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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

WRIT PETITION NO. 540 OF 2011

M/s. Viva Herba Pvt. Ltd.

a Company incorporated under the
Companies Act, 1956 and having its
registered office at 10, Usha, Sasmira
Road, Worli, Mumbai – 400 025

... Petitioner

V/s.

1. The Union of India
Ministry of Finance, Law & Justice,
Aayakar Bhavan, New Marine Lines,
Mumbai – 400 020

2. The Commissioner of Central Excise,
Raigad Commissioner, 4th Floor,
Central Excise Building,
Plot No.1, Sector 17, Khandeshwar,
Navi Mumbai – 410 206

3. Additional Commissioner of Central
Excise, Raigad Commissionerate,
4th Floor, Central Excise Building,
Plot No.1, Sector 17, Khandeshwar,
Navi Mumbai – 410 206

... Respondents

Mr. Sachin Chitnis with Mr. Kiran Chawan i/b. Manasi Patil for the
Petitioner

Mr. Swapnil Bangur with Mr. Siddharth Chandra-Shekhar for the
Respondents

***CORAM : NITIN JAMDAR &
GAURI GODSE, JJ.***

DATE : 16 DECEMBER 2022

Judgment (Per Nitin Jamdar, J.) :-

The Petitioner, Viva Herba Pvt. Ltd., filed a settlement application before the Settlement Commission for settlement of the case under Section 32E of the Central Excise Act, 1994, admitting the duty liability as against the duty demand and seeking cum-duty price benefit. The Settlement Commission rejected the prayer of the Petitioner, and therefore, the Petitioner is before us, challenging the order of the Settlement Commission.

2. The Petitioner is a 100% Export Oriented Unit (EOU) engaged in the manufacture of vegetable extracts under Chapter 13 of the First Schedule of the Central Excise Tariff Act, 1985 and, on necessary terms, carries out manufacturing in bond as per the provisions of the Customs Act, 1962. A Show Cause Notice was issued to the Petitioner on 28 June 2005 by the Additional Commissioner of Central Excise, Raigad, that during the period December 2002 to June 2003, the Petitioner cleared goods valued at Rs.59,76,771/- into Domestic Tariff Area (DTA) without permission, without preparing invoices, and through a defunct entity

and evaded payment of duty. Show Cause Notice proposed demand of duty of Rs.33,96,718/- under proviso to Section 11A(1) of the Central Excise Act along with interest under Section 11AB and penalty under Section 11AC of the Central Excise Act, 1944. The Managing Director of the Petitioner was called upon to show cause why the penalty under Rule 26 of the Central Excise Rule, 2002 be not imposed. There was no response to the Show Cause Notice. The Additional Commissioner took note of the statement of the Director of the Petitioner recorded under Section 14 of the Central Excise Act, where the Director admitted to the clandestine removal of finished goods. The Commissioner perused the statement of the customers to whom the finished goods were sold and concluded that the Petitioner had evaded duty through careful planning; therefore, action is necessary. Accordingly, by Order-in-Original dated 17 November 2005, the Commissioner confirmed the demand of Rs.33,96,718/- along with interest under Section 11A(1) and 11AB and penalty of Rs.10,00,000/- on the Managing Director of the Petitioner. The Petitioner filed an Appeal before the Commissioner, Central Excise (Appeal), under Section 35 of the Central Excise Act, 1994. While the Appeal was pending, the Petitioner filed an application for settlement of the case before the Settlement Commission under Section 32E of the Central Excise Act, 1944, on 2 June 2006, admitting the duty liability amounting to Rs.15,85,690/- against the duty demand of Rs.33,96,718/-.

Thereafter, the duty liability was revised. The Settlement Commission, by order dated 8 October 2007, settled the duty liability at Rs.33,96,718/- without allowing the cum duty price benefit and the interest liability at 10% per annum and the penalty of Rs.3,00,000/-.

