IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	27.01.2021
PRONOUNCED ON	08.02.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.NO.38738 OF 2016
AND
W.M.P.NO.33190 OF 2016

(THROUGH VIDEO CONFERENCING)

Shri. N.Ramanathan,
Proprietor of M/s.Shree Travels,
No.6, P.M.R.Nagar, Near TVS Nagar,
Edayarpalayam, Thadagam Road,
Coimbatore - 641 025. ...Petitioner

Vs.

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

2.The Additional Commissioner of Service Tax,
No.6/7, A.T.D. Street,
Race Course, Coimbatore - 641 018.

3.The Commissioner of Service Tax,
No.6/7, A.T.D. Street,
Race Course, Coimbatore - 641 018. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for the records on the file of the 1st respondent in Final Order No.72/2016-ST dated 29.09.2016 and quash the same in so far as it relates to the direction to pay a late fee of Rs.1,46,000/-.

For Petitioner : Mr.J.Shankara Raman
for Mr.S.Ravi

For Respondents : Mr.P.Rajkumar Jhabakh

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O R D E R

By an order dated 09.11.2020, W.P.No. 27948 and W.P.No. 27949 of 2017 were directed to be listed for being heard along with the above writ petition. This order has been partly complied by the Registry. However, the name of the counsel for the petitioner and respondents in these 2 writ petitions have not been printed in the list. Therefore, there is no representation on behalf of the petitioner and respondents in these 2 cases. This was brought to the notice of this court after the present writ petition taken up for hearing and heard at length. Having heard the present writ petition at length, these 2 writ petitions directed to be delinked and to be heard separately.

2. In the present writ petition, the petitioner has challenged the impugned order passed by the first respondent Settlement Commission on 29.09.2016 vide its Final Order No.72 of 2016 in F.No.S.A.S.Tax No.46/2016-SC.

3. By the impugned order dated 29.09.2016, the first respondent Settlement Commission has allowed the application filed by the petitioner for settling the dispute by accepting the tax liability, interest and penalty as was proposed in Show Cause Notice dated 15.10.2014. While passing impugned order, the first respondent Settlement Commission has however also levied a sum of Rs.1,46,000/- as a late fee payable under Rule 7C of the Service Tax Rules, 1994.

4. It is the contention of the petitioner that imposition of late fee of Rs.1,46,000/- levied by the first respondent/Settlement Commission was without jurisdiction in as much as there was no proposal in the Show Cause Notice dated 15.10.2014 issued to the petitioner and therefore there is no justification in imposition of the late fee on the petitioner. It is further submitted that late fee under Rule 7C of Service Tax Rules, 1994, is for the delay in filing of the returns and since already penalty has been imposed on the petitioner under Section 77(2) of the Finance Act, 1994 for non-filing of the returns in time, late fee under Rule 7C of Service Tax Rules, 1994, cannot be demanded from the petitioner.

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5. It is further submitted that even if the petitioner had not filed returns in terms of Rule 7C of Service Tax Rules, 1994, the first respondent Settlement Commission would have entertained the application under Section 32E of the Central Excise Act, 1944 as made applicable to the provisions of the Finance Act, 1994 under Section 83 of the Finance Act, 1994. In this connection, reference is drawn to the language in Section 32E of the Central Excise Act, 1944, which is reproduced below:-

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“Section 32E. Application for settlement of cases.- [(1) An assessee may, in respect of a case relating to him, make an application, before adjudication, to the Settlement Commission to have the case settled, in such form and in such manner as may be prescribed and containing a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction, the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by him and such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification, under-valuation, inapplicability of exemption notification or Cenvat credit [or otherwise] and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless,-

(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 application 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 11AA];

[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:
Provided also 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:

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Provided also that 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).

(1A) ....
(2) ....
(3) Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.
(4) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant."

6. It is submitted that in view of the amendment to section 32 E of the Central Excise Act, 1944 Vide Finance Act (No.2), 2014 (29 of 2014), the 1st respondent Settlement Commission can ignore non-filing of the returns and entertain the application for settling the case after reasons are recorded for entertaining the application to settle the case. It is therefore submitted that imposition of late fee under Rule 7C of the Service Tax Rules, 1994 was unsustainable.

7. The learned counsel for the petitioner drew the attention of this Court to a decision of Division Bench of this Court in Pravin Tex Pvt. Ltd., Vs Customs and Central Excise Settlement Commission, Chennai, (2017) 354 ELT 489 (Mad), wherein, it was held that the Settlement Commission cannot cross the periphery of the Show Cause Notice to impose a duty and that too, at rate higher than, what would could been mandated in law.

8. It is submitted that the Court further held that an Assessing Officer also could not have gone beyond the Show Cause Notice. Therefore, as a logical corollary, if the Assessing Officer could not have gone beyond the Show Cause Notice, the Settlement Commission, in exercise of powers under Section 127C of the Customs Act, 1962, could not have included ADE in the final order passed by it, and that too, at a rate, which adversely, impacted the appellant's financial burden, in the given facts and circumstances.

