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(2016) 02 CAL CK 0151

In the Calcutta High Court

Case No : A.P.O No. 187 of 2015 and W.P. No. 392 of 2014.

Commissioner of Central Excise and Service Tax, Durgapur Commissionerate - Appellant @HASH Ankit Metal and Power Ltd. and Others

Date of Decision : 23-02-2016

Acts Referred:
Central Excises and Salt Act, 1944 — Section 32E, Section 32M, Section 32O (1) (i), Section 32O(2)

Citation : (2016) 2 CalLJ 622

Hon'ble Judges : Soumitra Pal and Mir Dara Sheko, JJ.

Bench : Division Bench

Advocate : Mr. R.N. Das, Senior Advocate and Mrs. Santa Mitra, Advocate, for the Appellant; Mr. Sudhir Kumar Mehta, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Mr. Soumitra Pal, J. - Though this appeal was heard along with MAT 974 of 2015 and APO No.236 of 2015 as common questions of law are involved, for clarity, this judgment is delivered separately.

2. This appeal has been preferred by the Commissioner of Central Excise and Service Tax, Durgapur Commissionerate, against the judgment dated 26th August, 2014 passed in W.P. 392 of 2014 (Ankit Metal and Power Limited and others v. Settlement Commission and others) whereby the learned Single Judge had disposed of the writ petition by passing the following order:-

"It appears that the Settlement Commission in its order dated 28th March, 2014 has not made a correct interpretation of Section 32-O(i) of the Central Excise Act, which is reproduced below: "32-O?.[Where, [***]]-

(i) an order of settlement passed under sub-section (7) of section 32F [, as it stood immediately before the commencement of section 122 of the Finance Act, 2007 (22 of 2007) or sub-section (5) of section 32F,] provides for the imposition of a penalty on the person who made the application under section 32E for settlement, on the ground of concealment of particulars of his duty liability;

.....

then, he shall not be entitled to apply for settlement under section 32E in relation to any other matter."

The Commission has no doubt held in paragraph 24 of its order that a penalty of Rs.6 lakhs was imposed on M/s. Ankit Metal & Power Limited.

But it failed to appreciate that this did not prevent Ankit Metal & Power Limited from approaching the Settlement Commission in a second case unless the penalty was inflicted on them, on their making a Section 32E application for settlement and that the ground of imposition of that penalty was concealment of particulars of duty liability.

Section 32E enacts in very clear terms that an assessee may in a case relating to him make an application after issuance of the show-cause notice but before adjudication, to the Settlement Commission to have the case settled. Such application has to be in a prescribed form with full and true disclosure of the applicant''s duty liability which has not been disclosed before the Central Excise Officer having jurisdiction.

Now, if there is any concealment in that application and a penalty has been imposed by the Settlement Commission on the ground of such concealment, then a second application before the Settlement Commission is barred, in my interpretation of Section 32-O(i) of the said Act.

The order of the Settlement Commission does not specify whether this kind of a penalty was imposed on the writ petitioner. Just because a penalty is imposed on a show-cause notice the writ petitioner''s application before the Commission was not entertained.

In that view of the matter, I direct the Settlement Commission to reconsider its order dated 28th March 2014 in the light of the above observations and if it is found that the penalty has not been imposed on the writ petitioner in an application for settlement under Section 32E, on the ground of concealment of particulars of their duty liability in that application, then the Commission will proceeded to consider their case on merits.

This writ application is accordingly disposed of."

3. Mr. R.N. Das, learned senior advocate for the appellant had submitted that it is apparent from the judgment under challenge that earlier a show cause notice was issued. On that occasion the respondent filed applications for settlement under section 32E of the Central Excise Act, 1944 (for short ''the Act''). Those were considered by the Customs, Central Excise Settlement Commission (for short ''the Commission'') and order on that application was passed imposing penalty for concealment of duty particulars. The respondents, in appeal, that is the writ petitioners, had accepted the said order. Under section 32M of the Act those orders passed under section 32F(5) are conclusive and binding on the

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respondent and cannot be reopened. As it was found by the authorities that the respondents herein were again indulging in clandestine manufacture and clearance of goods, show cause notice dated 7th May, 2013 was issued. It was the second show cause notice. The respondents filed applications for settlement admitting removal of finished goods without payment of duty and deposited a sum of Rs.15 lakhs in advance. According to him, as on an earlier occasion order was passed by the Commission imposing penalty for evasion of duty, the Commission was justified in passing the order dated 28th March, 2014 on the said application for settlement holding it had no jurisdiction to entertain the application under section 32-O(1)(i) of the Act which the learned Single Judge in the impugned judgment had overlooked. Moreover in the writ petition the vires of section 32-O was not under challenge. Had the respondents been aggrieved with the second show cause notice, instead of filing applications for settlement, they should opted for adjudication under the Act.

