IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.01.2021

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.9051 of 2015
and M.P.No.1 of 2015

The Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Medu, Salem - 636 001. ... Petitioner

Vs.

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

2.M/s.Sankari Lorry Urimaiyalargal Sangam,
1-6-15/B-3, Salem Main Road,
Sankari - 637 301. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the records of the first respondent in File.No.S.A.S.Tax/53/2013-SC quash the impugned order No.48/2014-ST dated 24.10.14 and further direct the first respondent to return the Application in S.A (ST)/53/2013-SC filed by the second respondent as not maintainable for settlement of cases under Chapter V of the Central Excise Act, 1944.

For Petitioner : Mr.V.Sundareswaran
For Respondents : Mr.J.Shankar Raman, for R2

O R D E R

The petitioner, the Commissioner of Central Excise is aggrieved by the impugned order dated 24.10.2014 passed by the 1st respondent Settlement Commission.

2.By the impugned order, the 1st respondent Settlement Commission has accepted the application filed by the 2nd respondent for settling the case under Chapter V of the Central Excise Act, 1944 as made applicable for settling disputes/cases under the provisions of the Finance Act, 1994. The operative portion of the impugned order reads as under:-

> 8.1.In the light of the above, the Bench settles the case on the following

terms and conditions under the Central Excise Act, 1944 made applicable to Service Tax by Section 83 of the Finance Act, 1994.

i) The additional amount of Service Tax is settled at Rs.8,77,116/-(Rupees eight lakhs seventy seven thousand one hundred and sixteen only). The applicant has already paid Rs.4,77,808/- and the balance amount of Service tax of Rs.3,99,308/- has to be paid within 30 days of receipt of this order and proof of payment furnished to jurisdictional Commissioner.

ii) The interest payable should be worked out by the applicant to the satisfaction of the Jurisdictional Commissioner. The applicant has paid an amount of Rs.80,767/- towards interest. The balance amount shall be paid within 30 days of receipt of this order and compliance reported to the Commissioner.

iii) The Bench imposes a penalty of Rs.50,000/- on the applicant under the provisions invoked in the Show Cause Notice and grants immunity in excess of the penalty indicated herein. This amount should be paid by the applicant within 30 days of receipt of this order and proof of payment be furnished to Jurisdictional Commissioner.

iv) The applicant is granted immunity from prosecution under Section 32K of Central Excise Act, 1944, as made applicable to Service Tax vide Section 83 of the Finance Act, 1994.

8.2. The immunities are granted in terms of Section 32K of the Central Excise Act, 1944, as made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994. 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.

8.3. A copy of this order be given to the Applicant and the Jurisdictional Commissioner for their use in the implementation of this order. No one should use this order in any other manner or for any other purpose without the written permission of the Commission.

3.The 2nd respondent had earlier been issued with a Show Cause notice dated 19.10.2012 to show cause why an amount of Rs.1,11,60,860/- should not be demanded from the 2nd respondent for having rendered the following taxable services under the provisions of the Finance Act, 1994.

i.Clubs or Association's membership services;
ii.Renting of Immovable Property Service;
iii.Business Auxiliary Services;
iv.Supply of Tangible Goods services.

4.The said Show Cause notice dated 19.10.2012 was issued to the 2nd respondent by petitioner to invoking the extended period of limitation for the period between 01.04.2007 and 31.03.2012 the 2nd respondent filed Service tax returns in 25.11.2013.

5.Earlier, the Superintendent of Central Excise, Divisional Preventive Group, Erode Division II had summoned the officers of the 2nd respondent Association and recorded statement from its President.

6.Under the circumstances the 2nd respondent obtained service tax registration on 30.07.2012 and paid service tax for a sum of Rs.5,20,563/- on 04.10.2012 realizing that it may have after all have been liable to pay service tax under the provisions of the Finance Act, 1994.

7.Under these circumstances, the 2nd respondent filed an application before the 1st respondent Settlement Commission on 25.11.2013 for settling the case under the provisions of the Central Excise Act, 1944 as made applicable to Finance Act, 1994.

8.For settling the case before the 1st respondent, the 2nd respondent offered a sum of Rs.4,77,807/- and a sum of Rs.80,767/- as the additional amount of tax liability and interest respectively.

9.Before the 1st Respondent Settlement Commission, the petitioner had raised preliminary objection regarding maintainability of the application on the ground that the 2nd respondent had not complied with the requirement of Section 32E (1) of the Central Excise Act, 1944 as the 2nd respondent had not filed a periodical return in Form ST-3 and that the said return was belatedly along with late fee prescribed under Rule 7 (c) of the Service Tax Rules, 1994.