3. The Petitioner challenged the order of the Settlement Commission in Writ Petition No. 45 of 2008, which was disposed of on 10 August 2010, remanding the proceedings to the Settlement Commission. Upon remand, the Settlement Commission passed the impugned order holding that the Central Excise Duty was settled at Rs.33,96,718/-. The Petitioner has paid Rs.21,14,563/- and it was directed that the Petitioner shall pay the rest of the amount within 30 days; otherwise, the amount will be subject to simple interest at the rate of 18%. The terms of settlement regarding the interest penalty and the prosecution laid down in the order dated 8 October 2007 were held to be subject to no change, and the benefit of cum duty price was denied to the Petitioner. The Petitioner has challenged this order dated 31 January 2011 by the Writ Petition.

4. We have heard Mr. Sachin Chitnis, learned Counsel for the Petitioner and Mr. Swapnil Bangur, learned Counsel for the Respondents.

5. Though the learned Counsel for the Petitioner has sought to argue the Petition as if it is an appeal against the order of the Settlement Commission, the scope of the judicial review against the order of the Settlement Commission will have to be kept in mind. In the case of *N. Krishnan v/s. Settlement Commission*¹, the Division Bench of the Karnataka High Court considered the issue in detail in the context of the Settlement Commission under the Income Tax Act. The Division Bench observed that the Settlement Commission is a Tribunal and the judicial review is maintainable. As regards the scope of interference, the Division Bench observed that the Settlement Commission was constituted to settle the complicated claims and to allow the evaders to have the matters settled once and for all. It is not a forum for challenging the legality of assessment orders or orders passed in any other proceedings. The power conferred on the Settlement Commission is broad and it has the power to give immunity against prosecution or imposition of penalty. The Division Bench opined that the Settlement Commission's decision could only be interfered with if grave procedural defects such as violation of the mandatory procedural requirements of the statute and breach of principles of natural justice are made out, or if there is no nexus between the reasons given and the decision taken by the Settlement Commission. The Division Bench emphasized that the writ court cannot interfere with mere errors of fact or errors of law committed by the Commission.

1 ILR 1990 KAR 404

6. The issue of judicial review against the order of the Settlement Commission under the Income Tax Act, 1961 arose for consideration of the Hon'ble Supreme Court in the case of *Jyotendrasinhji v/s. S.I Tripathi and Ors.*². The Hon'ble Supreme Court held that the judicial review would be maintainable. However, the scope would be extremely limited. The Hon'ble Supreme Court observed that the Commission may choose to accept an amount of tax by way of settlement and prescribe the manner in which the amount is to be paid. It may condone defaults, and lapses, may waive interest penalties and prosecution when appropriate. The scope of enquiry against the order of the Settlement Commission would be to determine whether the order is contrary to any provision of law and whether it is vitiated on the grounds of bias, fraud or malice and breach of principles of natural justice. Erroneous interpretation based on documents is not a ground for interference. In the case of *Union of India v/s. Ind-Swift Laboratories Ltd.*³, the Hon'ble Supreme Court observed that the order passed by the Settlement Commission could be interfered with only if it is found contrary to the provisions of the Act. The provisions under consideration in these decisions are *pari materia* to the provision by which the Settlement Commission in the case at hand is governed. Therefore, the scope of enquiry before us to test the order of the Settlement Commission is extremely limited.

2 1993 Supp (3) SCC 389

3 (2011) 4 SCC 635

7. The learned Counsel for the Petitioner has argued the Petition on the point of denial of cum duty price benefit. In that context, the observations of the Settlement Commission will have to be noticed, and they are as under :-

“16. For considering the Cum-duty benefit, the facts of the case may be considered. The applicant being a 100% EOU, receives duty free inputs and in normal course is not allowed to clear its final products to the Domestic Tariff Area (DTA) without prior permission of the Development commissioner. In the present case, they not only cleared the goods without such permission but also cleared the same on the invoices of M/s. Specialty Neutraceuticals (SN) and did not account for the production and clearance of the same in the records of M/s. Viva Herba Ltd. Thus, these clearances were clandestine, unauthorized and fraudulently done in the name of M/s. Specialty Neutraceuticals (SN). Therefore, by obvious implication the price charged cannot be considered as Cum-duty price as held in Amit Agro Industries Ltd. 2007 (210) ELT 183 (SC) wherein the Hon'ble Supreme Court observed as under :