4. Mr. Sudhir Kumar Mehta, learned advocate for the respondents, that is the writ petitioners, submitted that as revenue laws have to be construed strictly and since the Commission in its order dated 28th March, 2014 did not specifically hold that earlier penalty was imposed for concealment of particulars of duty liability, the matter is not barred by section 32-O(I)(i) of the Act. If imposition of penalty of any kind would have been a disqualification, then in section 32-O(I)(i) the words "on the ground of concealment of particulars of his duty liability" would not have been incorporated. Since ambiguity was set at rest with the introduction of the ''Explanation'' to section 32-O(I)(i) in August, 2014 and as the earlier show cause notice was issued prior to its introduction, the bar under section 32-O(1)(i) does not apply to the respondent. According to him with the introduction of sub-section 2 to section 32-O with effect from 1st June, 2007, which was omitted on 8th May, 2010 by Act 14 of 2010, the one time approach was removed and thus even if earlier penalty was imposed for concealment of particulars of duty liability, an application for settlement was maintainable. The learned advocate for the respondent had relied on the following judgments:- Sedco Forex International Dril. Inc. v. Commissioner of Income Tax, Dehradun: (2005) 12 SCC 717; B.K. Muniraju v. State of Karnataka: (2008)4 SCC 451; Commissioner of Income Tax, Jalpaiguri v. Om Prakash Mittal: 2005 (184) ELT 3 (S.C); Commissioner of C. Ex. Visakhapatnam v. True Woods Pvt. Ltd.: 2006(199) ELT 388 (Del); Light Engg. Corporation v. Union of India: 2007(207) ELT 40 (P&H); Union of India v. Dharamendra Textile Processors: 2008(231) ELT 3 (S.C); Union of India v. Ind-Swift Laboratories Ltd.: 2011(265) ELT 3(S.C); Exotica Global Pvt. Ltd. v. Union of India: 2015(319) ELT 31 (Cal) and Vinod Kumar Mathur v. Union of India : 2015(322) ELT 107 (Bom).

5. The issues which require consideration are:- i) Whether with the introduction of the "Explanation" to section 32-O(1)(i) there was a change in law with regard to the one time bar under the said section; ii) Whether with the introduction of sub-section (2) to Section 32-O with effect from 1st June, 2007, subsequently omitted on 8th May, 2010, the concept of one time approach under section 32-O

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was removed and iii) Whether in the earlier proceedings before the Settlement Commission penalty was imposed on the respondents, that is the writ petitioners, for concealment of particulars of their duty liability.

6. Before dealing with the issues, it is appropriate to refer to section 32-O(1)(i) and sub-section 2 of section 32 which are as under :-

"32-O. Bar on subsequent application for settlement in certain cases.- [(1)] [Where, [***]]-

(i) an order of settlement passed under sub-section (7) of section 32F [, as it stood immediately before the commencement of section 122 of the Finance Act, 2007 (22 of 2007) or sub-section (5) of section 32F,] provides for the imposition of a penalty on the person who made the application under section 32E for settlement, on the ground of concealment of particulars of his duty liability; or

[Explanation.- In this clause, the concealment of particulars of duty liability relates to any such concealment made from the Central Excise Officer.]

then, he shall not be entitled to apply for settlement under section 32E in relation to any other matter."

7. Sub-section 2 to section 32-O, inserted with effect from 1st June, 2007 and omitted with effect 8th May, 2010 was as under:-

"(2) Where an assessee has made an application under sub-section(1) of section 32E, on or after the 1st day of June, 2007 and if such application has been allowed to be proceeded with under sub-section (1) of section 32F, such assessee shall not be entitled to apply for settlement under section 32E in relation to any other matter:

Provided that such assessee shall not be prevented from filing an application for settlement if the issue in the subsequent application is, but for the period of dispute and amount, identical to the issue in respect of which the earlier application is pending before the Settlement Commission."