10.In the impugned order, the 1st respondent Settlement Commission has concluded since the returns in Form ST 3 was filed under Rule 7 (c) of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 and it having attained finality, the mandatory requirement of Section 32E (1)(a) of the Central Excise Act, 1944 was satisfied by the 2nd respondent. By the impugned order, the 2nd respondent was directed to pay additionally a sum of Rs.3,99,308/- over and above Rs.4,77,108/- that was paid by the 2nd respondent.

11.The impugned order passed by the 1st respondent Settlement Commission is sought to be assailed by the petitioner primarily on the ground that the 1st Respondent Settlement Commission erred in entertaining the application filed under Section 32E (1) (a) of the Central Excise Act, 1944 as made applicable in as much as there was violation by the petitioner in not filing the returns in time declaring the service tax payable in the manner prescribed under the provisions of Finance Act, 1994 read with Service Tax Rules, 1994.

12.It is further submitted that the 2nd proviso to Section 32E (1)(a) of the Central Excise Act, 1944 was amended only in the year 2015 wherein, discretion was vested with the 1st respondent Settlement Commission to condone the non-filing of return.

13.The learned counsel for the petitioner further submits that the 1st respondent Settlement Commission has meandered with the classification issue and therefore the impugned order passed by the 1st respondent Settlement Commission was liable to be quashed as having passed without the jurisdiction.

14.The learned counsel for the petitioner further submitted that as against a total demand for a sum of Rs.1,11,60,860/- 1st respondent Settlement Commission has allowed the case of the 2nd respondent on payment of a paltry sum of Rs.8,77,116/- and interest of Rs.80,767/-.

15.Defending the impugned order, the learned counsel for the 2nd respondent submits that the impugned order of the 1st respondent Settlement Commission was well reasoned and requires no interference in the present writ petition. He therefore prays for dismissal of the present writ petition.

16.The learned counsel for the 2nd respondent further submits that the 2nd respondent had complied with the requirements of Section 32E (1)(a) of the Central Excise Act, 1944 prior to filing of the return in Form ST 3 and therefore the issue having attained finality, it was not open for petitioner to file the present writ petition.

17.It is further submitted that the case was not settled on the strength of any arguments advanced regarding classification. It is further submitted that the issue relating to levy of service tax on club or association services in any event now squarely covered by the decision of the Hon'ble Supreme Court in State of West Bengal VS. Calcutta Club 2019 (29) GSTC 545 against the respondent. It is therefore submitted that even if the impugned order of the 1st respondent Settlement Commission is quashed, the demand has to go in the adjudicatory mechanism under the provision of the Finance Act, 1994 and therefore no useful purpose will be served.

18.As far as supply of Tangible Goods Service is concerned, it is submitted that service tax was paid by the recipient of such services as recipient of goods transport services on reverse charge mechanism and therefore on this score also under the scheme of the Finance Act 1944, the service tax was not payable by the 2nd respondent.

19.As far as renting of immovable property is concerned, the space was rented for parking of tanker lorries upto 01.07.2010 the 2nd respondent was not liable to pay tax in terms of Ministry circular No.DOF 334/1/2007-TRU dated 28.02.2007 and therefore there was no liability. For the period thereafter, the value of taxable service of the 2nd respondent was below threshold limit and therefore the 2nd respondent was not liable to pay tax. As far as Business Auxiliary Service was concerned, the 2nd respondent had admitted the tax liability and agreed to pay the tax. It is therefore submitted that there is nothing irregular in the impugned order passed by the 1st respondent Settlement Commission.

20.Finally, the learned counsel for the 2nd respondent submits that under similar circumstances, the petitioner had filed W.P.No.10803 of 2015, wherein a similar order of the 1st respondent Settlement Commission was challenged. However, the said writ petition was dismissed as withdrawn on 30.08.2018. It is therefore submitted that the petitioner cannot pick and choose at their whims and fancies to prosecute one case and withdraw another case dealing with an identical situation.

21.I have considered the arguments advanced by the learned counsel for the petitioner and the 2nd respondent Settlement Commission.

22.It is noticed that on the previous occasion, when the case was heard on 02.11.2020, by my predecessor, the learned counsel for the petitioner had sought time to get instruction as to whether the present writ petition also could dismissed as withdrawn as W.P.No.10305 of 2015 was dismissed as withdrawn on 30.08.2018.

23.The learned counsel for the petitioner however submits that he has received written instruction from the office of the petitioner to pursue with the present writ petition. Under these circumstances, I am unable to dismiss the writ petition based on the above submission of the learned counsel for the 2nd respondent.

