08.2016, as far as the third respondent is concerned. The petitioner filed an application before the Settlement Commission under Section 32E of the 1944 Act. Section 32E of the 1944 Act provides for submission of application for settlement of cases. The mandatory requirement in the event of submitting an application by a person is that the application must contain full and true disclosure of his duty liability, which has not been disclosed before the Central Excise Officer having jurisdiction. Therefore, settlement can be made under the provisions of the 1944 Act, if the assessee come forward with true and full disclosure including informations and material not provided before the jurisdictional officer. In the present case, the application submitted by the writ petitioner for settlement had been entertained by the Settlement Commission and an adjudication was conducted and final order was passed on 29.09.2017 by the Settlement Commission, which is under challenge in the present writ petition.

4.The learned counsel for the petitioner strenuously contended that the petitioner had paid the entire service tax and there was no due. While so, the interest settled by the Settlement Commission is erroneous and contrary to the facts placed before the Commission. Thus, the petitioner is constrained to move the present writ petition.

5.The learned Senior Standing Counsel appearing on behalf of the respondent-Department disputed the said contention by stating that there was a short payment by the service provider with reference to the payment of service tax and in respect of such short payment, the interest was charged and the Settlement Commission also settled the matter in this regard. Once the matter is settled pursuant to the application submitted by the writ petitioner, there is no scope for further adjudication of facts on merits and thus, the writ petition is liable to be rejected.

6.This Court is of the considered opinion that admittedly the application filed under Section 32E of the 1944 Act, for settling the issues, was entertained by the Settlement Commission. The Settlement

Commission also adjudicated the issues with reference to the informations and particulars provided by the assessee. The Settlement Commission accepted the terms of reference and finally granted immunity to the applicant/petitioner from prosecution and the order was passed. The petitioner has no grievance in respect of the other orders passed, except the interest portion directed to be paid by the petitioner. As far as the interest portion is concerned, the finding of the Settlement Commission in para 5.4 is relevant, which is extracted hereunder:-

> *"5.4.On a careful study of the whole gamut of the issue, the Bench considers that the stand of the jurisdictional Commissioner has force. Eventhough initially a portion of the tax was wrongly paid by the Service recipient, instead of Service provider, i.e. the Applicant, and even accepting that the wrong payment had happened by mistaken understanding of the legal position, the fact remains that Service Tax was short paid by the Service provider vis-a-vis the value determined by them under Section 67 of the Finance Act, 1994. It is also an admitted fact that the Applicant had raised bill on the Service recipient charging 100% and paying only 50% of the tax to the Government clearly*

establishes short payment by the Service provider, attracting interest. The Bench also considers that the decision of the Adjudicating Authority in the case of their Service recipient permitting adjustment of excess payment of Service Tax for the period November, 2012 to December, 2013, towards their Service Tax liability for March, 2014 and April, 2014, does not lend support to the Applicant for calculating interest liability in their case from the date of passing of the Adjudication order, a position which is not supported by any legal provisions. It is only a case of excess payment of tax by a different assessee, dealt according to the provisions of law governing refund/ adjustment and it cannot be linked with the case on hand. Hence, the Bench holds that interest is chargeable from the date on which the Service Tax became payable by the Applicant, as alleged in the Show Cause Notice and as contended by the jurisdictional Commissioner. The Bench, thus, settles the Service Tax liability and interest liability at Rs.81,59,255/- and Rs.14,61,006/- respectively."

7.On a perusal of the above findings, it is clear that it is an admitted fact that the applicant/petitioner has raised bill on the service recipient charging 100% of the applicable rate of service tax. Having charged service tax at 100% and paying only 50% of the tax to the Government clearly establishes short payment by service provider, attracting interest. Under these circumstances, the Settlement Commission held that interest is chargeable from the date on which the service tax became payable by the applicant/petitioner, as alleged in the show cause notice, as contended by the jurisdictional Commissioner. Thus, the Settlement Commission settled the service tax liability and interest liability at Rs.81,59,255/- and Rs.14,61,006/- respectively.

8.The interest is chargeable based on certain admitted facts and circumstances placed before the Settlement Commission. If at all there is any error apparent in respect of such findings with reference to the original records, the petitioner is at liberty to approach the Settlement Commission for clarification or for rectification of any such error apparent, regarding the facts admitted or pleaded. However, such an adjudication cannot be done by the High Court in a writ proceedings, which require examination of original records and the admission statements made by the parties before the

Settlement Commission with reference to the application filed under Section 32E of the 1944 Act.

9.This being the factum, this Court is of the opinion that the order passed by the Settlement Commission, pursuant to the admission made by the parties, need not be interfered with. However, if there is any error apparent on record or if there is any factual error regarding the admitted statements, the Settlement Commission is empowered to rectify such mistakes by following the procedures contemplated. In this regard, the petitioner is at liberty to file an application, if required.

With the above observations, this writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

28.06.2021

Index : Yes
Speaking Order

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S.M.SUBRAMANIAM, J.

(abr)

To

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Settlement Commission,
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