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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12-08-2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.3443 of 2017

And

WPMP No.3417 of 2017

M/s.Great Lakes Institute of Management Ltd.,
2nd Floor, NPL Devi Building,
No.111, Kalki Krishnamorthy Salai (L.B. Road),
Thiruvanmiyur,
Chennai-600 041.

..Petitioner

vs.

1. Customs, Central Excise and Service,
Tax Settlement Commission,
Additional Bench, II Floor,
Narmada Block,
Customs House,
60, Rajaji Salai,
Chennai-600 001.

2. The Commissioner of Service Tax,
Service Tax Commissionerate,
Newry Towers,
No.2054-I, II Avenue,
Anna Nagar,
Chennai-600 040.

..Respondents

Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records of the impugned Final Order No.97/2016-ST dated 20.12.2016 passed by the first respondent in Show Cause Notice No.123/2011, 72/2012, 345/2013 (SOD), 24/2014 and 45/2015 (SOD) and quash the same and direct the first respondent to rehear Application No.S.A. (S.T.) No.89/2015-SC filed by the petitioner.

For Petitioner

:

Mr.T.Mohan for
Mr.R.Anish Kumar



For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel.

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O R D E R

The writ on hand is filed to call for the records of the impugned order No.97/2016-ST dated 20.12.2016 passed by the first respondent in Settlement Application No. S.A. (S.T.) No.89/2015-SC, quash the same and direct the first respondent to rehear the application and pass appropriate orders.

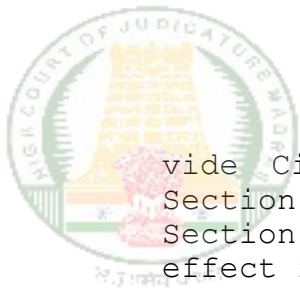
2. A sum of Rs.14,92,05,214/-, out of total demand of Rs.17,50,90,755/- proposed by five show cause notices, which were the subject matter of the case before the first respondent represents the demand proposed on exempted Course namely, Courses approved by All India Council for Technical Education (AICTE) as stated in the affidavit.

3. The petitioner claims as a non-profit organisation, incorporated in the year 2004 under the Companies Act, 1956 with an object to establish and run educational institutes, training institutes and the like for propagating education in all fields in India and elsewhere. The petitioner offered other two courses namely PGPM and PGDM, which was approved by AICTE and entitled to exemption from payment of service tax.

4. The Service Tax Department had earlier treated activities of the petitioner as that of a taxable service of 'Commercial Training or Coaching Services' within the meaning of Section 65(27) of Finance Act, 1994 and had issued show cause notice No.73/2006 dated 22.08.2006 for the period between 01.04.2004 to 31.07.2006 and proposed a demand for a sum of Rs.1,59,27,396/-.

5. The petitioner was a non-profit organisation and had entertained a bona fide doubt that its activities were outside the purview of the taxable service of a 'Commercial or Coaching Centre' during the relevant period. The demand was confirmed by the Commissioner vide 0.1.0 No.14/2007 dated 30.04.2007. Aggrieved by the order of the Commissioner, the petitioner preferred an appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT), Chennai.

6. The CESTAT, Chennai vide its final order No.11/2008 dated 02.01.2008 set aside the order of the second respondent-Commissioner and dropped the demand. The second respondent preferred an appeal before the Hon'ble Supreme Court of India



vide Civil Appeal No.4464/2007. Meanwhile, an Explanation to Section 64(105)(zzc) to the Finance Act, 1994 was inserted vide Section 76(A)(6) of the Finance Act, 2010 with retrospective effect from 1st July, 2003.

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7. An attempt was made to justify the demand retrospectively. The Hon'ble Supreme Court of India vide its final order dated 14.05.2010 remanded the case back to the CESTAT to examine the issue afresh in the light of the Explanation.

8. Meanwhile, the petitioner challenged Section 76(A)(6) (b) of the Finance Act, 2010, inserting the above Explanation to Section 65(105)(zzc) of Finance Act, 1994 vide W.P.No.20385 of 2010 before this Court and the same is pending for final hearing.