8. In order to answer the issues it is appropriate to refer to the relevant portion of paragraph 8 and paragraphs 24 and 28 of the order dated 28th March, 2014 which are as under:-

"8. As the applicant had earlier been penalised by Settlement Commission, it appeared that the "Bar'' under section 32-O(1)(i) is attracted in this case. However, since this Bench had been admitting such applications and setting them in the past, an opportunity was given to the Applicants on 17.01.2014 to put forth their defence. During the hearing on 17.01.2014 Shri Kalyan Kumar Biswas, Advocate appeared on behalf of the applicants. The Revenue was represented by Shri B.S. Meena, Assistant Commissioner Shri Kajal Choudhuri, SIO and Shri Mukul Halder, I.O. The Ld'' Advocate submitted that:

(i) The Hon''ble Commission, on earlier occasion(s) granted immunity to the

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applicants (I) and (iii) above, which is not same as imposition of penalty;

(ii) There is no provision for imposition of penalty per se by the Commission as under Section 32F(5) of the Act there is no clear provision for imposition of penalty and moreover under Section 32K of the Act, the power has been given for granting immunity from penalty;

(iii) Section 32O refers only Section 32F(5) and no other sub section for making provision for imposition of penalty.

(iv) Such cases being admitted by other co-ordinate Benches, before taking any adverse decision in this regard, the matter may be referred to a Special Bench.

24. M/s. Ankit Metal & Power Ltd. have earlier approached the Settlement Commission and got their cases settled vide order no.F-247/CE/10-SC(KB). Dated 26.11.2010 wherein the central excise duty was settled at 1,38,82,392 and a penalty of Rs. Six lakhs was imposed on M/s. Ankit Metal & Power Ltd. The provisions of section 32-O(1)(i) are clear. There is no ambiguity in its meaning and scope. It clearly provides that where an order issued under section 32F(5) provides for imposition of a penalty on the person who made the application under section 32E for settlement, on the ground of concealment of particulars of his duty liability, then, he shall not be entitled to apply for settlement under section 32E in relation to any other matter.

25. ?????

26. ?????

27??????

28. Learned Member (Shri Karan K. Sharma) has passed the above order. In addition to the case of M/S Shakambhari Overseas Trades Pvt. Ltd. [Final Order No. F-412/CE/2014-SC(KB)-REJ dated 26.03.2014], this Bench has passed another order in the case of M/s. Rohit Ferro-Tech Limited and other co-applicant [Final Order No. F-413/CE-2014-SC(KB)-Rej. Dated 28.03.2014] holding that the provisions of Section 32O(1)(i) are clear and the bar applies in such cases. The bar against filing of subsequent application under Section 32O(1)(i)is attracted in the present case of M/s.Ankit Metal and Power Limited to make the application of the applicant liable to dismissal. The Bench has no jurisdiction to entertain such an application as it is barred by Section 32-O (1)(i) of the Central Excise Act, 1944 and is liable to dismissal, without going into the merits of the case. The applications of the co-applicants cannot be settled when the main applicant is not eligible to come before the Settlement Commission. In terms of Section 32O(1)(i) of the Central Excise Act, 1944, without going into the merits of the case, all the applications (main applicant as well as co-applicants) are out rightly rejected and dismissed."

9. So far as the first issue is concerned, it is to be noted that Mr. Mehta learned advocate for the respondents in this appeal had submitted that as the earlier

