(2017) 09 DEL CK 0327

In the Delhi High Court

Case No : Civil Writ Petition No. 2047, 2053 Of 2017

Anuj Rana APPELLANT

Vs

Union Of India & Anr. RESPONDENT

Date of Decision : 18-09-2017

Acts Referred:
Central Excise Act, 1944 — Section 31(c), 32E, 32E(1), 32F(1), 32F(2), 32F(3)

Citation : (2017) 09 DEL CK 0327

Hon'ble Judges : S. Muralidhar, J;Prathiba M. Singh, J

Bench : Division Bench

Advocate : A.K. Prasad, Priyanka Goel, Sanjeev Narula, Abhishek Ghai

Final Decision : Allowed

Judgement

Prathiba M. Singh, J

1. The short question that arises in these two writ petitions is whether the Customs, Central Excise and Service Tax Settlement Commission

(hereinafter referred to as the â??Settlement Commissionâ??) was right in rejecting the applications filed by the Petitioners (AA), filed before it on

the ground that there was no â??caseâ?? pending in terms of Section 31 (c) of the Central Excise Act, 1944 (hereinafter â??CEAâ??).

Facts in brief:

2. Both the writ petitions arise out of identical facts. The Petitioner in WP(C) 2053/2017 is a company engaged in providing taxable services of

construction, work contract services and is also receiving taxable services of goods transport agency as defined in the Finance Act 1994

(â??FAâ??). The Petitioner in WP (C) 2047/17 is one of the directors of the Petitioner in WP (C) 2053/17. Pursuant to a search conducted on 18th

July, 2012, a show-cause notice (â??SCNâ??) dated 18th October 2013 was issued to the Petitioners to produce their records and also show cause

why service tax, which the Petitioners had failed to deposit, should not be recovered. Interest and penalty was also sought to be levied. Since there is

only one SCN issued to both the Petitioners i.e., as Noticee No.1 and Noticee No. 2, they are together referred to as â??Petitionerâ?? hereinafter.

3. The Petitioner had deposited the service tax demanded along with interest and filed an application before the Settlement Commission on 5th

December, 2016. On 6th December, 2016, the Petitioner also informed the Commissioner of Central Excise (â??Commissionerâ??) of this fact.

While the application filed before the Settlement Commission was pending scrutiny, the Petitioner was also served an adjudication order passed by the

Commissioner on the SCN. The said order was dated 2nd December, 2016 but was dispatched on 7th December, 2016 and was received by the

Petitioner on 9th December 2016. Meanwhile, the Settlement Commission sent a notice under Section 32F (1) of the CEA, to the Petitioner on 9th

December, 2016, seeking a response in writing as to why the application should be proceeded with. Subsequently, a notice dated 22nd December 2016

was issued to the Petitioner fixing the admission hearing for 4th January, 2017.

4. The Settlement Commission, on 9th January, 2017, rejected the application filed by the Petitioner on the ground that the matters stood adjudicated

and hence the Petitionerâ??s application was no longer in respect of a â??caseâ?? within the meaning of Section 31 (c) of the CEA. This order is

impugned in the writ petitions.

Submissions of parties:

5. Mr. A.K. Prasad, learned counsel for the Petitioner, relies upon the decision in Qualimax Electronics Pvt. Ltd. v. Union of India 2010 (257) E.L.T.

42 (Del) (hereafter â??Qualimaxâ??) to submit that the order of the Commissioner, though dated 2nd December, 2016 was dispatched only on 7th

December, 2016, and the date of the order would thus be deemed to be the date of dispatch. He further relies on the judgment of the Bombay High

Court in Vishnu Steels v. Union of India (2014) 299 E.L.T. 292 (hereafter â?? Vishnu Steelsâ??) which has also taken a similar view as this Court in

Qualimax (supra).

6. The submission of Mr. Prasad is that since the application was filed by the

Petitioner on 5th December, 2016, and the date of the adjudication order

is 7th December, 2016 â?" hence, the application was maintainable before the Settlement Commission as the case was still pending on the date when

the application was filed. He thus submits that the application of the Petitioner deserves to be considered on merits by the Settlement Commission and

the impugned order is erroneous.