9. The case of the petitioner was heard along with the batch of cases and disposed on 20.09.2013. The Larger Bench of the CESTAT has upheld the demand in the light of the retrospective amendment to the definition. During the interregnum period, the second respondent issued nine other periodical show cause notices to the petitioner.

10. The petitioner states that during April 2010, the petitioner obtained recognition from AICTE for the Courses, namely, PGPM and PGDM. Thus, from 2010, the abovesaid Courses were exempted from payment of service tax. However, demand had been proposed, ignoring the fact that the abovesaid Courses are specifically exempted from payment of service tax.

11. The petitioner was advised to pay differential service tax of Rs.1,90,93,605/- together with interest amounting to Rs.1,64,97,112/- thereon and file an application to settle the case before the first respondent. Under these circumstances, the petitioner paid the said amount and filed the application before the first respondent under Chapter V of the Central Excise Act, 1944.

12. The Settlement Commission rejected the application on the ground that the dispute exists between the Department and the petitioner and therefore, the jurisdiction of the Settlement Commission under the provisions of the Act, is ousted. Consequently, the petitioner is constrained to move the present writ petition.

13. The learned counsel, appearing on behalf of the petitioner, reiterated that the Settlement Commission has not considered the contention of the petitioner that the Courses approved by the AICTE are exempted from payment of service tax. This was not taken into consideration by the first respondent-



Settlement Commission and the learned counsel, drawn the attention of this Court with reference to the application submitted by the petitioner and various documents produced by the petitioner, to establish that the Courses are approved by the AICTE and the said approval was admitted by the respondents also. While-so, there is no reason whatsoever to reject the application by the Settlement Commission and thus, the matter is remanded back for fresh consideration.

14. It is contended that the report filed by the Commission on two occasions not served to the petitioner, to enable the petitioner to respond to the objections raised. This apart, the petitioner with an intention to settle the matter, approached the first respondent and in the event of any doubt, the first respondent ought to have directed the petitioner to clarify the issues, more specifically, regarding the approval of Courses by the AICTE and the exemptions, as applicable under the Act. Without doing so, the Settlement Commission has formed an opinion that the dispute was in existence and therefore, the application cannot be entertained.

15. There was no dispute, in fact, as the approval of Courses by the AICTE was admitted by the respondent themselves. Thus, the order impugned is liable to be set aside as the same is not in consonance with the provisions of the Central Excise Act, 1944.

16. The learned Senior Standing Counsel, appearing on behalf of the respondents, disputed the contentions raised on behalf of the petitioner in entirety. There was no scope for settlement in this matter, as the petitioner has not come out with true and full disclosure of facts. Even before the Settlement Commission, the petitioner admitted that totally ten show cause notices were issued to the petitioner covering the period from April 2004 to September 2014. However, the applicant has come forward for settlement in respect of the show cause notices at S.Nos.1 to 5 and for the period of show cause notice at Serial No.6.

17. Regarding the first show cause notice, it was adjudicated by the Commissioner, confirming the demand and thereafter set aside by the CESTAT's order dated 02.01.2008. The Department filed Civil Appeal before the Supreme Court, challenging the said order of the CESTATE.

18. Citing these submissions made on behalf of the petitioner before the Settlement Commission, the learned Senior Standing Counsel, appearing on behalf of the respondents, solicited the attention of this Court with reference to the findings and the decision of the Bench, wherein it is



categorically stated that the issues raised by the petitioner were disputed by the Department and during the subsistence of the dispute, the Settlement Commission cannot entertain an application with reference to the provisions of the Act. Therefore, the writ petition is devoid of merits and is liable to be rejected.

19. Considering the arguments, it is relevant to understand the spirit of Section 32E of the Central Excise Act, 1944, which provides an opportunity for submission of application for settlement of cases. The said provision reads as under:-

"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."