9. Per Contra, defending the impugned order of the first respondent Settlement Commission, the learned counsel for the respondents placed reliance on the following decisions of the Settlement Commission and that of the Tribunal & the Hon'ble Supreme Court:-

(1) In re Thiruchengode Lorry Urimiyalargal Sangam, 2016 (1) S.T.R.343

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(2) In re Annai Infra Developers Pvt. Ltd., 2016 (41) S.T.R 332
(3) Commissioner of CGST & Central Excise Vs Siddhivinayak Estates, 2019 (27) G.S.T.L. 565
(4) Union of India Vs Ind-Swift Laboratories Ltd., (2011) 4 SCC 635

10. The learned counsel for the respondents further submits that the petitioner had not filed the returns prior to issue a Show Cause Notice dated 15.10.2014 and therefore question of issuing Show Cause Notice incorporating such proposal to levy late payment fee under Rule 7C of the Service Tax Rules, 1994 did not arise. He further submits that the order of the first respondent Settlement Commission was a composite order for settling the dispute with the department and therefore it is not open for the petitioner to call for interference under Article 226 of Constitution of India as the scheme of Chapter V of the Central Excise Act, 1944 is to bring a finality to the case.

11. It is further submitted that unless there are material irregularity in the procedure followed by the first respondent Settlement Commission, while passing the impugned order, there cannot be any interference under Article 226 of Constitution of India. It is further submitted that the impugned order passed by the first respondent Settlement Commission was not perverse and therefore same has to be upheld.

12. The learned counsel for the respondents further submits that in the impugned order, the first respondent Settlement Commission has also recorded the deliberations and submission of the petitioner. It is submitted that both the petitioner and the department had given their calculation of late fee to be paid by the petitioner. The petitioner had calculated the late fee under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act 1994 at Rs.2000/- and offered to pay a sum of Rs.1,28,800/-, whereas, as per the amendment to Section 70 of the Finance Act, 1994, the late fee payable for furnishing the return beyond the time had been increased to Rs.20,000/- with effect from 08.04.2011 by Finance Act, 2011 (8 of 2011) and therefore, the petitioner was liable to pay a sum of Rs.1,66,000/- as late fee and therefore, the impugned order of the first respondent Settlement Commission cannot be assailed.

13. The learned counsel for the respondents further submitted that before the first respondent Settlement Commission, the department had contended that the petitioner was liable to pay a sum of Rs.1,46,000/- as late fee, whereas, the petitioner submitted a statement of working, wherein, it has agreed to pay a sum of Rs.1,28,000/-. It is further submitted that the first respondent Settlement Commissioner after

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considering the amendments to the provisions of Section 70 of the Finance Act, 1994 which was amended on 08.04.2011, has rightly held that the petitioner was liable to pay a sum of Rs.1,46,000/- instead of Rs.1,28,000/- and Rs.1,66,000/- as was contended by each of them.

14. The petitioner had agreed to pay late fee, but also submitted that the late fee could not be paid due to extreme final constraints and prayed for waiver of the same or given some more time for payment of late fee.

15. Heard the learned counsel for the petitioner and the respondents.

16. The submission of the learned counsel for the petitioner that late fee was imposed beyond the scope of the Show Cause Notice cannot be countenanced in as much as the returns were filed belatedly by the petitioner after the issuance of Show Cause Notice. If the Petitioner had filed its periodical returns under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994 belatedly prior to the issue show cause notice and if there was a deficit in the payment of late fee and if no proposal was made in the show cause notice to recover such late fee, the arguments of the learned counsel for the petitioner can be considered. Therefore, it would be incorrect to state that the first respondent Settlement Commission was not justified and asking the petitioner to pay a late fee of Rs.1,46,000/- for delayed filing of returns while passing the impugned order.

17. Further, before the Settlement Commission, the petitioner had prayed for waiver of late fee as the petitioner was facing the extreme financial constraints. In the alternative, the petitioner prayed for time to pay the late fee. Since the petitioner himself offered to pay the late fee of Rs.1,28,000/- instead of Rs.1,66,000/- as was demanded by the respondents, there is no justification in this Writ Petition. Further, under the Scheme of Section 32F of the Central Excise Act, 1944 as made applicable for settling of cases under the Finance Act, 1994, it is to be observed that every order passed by the Settlement Commission is final and conclusive and therefore such orders of the Settlement Commission cannot be interfered. Unless the order passed by the Settlement Commission is contrary to the provisions of the Act, it cannot challenged.

18. The Court while exercising its jurisdiction under Article 226 of the Constitution of India is also not concerned with the correctness or otherwise of the decision arrived by the

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Settlement Commission or Tribunal whose orders are challenged before it unless there is perversity in the order impugned before it or there was a material irregularity in the procedure followed by such Tribunal while passing the order impugned before it which had caused prejudice to the petitioner or there was a violation of Principles of Natural Justice. None of the above irregularities are found in the impugned order passed by the first respondent Settlement Commission.

19. In my view, the petitioner has not made out a case for any interference as the petitioner himself agreed to pay the late fee of Rs.1,28,000/- before the first respondent Settlement Commission. Under these circumstances, I dismiss this Writ Petition. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(I)

//True Copy//

Sub Assistant Registrar

arb / jen

To

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

2.The Additional Commissioner of Service Tax,
No.6/7, A.T.D. Street,
Race Course, Coimbatore - 641 018.

3.The Commissioner of Service Tax,
No.6/7, A.T.D. Street,
Race Course, Coimbatore - 641 018.

+1cc to Mr.S.Senthilnathan, Advocate, S.R.No.6579

Pre- delivery order
in
W.P.No.38738 of 2016 and
W.M.P.No.33190 of 2016

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KKV/23/02/2021

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