“In our view, the above judgments in the case of Maruti Udyog Ltd. and Srichakra Tyres Ltd. have no application in the facts of the present case. In the case of Asstt. Collector of Central Excise vs. Bata India Ltd. reported in 1996 (84) E.L.T. 164 this Court held that under section 4 (4) (d) (ii) of Central Excises and Salt Act, 1994 the normal wholesale price is the cum duty price which the wholeseller has to pay to the manufacturer assessee. The cost of production, estimated profit and taxes on manufacture and sale of goods are usually

included in the wholesale price. Because the wholesale price is usually the cum duty price, the above section 4 (4) (d) (ii) lays down that the "value" will not include duty of excise, sales tax and other taxes, if any, payable on the goods. It was further held that if, however, a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty. He is really increasing the profit element in another guise, and in such a case there cannot be any question of deduction of duty from the wholesale price because as a matter of fact, no duty is actually being included in the wholesale price. It was further held that the manufacturer has to calculate the value on which the duty would be payable and it is on that value and not the cum-duty price that the duty of excise is paid. Therefore, unless it is shown by the manufacturer that the price of the goods includes excise duty payable by him, no question of exclusion of duty element from the price for determination of value under 4 (4) (d) (ii) will arise.

17. Similar view was followed in the case of Asian Alloys Ltd. 2006 (203) ELT-252 (Tri -Del) and in the case of Sarla Polyester Ltd. -2008 (222) ELT 376 (Tri -Ahmd.) wherein it was held that where all the sales to the DTA were clandestinely done in contravention of the provision of EXIM Policy and the Rules applicable to 100% EOU Units, there is no scope to treat the sale price worked out as cum duty price.

18. Had the assessee cleared the goods from their unit at the price at which they had cleared the duty paid goods to the DTA or had they loaded the price of goods after duty paid clearances, the benefit of Cum-duty could have been considered for the excess clearance

(over and above the permission given by Development Commissioner) or on the loaded price. But in this case, neither there is any evidence of price realized being inclusive of duty nor there is any ground to treat the value of clearances as Cum-duty in view of the clandestine and fraudulent manner in which these were removed. It should also be not forgotten that the inputs used in the manufacture of these goods had also not suffered any incidence of duty and were obtained duty free by the applicant having a special status of a 100% EOU. Therefore, there appears no reason to consider the value of the impugned goods as Cum-duty and the benefit of Cum-duty price on clearances of these goods to the DTA cannot be granted."

(Emphasis supplied)

The Petitioner's challenge to these findings is twofold. First, the factual position narrated therein regarding clandestine removal was never put to the Petitioner in the Show Cause Notice, and it could not have been held against the Petitioner. Second, even assuming there was a removal to DTA without permission, the Cum Duty benefit cannot be denied. The learned Counsel for the Petitioner submitted that the reasoning of the Settlement Commission in the impugned order is contrary to the decision of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Delhi v/s. Maruti Udyog Ltd.*⁴ and the decision in the case of *Sarla Performance Fibers Ltd. v/s. Commissioner of Central Excise, Surat-IP*. The learned Counsel for the Petitioner submitted that the sale

⁴ (2002) 141 ELT 3 SC

⁵ (2016) 336 ELT 577 SC

price of a 100% EOU into the domestic tariff area would have to be considered as inclusive of duty payable, that is cum duty price, and therefore, there is no relevance to the aspect of clandestine removal as erroneously relied upon by the Settlement Commission.