24.At the same time, it is made clear that if a similar dispute arising out of an order of the 1st respondent Settlement Commission was instructed to be withdrawn in W.P.No.10305 of 2015, I see no reason why the petitioner has not issued suitable instruction to the learned counsel for the petitioner to withdraw the present writ petition. The petitioner being a public authority acting under a statute cannot act in an arbitrary manner by discriminating between assesses.

25.Neither the content of the order impugned in W.P.No.10305 of 2015 is available for my perusal nor order dated 30.08.2018 wherein the above writ petition was dismissed as withdrawn has been produced. If indeed W.P.No.10305 of 2015 was filed to challenge a similar order of the 1st respondent Settlement Commission by the petitioner and was dismissed as withdrawn as was submitted by the learned counsel for the 2nd respondent, it was not open for the petitioner pursue with the present writ petition.

26.Since, neither the learned counsel for the petitioner nor the learned counsel for the 2nd respondent have neither filed a copy of the order impugned therein nor the order of this Court in the said W.P., I am unable to dismiss the present writ petition.

27.Be that as it may, having heard the matter at length and since the present writ petition can be disposed based on the other submissions advanced, I dispose this writ petition for the reasons given herein.

28.As per Section 83 of the Finance Act, 1994, provisions of the Central Excise Act, 1944 are applicable ''so far as may be, in relation to service tax as they may apply to a duty of Excise.'' Section 32 A to 32 P of Chapter V of the Central Excise Act, 1994 has also been thus made applicable to the provisions of the Finance Act, 1994 so far as they 'apply'. At the time when the 2nd respondent had filed application for settling the case before the 1st respondent Settlement Commission, Provisos to Section 32E of the Central Excise Act, 1944 reads as under:-

> Provided also no application under this sub-section shall be made for the interpretation of the classification of

excisable goods under The Central Excise Tariff Act, 1985 (5 of 1986)

(a)the applicant has filed returns showing production, clearance and central excise duty paid in the prescribed manner;

(b)a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant;

(c)the additional amount of duty accepted by the applicant in his applicant exceeds three lakh rupees, and

(d)the applicant has paid the additional amount of excise duty accepted by him along with interest due under Section 11-AB:

Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending with the Appellate Tribunal or any Court:

29.In the year 2015, the 2nd proviso was substituted as follows:-

''Provided further that the Settlement Commission, if it is satisfied that the circumstances exist for not filing the returns referred to in clause (a) of the first proviso to sub-section (1), may after recording the reasons therefor, allow the applicant to make such application:

30.Thus, a discretion came to be vested with the 1st respondent Settlement Commission when the impugned order was passed. Even where an applicant had not filed returns, the 1st respondent Settlement Commission for reasons to be recorded and on being satisfied that the circumstances existed for not filing the returns, may allow the application.

31.In the facts of the present case, it is noticed that the 2nd respondent had not filed periodical returns as per the provisions of the Finance Act, 1994 read with Service Tax Rules, 1994 in time. However, it had later filed returns in terms of Rule 7 (c) of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 on payment of necessary charges. Therefore, it cannot be said that the application filed by the 2nd respondent before the 1st respondent Settlement Commission was without jurisdiction. Further, sub clause (a) to the 1st proviso to Section 32E of the Central Excise Act, 1994 only requires filing of returns. Therefore, there is no infirmity in the impugned order of the 1st respondent Settlement Commission. Therefore, the present writ petition filed by the petitioner is liable to be dismissed in this ground.

32.As far as the merits of the case is concerned, I find that the 2nd respondent has a good case on merits even if the impugned order is set aside and even if the case was remitted back to the petitioner to adjudicate the said show cause proceeding. Therefore, it would be useless formality to remit the case back to the petitioner to adjudicate the Show Cause Notice. Further, the power of revision under Article 226 of the Constitution of India against an order of the 1st respondent Settlement Commission cannot be interfered for the asking. Only if there are glaring mistakes in the decision making process adopted by the 1st respondent Settlement Commission, the order can be set aside. The decision of the 1st respondent Settlement Commission also cannot be interfered as unless the decision is perverse. On a reading of the impugned order of the 1st respondent Settlement Commission, I neither find any perversity in the impugned order nor any irregularity committed by the 1st respondent Settlement Commission while passing the impugned order.

33.I therefore do not find any merits in the present writ petition. The present writ petition is therefore liable to be dismissed and is accordingly dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar (CS.VII)

/True Copy/

Sub Assistant Registrar

To

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

+1cc to Mr.V.Sundareswaran, Advocate SR.NO.1021

AKM/19.02.21/ 8P-3C/

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