7. Mr. Sanjeev Narula, learned Senior Standing counsel for the Revenue, does not dispute that the date of the order of the Settlement Commission

should be treated as 7th December, 2016 i.e. the date of dispatch of the order. However, he also contends that in the scheme of the CEA, there is a

period during which the matter can be pending both before the Settlement Commission and before the adjudicating authority. During the said period,

the adjudicating authority is well within its powers to pass the adjudication orders. Mr. Narula relies upon Section 32F (1) of the CEA to submit that

under this provision, the Settlement Commission has to, within a period of 7 days from the date of receipt of the application, issue a notice to the

applicant to explain in writing as to why the application be proceeded with and thereafter, within a period of 14 days from the date of the notice, pass

an order to either proceed with the application or reject it.

8. Mr. Narula points out that Section 32F of the CEA also creates a deeming fiction that if the order is not passed within 14 days from the date of

notice, the application would be deemed to have been proceeded with. Thus, as per Mr. Narula, during these two periods - first, 7 days and then 14

days, the jurisdiction of the Settlement Commission is not exclusive. He further submits that the question is whether the proceedings which are pending

adjudication ought to be considered at the time when the order to â??proceed withâ?? the application is to be passed. Mr. Narula thus submits that

the order having been passed on 2nd December, 2016 and having been dispatched on 7th December, 2016, the Settlement Commission has rightly

rejected the Petitionerâ??s applications.

9. Mr. Narula also took this Court through the chronology of events to show that the Petitioners have been deliberately delaying the adjudication

proceedings since 2014 and they only chose to approach the Settlement Commission on the eve of the passing of the order by the adjudicating

authority. His submission in short was that the Petitioners do not deserve any indulgence from this Court in view of their conduct.

Relevant Provisions of the Central Excise Act, 1944

10. The provisions of the CEA which fall for consideration in the present case are:

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 therefore, 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:

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).

(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.

Section 32F â?" Procedure on receipt of application under Section 32E -

(1) On receipt of an application under sub-section (1) of section 32E, the Settlement Commission shall, within seven days from the date of

receipt of the application, issue a notice to the applicant to explain in writing as to why the application made by him should be allowed to be

proceeded with, and after taking into consideration the explanation provided by the applicant, the Settlement Commission, shall, within a

period of fourteen days from the date of the notice, by an order, allow the application to be proceeded with, or reject the application as the

case may be, and the proceedings before the Settlement Commission shall abate on the date of rejection:

Provided that where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the

application shall be deemed to have been allowed to be proceeded with.

(2) A copy of every order under sub-section (1), shall be sent to the applicant and to the Principal Commissioner of Central Excise or

Commissioner of Central Excise having jurisdiction.

Analysis and Findings

11. A perusal of the above provisions reveals that an application under Section 32E has to be made â??before adjudicationâ??. So, what needs to be

checked by the Settlement Commission is whether on the date of making of the application, there was a case relating to the Petitioner. Section 31 (c)

of the CEA defines â??caseâ?? as under:

31(c) â??caseâ? means any proceeding under this Act or any other Act for the levy, assessment and collection of excise duty, pending

before the adjudicating authority on the date on which an application under sub-section (1) of section 32E is made:

Provided that when any proceeding referred back by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the

meaning of this clause.

12. It is clear from a conjoint reading of Sections 31 (c) and 32E of the CEA, that if any proceeding is pending before the adjudicating authority on the

date on which the application under Section 32E is filed, the said application would be maintainable, subject to the fulfilment of the other requirements

under Section 32E of the CEA.

13. The consideration of the Settlement Commission whether to proceed with or reject an application filed before it, as contemplated under Section

32F (1) involves not merely an examination into the pendency of the proceedings but various other conditions/requirements which are to be fulfilled as

per Section 32E of the Act. Such conditions/requirements include making a full and true disclosure of the duty liability, the manner in which such

liability is derived, the additional amount of excise duty accepted to be payable by the applicant, other particulars, if any, including particulars of such

excisable goods in respect of which the applicant admits short levy on account of misclassification, under-valuation, inapplicability of exemption

notifications, CENVAT credit availed of and such other requirements as stipulated in the said provision.

14. The discretion of the Settlement Commission at the point when it considers as to whether the application should be proceeded with, is of a much

larger conspectus i.e. to determine whether the application is in accordance with law. The Settlement Commission at this stage does not have the

discretion to simply reject the application on the basis that an order by the adjudicating authority has come to be passed post the filing of the application

for settlement before the Settlement Commission. Any other interpretation would defeat the purpose of the terms â??proceeding under this

Act...pending before the adjudicating authority on the date on which the application under sub-Section (i) of Section 32E is madeâ?? and â??before

adjudicationâ?? as contained in Section 31 (c) and 32E of the Act, respectively.