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show cause notice was issued prior to the introduction of the "Explanation" by Finance Act (N). (No.2) ACT 2014, the bar under section 32-O (1)(i) is not applicable. The argument made on behalf of the respondent that section 32-O(I)(i) cannot be accepted, if one looks at the plain language of section 32-E(1) of the Act. The "Explanation" in section 32-O(I) (i) stating that "the concealment of particulars of duty liability relates to any such concealment made from the Central Excise Officer" is in aid to and evidently in consonance with the opening part of the provisions contained in section 32-E(1) which provides "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,?." (Emphasis supplied). Therefore, under section 32E(1) an application for settlement can be filed before the Commission where there is nondisclosure of duty liability before the Central Excise Officer. Under section 32-O(1)(i) a person is barred from filing a subsequent application for settlement where he has suffered an order passed under section 32F(5) and therein the "Explanation" has been introduced that the concealment of particulars of duty liability "relates to any such concealment made from the Central Excise Officer". Thus, "Explanation" in 32-O(1)(i) is consistent with the statutory intent in section 32-E(1). As seen "Explanation" introduced is a reiteration of the statutory provisions in section 32E(1). Hence, the "Explanation" is clarificatory in nature. Therefore, as the bar under section 32-O(1)(i) was always in vogue, the submission in this regard on behalf of the respondent is unacceptable.

10. With regard to second issue, the argument of the respondent, that with the introduction of sub-section 2 to section 32-O from 1st June, 2007, which was omitted on 8th May, 2010, the one time approach was removed, cannot be accepted as no earlier application for settlement "identical to the issue" was "pending" before the Commission when the subsequent application was filed. To put the facts in proper perspective, it is to be noted that the Commission had disposed of the earlier application of settlement by order dated 26th November, 2010 by directing the respondents to pay duty of Central Excise. Therefore, as and when the Commission took up the application for settlement for hearing, no "earlier application" on the "identical" issue was "pending" before it. Hence, the section 32-O(2) since deleted, does not come to the aid of the respondents herein, that is the writ petitioners.

11. So far as the third issue is concerned, as under section 32-O(1)(i) the bar to file subsequent application was always in vogue, in view of the clear finding in detail by the Commission that in the previous proceedings penalty was imposed for concealment of particulars of duty liability, the argument of the respondent on this issue cannot be accepted. In the instant case the learned Single Judge, in the judgement under challenge, had overlooked paragraphs 8, 24 and 28 of the order dated 28th March, 2014 passed by the Commission dealing specifically with

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the earlier proceedings and the order passed thereon, as noted hereinbefore. Be it noted that the said order, under section 32M, is conclusive. That apart, as evident from the records, the respondents had accepted the earlier order passed by the Settlement Commission. It is clear from the order dated 28th March, 2014, particularly paragraphs 8, 24 and 28 thereof, that on the earlier occasion the respondent herein was found guilty for concealment of duty particulars and penalty was imposed which the learned Judge had overlooked and thus erred in passing the judgement under challenge.

12. So far as the decisions relied on behalf of the respondents are concerned, the judgment in Sedco Forex International Dril. Inc. (supra) has no application as the "Explanation" in section 32-O(1)(i) is in consonance with section 32E(1) as even with its introduction there is no change of the existing law. Since it is an admitted fact that on earlier occasion the respondents were found by the Commission to have concealed particulars of duty liability and orders were passed imposing penalty which the respondents had accepted, the principles of law in Commissioner of Income-Tax, Jalpaiguri v. Om Prakesh Mittal (supra), in Union of India v. Dharamendra Textile Processors (supra), in Light Engineering Corporation (supra) and in Commissioner of C. Ex. Visakhapatnam v. True Woods Pvt. Ltd (supra) are not applicable. Since the order passed by the Settlement Commission was in accordance with the provisions contained in Chapter V of the Act and facts have been dealt with in detail, the judgments in Union of India v. Ind-Swift Laboratories Ltd (supra), in Vinod Kumar Mathur (supra) and in Exotica Global (supra) are not applicable.

13. Moreover, the issues stand settled by unreported judgments and orders passed on 2nd February, 2016 in M.A.T 974 of 2015 (M/s. C.P. Re-Rollers Limited and Anr. v. Union of India and Ors.) wherein the appeal has been dismissed and on 3rd February, 2016 in APO No. 236 of 2015 (Commissioner of Central Excise and Service Tax, Durgapur Commissionerate v. Rohit Ferro Tech Ltd. & Ors.) wherein appeal has been allowed.

14. Therefore, for the reason as aforesaid, the judgment and order dated 26th August, 2014 cannot be sustained and is thus set aside and quashed. Hence, the appeal is allowed.

15. Urgent certified photostat copy of this judgment, if applied for, be furnished to the appearing parties on priority basis.

Mr. Mir Dara Sheko, J. : I agree.

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