20. The primary condition stipulated in sub-section (1) to Section 32E of the Central Excise Act, is that the application submitted by the person must contain a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction.

21. Section 32L of the Central Excise Act, provides, power of Settlement Commission to send a case back to the Central Excise Officer. Sub Section (1) contemplates that "the Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer



having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.”

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22. Section 32M of the Central Excise Act, denotes that the order of the settlement to be conclusive.

23. Cogent reading of the provisions relating to settlement of cases would reveal that the application must contain full and true disclosure of facts and there must be spirit and intention to settle the cases and the person, who is approaching the Settlement Commission, should cooperate for such settlement. Thus, in the event of any dispute between the parties, the Settlement Commission cannot entertain an adjudication of the disputed issues. Only if there is a consensus with reference to the issues placed for settlement, the Commission is empowered to arrive a settlement between the parties, but not otherwise.

24. In this context, it is relevant to consider the findings of the Settlement Commission. The Settlement Commission taken the application filed by the petitioner on file and proceeded with the same by providing an opportunity to the petitioner. The petitioner also explained the case in brief and submitted the relevant documents. The reports of the Commissioner were also considered by the Settlement Commissioner. Three reports were filed. Thus, the first respondent-Settlement Commission followed the procedures as contemplated under the provisions of the Act.

25. The findings of the Tribunal in paragraphs-10.2, 10.3, 10.4, 10.5 and 10.11, read as under:-

“10.2 This is a case of non payment of service tax by the applicant on “Commercial Training or Coaching Centre Services”. The show cause notices covered in the application demanded an amount of Rs.17,50,90,755/- for the period from October 2009 to September 2014, out of which the applicant had accepted a liability to the extent of Rs.2,58,86,541/- and have not admitted the balance tax liability of Rs.14,92,05,214/- on the grounds that the demand included Service Tax on fees collected for Courses, for which they had obtained approval from AICTE, which are exempt from payment of Service Tax and further that



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the demand had been worked out without extending cum-tax relief. The applicant relied on the provisions of Section 65(27) of the Finance Act, 1994, Notification No.33/2011 ST dated 25.04.2011, Negative list under Section 66D(I)(ii), Notification No.25/2012 ST dated 20.06.2012 and Board's Circular No.107/01/2009 ST dated 28.01.2009 with regard to claim of exemption.

10.3 The Revenue, on the other hand vehemently contended and reiterated that the subject Show Cause Notices did not propose any demand of Service Tax in respect of Courses such as PGCM, EPGDM, which are approved by AICTE and therefore the entire demand is sustainable. Further, the department also contested the relief sought by the Applicant to treat the consideration as cum-tax in the absence of worksheet supported by records for verification by the Revenue. This is despite the fact that during the Course of hearing on 19.07.2016, the Department representative clearly pointed out and submitted that the Show Cause Notices have not demanded service tax on Courses which have been approved by the AICTE. The Applicant has not effectively countered it in spite of applicant being provided with ample opportunities. The question whether the Show Cause Notices have included in its ambit or not is simply a question of fact and the same could have been easily sorted out by producing all the evidences showing factual position and quantification of disparity. The Applicant seems to have totally failed on this account clearly evidencing lack of cooperation and absence of true spirit of settlement. Unless applicants cooperate and come out with true and full nature of disclosure, the Commission cannot take on itself the role of Adjudicator. Under the circumstances, the Bench is constrained to believe that the lack of cooperation on the part of applicant emerges as the main cause for the kind of deadlock on this issue.