8. The learned Counsel for the Respondents, on the other hand, submitted that the Petitioner was put to notice about the case against the Petitioner and the Petitioner has not even bothered to file a reply to the Show Cause Notice or not appeared for a personal hearing pursuant to show cause and has admitted that there was a clandestine removal of goods. The learned Counsel for the Respondents submitted that the decision of the Hon'ble Supreme Court in the case of *Amit Agro Industries Ltd. v/s. Commissioner of Central Excise, Ghaziabad*⁶ has, after analyzing the decision in the case of *Maruti Udyog*, held that it is not permissible to go by the general implications that the wholesale price would always mean cum duty price and the factual enquiry as necessary. The learned Counsel for the Respondents submitted that there is no error in the view taken by the Settlement Commission that since the Petitioner has cleared the goods fraudulently through a bogus unit, there is no evidence of the price realized being inclusive of duty.

9. To consider these two submissions and the application of the principles laid down in the judgments cited by the learned

6 2007 (210) ELT 183 SC

Counsel for the parties, the case against the Petitioner needs to be seen in detail, which will show that it was not a mere case of removal of goods to DTA without permission, but of an intricate plan of routing it through another unit.

10. The Petitioner is a private limited company. One Mr. A.A. Pendse is the Director of the Petitioner – Company. The Petitioner – Company had premises at Kamothe, Taluka - Panvel, District – Raigad. The Petitioner was engaged in the manufacture of vegetable extracts. It was a 100% Export Oriented Unit. An intelligence input was received that the Petitioner had guised the clearance of finished goods into the Domestic Tariff Area from their factory on the invoices of M/s. Speciality Neutraceuticals (M/s. Speciality). Mr. Pendse was also the proprietor of M/s. Speciality. An investigation was carried out and the statements of the Petitioner's customers were recorded. Some of the customers stated that they had purchased the products from M/s. Speciality receiving the delivery challans of M/s. Speciality. In the statement Mr. Pendse, the Director of the Petitioner and Proprietor of M/s. Speciality recorded on 14 June 2004 under Section 14 of the Central Excise Act, 1944 admitted that M/s. Speciality was a proprietary firm, and he was a proprietor. It transpired during the investigation that the machinery and M/s. Speciality was not complete, and M/s. Speciality did not have storing arrangement for methanol, nor it had any

manufacturing premises prior to May 2003. M/s. Speciality had no supervisors, workers or staff during the concerned period; however, the office staff of the Petitioner used to be present. The goods were manufactured with the Petitioner, and the sales bills of M/s. Speciality was in effect in respect of goods not manufactured.

11. The Show Cause Notice was issued to the Petitioner on 20 June 2005 and also to Mr. Pendse. Neither the Petitioner nor Mr. Pendse responded to the Show Cause Notice and remained present. Again notice was given, and the hearing was fixed on 4 October 2005 and 7 October 2005, yet the Petitioner failed to remain present. Again hearing was fixed on 19 October 2005/24 October 2005, and the Petitioner was asked to remain present; neither the Petitioner remained present nor filed any reply. The Commissioner, Central Excise, went through the record and the statements of the witnesses and found that vital documentary evidence was done fraudulently to make it appear that the goods were cleared from the premises of M/s. Speciality, and for that purpose, the Petitioner prepared invoices of M/s. Speciality to cover goods which were manufactured and cleared from M/s. Speciality. In light of this finding, the Additional Commissioner confirmed the demand and imposed a fine and penalty. The Petitioner filed an Appeal before the Commissioner (Appeals) and moved the Settlement Commission while the Appeal was pending.

12. The First contention of the Petitioner is that the case of clandestine removal was not put to the Petitioner and, therefore, the Petitioner was handicapped in meeting the same before the Settlement Commission and that the Settlement Commission has relied upon the facts not put to the Petitioner. There is no merit in this contention. The entire case in the Show Cause Notice is of clandestine removal through M/s. Specialty. Witnesses have been examined. Not only the case against the Petitioner was of the sale of goods to the Domestic Tariff Area in violation of the policy being a 100% EOU but also creating a bogus record to route the sale through a defunct entity. The Petitioner dealt with these allegations in the appeal memo. He was given an opportunity before the Commissioner when the Order-in-Original was passed. Therefore, if the Settlement Commission has taken note of these facts to hold against the Petitioner, it cannot be said there was any breach of principles of natural justice.