15. So long as the application has been filed prior to the order of the adjudicating authority, it will not be open to the Settlement Commission to reject it

merely on the ground that an order has been passed subsequently by the adjudicating authority i.e. during the intervening period â?" from the date of filing till the date of passing of the order on the application to be proceeded with or rejection thereof as per Section 32F.

16. In the present case, there is no dispute as to the date of the order passed by the adjudicating authority. The date of the order is 7th December,

2016, though, the date appearing on the order itself is 2nd December, 2016. This is as per the dictum of this Court in Qualimax (supra) wherein it was

held:

â??...33. Thus, the date of receipt of the order-in-original is not a relevant circumstance. What is of prime importance is the date on which

the order-in-original was despatched from the office of the adjudicating authority (in this case, the Commissioner of Central Excise &

Customs, Ghaziabad). As we have seen, the order-in-original dated 24.12.2009 had left the office of the said Commissioner on 31.12.2009

and was beyond his reach and control. Consequently, the adjudication becomes effective and complete on that date, i.e., 31.12.2009. That

being so, the necessary pre-condition of a case pending adjudication on the date of the settlement application is not satisfied. As such, the

Settlement Commission had no jurisdiction to entertain the plea of settlement. Because, it is only a ""case"" as defined in Section 31(c) which

could be the subject matter of settlement. Section 31(c) defines ""case"" to mean any proceeding for the levy, assessment and collection of

excise duty, ""pending before an adjudicating authority on the date on which an application under Sub-section (1) of Section 32E is made"".

Once, the order leaves the hands of the adjudicating authority in the sense explained above, the â??caseâ?? can no longer be said to be

pending before him. Conversely, the proceeding would be regarded as pending before an adjudicating authority till the order does not go

out of his control. In the present case, this happened on 31.12.2009. Thus, on 08.01.2010, when the settlement applications were filed by

the petitioners, the matter before the adjudicating authority had already been adjudicated...â??

17. The decision of the Bombay High Court in Vishnu Steels (supra) is on the same lines as in Qualimax (supra) and reads as under:

â??...16. In consequence we also set aside the order of the Commissioner of Central Excise dated 13 January 2011 since we have held that the application which was filed before the Settlement Commission on 14 January 2011, prior to the dispatch of the order of adjudication,

was maintainable. We clarify that we have done so without expressing any opinion on the merits of the allegations contained in the show

cause notice issued to the assessee. Unless this consequential relief were to be granted as prayed, two parallel proceedings would result,

namely (i) arising out of the order of the Commissioner of Central Excise and, (ii) before the Settlement Commission which the statute does

not contemplate. Hence, for these reasons the order of the Commissioner of Central Excise dated 13 January 2011 is also set aside....â??

18. That the adjudicating authority can deal with the proceedings pending before it prior to the order being passed by the Settlement Commission on

whether to proceed with the settlement proceedings, is not an issue that arises in this case.

19. There is no doubt that under the scheme of the CEA, the adjudicating authority has to, under Section 32F (3), call for a report from the Principal

Commissioner of Central Excise or the Commissioner of Central Excise in respect of the adjudicating proceedings pending before them. However,

under Sections 32F (1) and 32F (2), the Settlement Commission gets exclusive jurisdiction only after the order is passed by the Settlement Commission

to proceed with the application. This Court, in these proceedings, is not called upon to decide upon the validity or otherwise of the order passed by the

adjudicating authority.

20. There is no cavil to the conclusion that the date of the order in the present case is 7th December, 2016 and the date of the filing of the application

before the Settlement Commission is 5th December, 2016. Thus, on the date when the application came to be filed before the Settlement Commission,

the proceeding was pending before the adjudicating authority. In the circumstances, the Settlement Commission was in error in holding that the

application before it was not maintainable.

21. For the aforementioned reasons, the impugned order dated 9th January, 2017 of the Settlement Commission is hereby set aside; the applications of

the Petitioners are held to be maintainable. The said applications are restored to the file of the Settlement Commission for being proceeded with from

the stage at which they were, when the impugned order was passed, in accordance with law.

22. The writ petitions are allowed in the above terms. The Petitionersâ?? application be listed before the Settlement Commission on 6th November,

2017 for further proceedings.