10.4 The Bench, having considered the facts, including those covered by pending litigations in the Courts and outside the scope of this application, and rival submissions, observes that even though the Applicant and the



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jurisdictional Commissioner agreed that the larger issue of retrospective amendment of the provisions the enactment (enunciated in the facts above) litigated before the Court has no bearing in settling the present application, the rival claims on facts with regard to demand on some Courses, for which the Applicant is reported to have approval from AICTE, remain unsolved. While the Applicant claims that the total demanded amount in the Show Cause Notices included demands on Courses approved by the AICTE and consequently exempt, the department vehemently opposes this and claims that the demands did not cover any Course that is approved by AICTE. This results to a total state of divergence between the contentions of the Applicant and the department. It is also observed that there is no convergence of views between the parties even on the issue of extending relief of cum-tax benefit. Further, the Bench also observes that the amount involved in the contentious issue whether the demand includes or excludes Courses approved by AICTE occupies a substantial portion of the total demand, in as much as the liability not admitted is Rs.14,92,05,214/- and admitted is only Rs.2,58,86,541/-.

10.5 In the above circumstances, the Bench is of the considered view that Settlement Commission is not the forum to decide upon these contentious issues, by weighing in the evidence let in by the rival parties to the proceedings and conclude one way or the other. Such an act would tantamount to the Settlement Commission adjudicating upon the notice, based on the submissions made by the rival parties to the proceedings. It is now a well settled proposition that the Settlement Commission is not an adjudicating authority. It is only an arbitration forum where a dispute is settled in the interest of both the parties within the framework of law. This principle has clearly been enunciated by the Hon'ble High Court of Bombay in the case of Amrut Ornaments reported in 204 (305) ELT 365 (Bom.), and by the Hon'ble Delhi High Court in the case of Union of India vs. Dharampal Satyapal as reported in 2013 (298) ELT 653 (Del.), by the Hon'ble Allahabad High Court in the case of Vinay Wire



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Poly Product P. Ltd vs. Director General of Central Excise Intelligence reported at 2014 (307) E.L.T 438 (AII) and also by the Hon'ble Madras High Court in the case of Australian Foods Ltd vs. Commissioner of Central Excise, Chennai II reported in 2012 (254) E.L.T. 392 (Mad.).

10.11 In view of the foregoing discussions, the Bench observes that the case is not one that can be settled in this forum in view of rival claims on facts, leading to total contradiction and confrontation on facts, which are essential for settling this case. The Bench observes that the issue of analysing the facts and consequently determining the tax liability or otherwise of services merely on the basis of claims made by the applicant vis-a-vis the counter claims made by the department cannot be decided in this Forum as in an adjudication proceeding. Bench for the reasons cited in previous paragraphs also observed lack of cooperation on the part of the applicant towards settlement of this case. Hence, it would be more appropriate that the case is adjudicated by the Proper Officer after appreciation of facts and evidence let in by the applicant and orders passed by following the due process of law."

26. With reference to the said findings, it is relevant to consider paragraphs 3, 4 and 5 of the counter-affidavit filed by the respondents, read as under:-

"3. I submit that Paras 1 to 59 are facts of the case. Regarding Para 60(iii), the petitioner attempts to misinform the Court. This respondent had fully co-operated with the Settlement Commission by way of furnishing detailed report as and when called for by the Commission. In addition, the Officers promptly appeared and deposed before it whenever called up on by the first respondent. Report submitted by this Office vide Commissioner's C.No.V/13/100/2016-R & T dated 19.07.2016 and final report of even no dated submitted on 21.07.2016. Also, the jurisdictional Superintendent appeared before the Commission and made submissions. It is because of detailed fact finding reports



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submitted by the Commissionerate on whether actual demand included or excluded Courses appeared by AICTE, the claim of the petitioner not accepted by the Commission. The first respondent itself has repeatedly observed vide Paras 10.3 and 10.11 of the impugned order that it was due to lack of cooperation on the part of the petitioners it was not possible to settle the issue by the first respondent. In view of the above facts it is self that the petitioner's submissions in this regard do not merit for consideration.

4. I submit that regarding, Para 60(xi) it was submitted before the Commission that none of the two Courses viz., PGCM and PGDM figure in any of the impugned Show Cause Notices viz., SCN No.123/2011, 72/2012, 345/2013, 24/2014 and 45/2015. In the last submission made on 15.11.2016, it has been clearly explained in tabular form, the details of the Course wise demand made in each of the impugned show cause notices. In spite of this factual position, the petitioner is attempting to mislead the Court by giving false and distorted facts.