13. The second contention is that even assuming there was a removal of goods to DTA without permission, the benefit of cum duty price could not have been denied to the Petitioner. The reasoning of the Settlement Commission on this aspect has been reproduced above. The Settlement Commission has referred to the decision of the Hon'ble Supreme Court in the case of *Amit Agro Industries* and the decision of *Asian Alloys Ltd.*⁷ and *Sarla Polyester*

⁷ 2006 (203) ELT-252 (Tri -Del)

*Ltd.*⁸ The Tribunal has held that since all sales were clandestinely done in contravention of the provisions of EXIM Policy and Rules applicable to the 100% EOU, there is no scope to treat the sale price as a cum duty price. Apart from this, the Tribunal has also held that had the Petitioner cleared the goods from their unit and had they loaded the price of goods after duty paid clearance. There was evidence of the price released being inclusive of duty, and therefore, the Petitioner had to show that the price of the goods includes excise duty payable by it, and there is no question of exclusion of duty element from the price determination of the value. The observations of the Hon'ble Supreme Court in the case of *Amit Agro*, observed in paragraph 14, are reproduced in the order of the Commission, which is extracted above. In the present case, since the Tribunal has opined that in the light of the transaction of the Petitioner, there is no evidence based on which it could be held that the price realized was inclusive of duty, and therefore, the benefit of cum duty could not be granted.

14. Considering the limited scope of challenge against the order of the Settlement Commission, the Petitioner had to show that the impugned order was in breach of a settled position of law which covered the facts of the Petitioner's case. The order of the Settlement Commission cannot be assailed as if it is an order passed under an ordinary adversarial adjudication or as if the appellate power is being

8 2008 (222) ELT 376 (Tri-Ahmd.)

exercised. There are two facets in the Petitioner's case. First, the Petitioner cleared the goods from a 100% EOU without permission in the Domestic Tariff Area and without paying the duty. Second, most important, is that the Petitioner resorted to use M/s. Speciality to effect clearances from their factory. Panchnama of the factory premises of M/s. Speciality revealed that only five items of machinery were functional. The rest of the machinery was non-functional, and the boiler was in a stage of scrap. There was no stock of raw materials. Mr. Pendse was the proprietor of both, M/s. Speciality and the Director of the Petitioner. The Petitioner not only did not clear the goods to the DTA but used some other entity to route the goods and create fabricated documents. Therefore, as per the opinion of the Commission, no reliable documents existed on record. It is in this context that the Settlement Commission concluded that there was no evidence of the price realized being conclusive of duty given the manner in which the goods were removed; the value of the goods as a benefit of cum duty price of clearance of goods could not be granted. The decisions cited by the learned Counsel for the Petitioner before us do not arise from the facts and circumstances similar to that of the Petitions enumerated above. In the decision of *Sarla Performance Fibers Ltd.*, the Hon'ble Supreme Court considered the challenge to the order passed by the Customs Excise Service Tax Appellate Tribunal, and the allegations against the Petitioners therein were that the goods were removed in

the Domestic Tariff Area without permission. The learned Counsel for the Respondents has rightly pointed out that the decisions in the case of *Maruti Udyog* and *Srichakra Tyres Ltd.* also did not deal with the factual situation where the documents from which the cum duty price could be ascertained were themselves of doubt having routed under a fictitious entity. Therefore, we are not shown any judicial decision directly dealing with the fact situation such as the Petitioner, where the documentation itself was in grave doubt.

15. Keeping in mind the scope of the judicial review and the ambit of proceeding for the settlement, we are not inclined to interfere in the writ jurisdiction of this Court.

16. The Writ Petition is dismissed. Rule discharged. No order as to costs.

GAURI GODSE, J.

NITIN JAMDAR, J.

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