5. I submit that, regarding Para 60 (xiv), again the petitioner is trying to mislead the Court by giving false statement. In this context it is worth mentioning that Hon'ble Settlement Commission vide Para 10.3 by the order observes

"The department also contested the relief sought by the Applicant to treat the consideration as cum-tax in the absence of worksheet supported by records for verification by the Revenue. This is despite the fact that during the Course of hearing on 19.07.2016, the Department representative clearly pointed out and submitted that the Show Cause Notices have not demanded service tax on Courses which have been approved by the AICTE. The petitioner has not effectively countered it in spite of petitioner being provided with



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ample opportunities. The question whether the Show Cause Notices have included in its ambit or not is simply a question of fact and the same could have been easily sorted out by producing all the evidences showing factual position and quantification of disparity. The petitioner seems to have totally failed on this account clearly evidencing lack of cooperation and absence of true spirit of settlement.

From the above it is amply evident that it is only the petitioner who acted in an unfair manner leading to the rejection of their application by the first respondent."

27. Considering the findings as well as the decision taken by the Settlement Commission, this Court is of an opinion that the Settlement Commission followed the procedures by considering the application filed by the petitioner as well as the issues proposed for settlement. When the Settlement Commission, in clear terms, formed an opinion that the failure of the petitioner/applicant and the absence of true spirit of settlement shows a lack of cooperation and further, the petitioner had not come out with true and full nature of disclosure and in this context, the Settlement Commission formed an opinion that the Commission cannot take on itself the role of Adjudicator.

28. The observations made by the first respondent that the Bench is constrained to believe that the lack of cooperation on the applicant/petitioner emerges as the main cause for the kind of deadlock to this issue. The Commission further proceeded by stating that the Settlement Commission is not the Forum to decide the Bench contentious issues by weighing in the evidence let in by the rival parties to the proceedings and conclude one way or the other.

29. The Settlement Commission has rightly formed an opinion that the disputed issues cannot be adjudicated in an application filed to settle the issues. Thus, the spirit of provision under the Central Excise Act, in the matter of entertaining the application for settlement has been rightly considered by the Settlement Commission and there is no infirmity or perversity as such.



30. The settlement of cases under Section 32E of the Central Excise Act, no doubt, is the right provided to a person. However, such right is contemplated subject to certain terms and conditions. The settlement, in other words, is a facility provided to get this from the adjudication. Therefore, the party willing to settle the issues statutorily is expected to approach with true and full disclosure of facts and extend full cooperation for the settlement of issues.

31. Settlement though read under the Act, cannot be construed as conclusive, in view of the fact that in the event of non-settlement, the issues are to be adjudicated before the Competent Authority under the provisions of the Act. Therefore, it is an additional facility or redressal mechanism contemplated under the Act for the benefit of the aggrieved persons/assesseees. Under these circumstances, the doubt in respect of genuinity, cooperation, disclosure of true and full facts are traced or identified by the Settlement Commission, then the Settlement Commission cannot settle the issues by way of adjudicating such issues on merits and with reference to the documents.

32. This being the scope and spirit of the settlement to be done under the provisions of the Central Excise Act, this Court is of an opinion that the findings of the Settlement Commission in the impugned orders are candid and convincing and there is no infirmity or perversity as such.

33. Accordingly, the writ petition fails and the same stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

Svn



To

1. Customs, Central Excise and Service,
Tax Settlement Commission,
Additional Bench, II Floor,
Narmada Block,
Customs House,
60, Rajaji Salai,
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2. The Commissioner of Service Tax,
Service Tax Commissionerate,
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No.2054-I, II Avenue,
Anna Nagar,
Chennai-600 040.

+1cc to Mr.R.Anish Kumar , Advocate, S.R.No.40696

+1cc to Mr.AP.Srinivas , Advocate, S.R.No.40084

W.P.No. 3443 of 2017

PL(CO)
SU(09/09/2021)