(2016) 02 CAL CK 0017

In the Calcutta High Court

Case No : APO No. 236 of 2015 and W.P. No. 393 of 2014

Commissioner of Central Excise and Service Tax, Durgapur Commissionerate — APPELLANT

Vs

Rohit Ferro Tech Ltd. and Others — RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 32E, Section 32E(1), Section 32-E(1), Section 32F, Section 32F(5), Section 32M
Finance Act, 2007 — Section 122

Citation : (2016) 02 CAL CK 0017

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

Bench : Division Bench

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

Final Decision : Disposed Off

Judgement

Soumitra Pal, J.—1. Though this appeal was heard along with MAT 974 of 2015 and APO No. 187 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. 393 of 2014 (Rohit Ferro Tech Limited and others versus Settlement Commission and others) whereby the learned Single Judge had disposed of the writ petition by passing the following order:-

"In this case four show-cause notices were dealt with by the Settlement Commission at an earlier point of time. This case arises out of an application made by the writ petitioner under Section 32E of the Central Excise Act, 1944 with regard to the fifth show-cause notice.

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. 5 lakhs was imposed on M/s. Rohit Ferro Tech Limited.

But it failed to appreciate that this did not prevent Rohit Ferro Tech 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 four show cause notices were issued. On each 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 orders on each of those applications were passed imposing penalty for concealment of duty particulars. The respondents, in appeal, that is the writ petitioners, had accepted the said orders. Under section 32M of the Act those orders passed under section 32F(5) are conclusive and binding on the 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 fifth show cause notice. The respondent filed an application for settlement admitting removal of finished goods without payment of duty and deposited a sum of Rs. 20 lakhs in advance. According to him, as on earlier four occasions orders were 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 fifth 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(1)(i) of the Act. If imposition of penalty of any kind would have been a disqualification, then in section 32-O(1)(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(1)(i) in August, 2014 and as all the earlier four show cause notices were 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:- 1) Sedco Forex International Dril. Inc. v. Commissioner of Income Tax, Dehradun: , (2005) 12 SCC 717; 2) B.K. Muniraju v. State of Karnataka: , (2008) 4 SCC 451; 3) Commissioner of Income Tax, Jalpaiguri v. Om Prakash Mittal: , 2005 (184) ELT 3 (S.C); 4) Commissioner of C. Ex. Visakhapatnam v. True Woods Pvt. Ltd.: 2006 (199) ELT 388 (Del); 5) Light Engg. Corporation v. Union of India: , 2007

(207) ELT 40 (P & H); 6) Union of India v. Dharamendra Textile Processors: , 2008 (231) ELT 3 (S.C.); 7) Union of India v. Ind-Swift Laboratories Ltd.: , 2011 (265) ELT 3 (S.C); 8) Exotica Global Pvt. Ltd. v. Union of India: , 2015 (319) ELT 31 (Cal) and 9) 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 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 32Ein 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 paragraphs 24, 25, 28, 29, the relevant portion of paragraph 34 and paragraph 35 of the order dated

28th March, 2014 which are as under:-

"24. M/s. Rohit Ferro-Tech Ltd. had earlier on four different occasions approached the Settlement Commission and got their cases settled. The first application No. 47 of 2005 is dated 22.08.2005. In this case, the duty evasion admitted by them was Rs. 5,06,452/-. While settling this case, M/s. Rohit Ferro-Tech Ltd. were granted immunity from penalty and prosecution. Again in 2010, vide their Application No. 606/2010 dt. 22nd July, 2010, they again approached the Settlement Commission in respect of a case involving removal of 841 M.T. Ferro Chrome and Silicon Maganese without payment of Central Excise Duty. The duty in this case was settled at Rs. 1,27,32,650/- along with interest payable. A penalty of Rs. 5 lakhs was also imposed on M/s. Rohit Ferro-Tech Ltd. and they were granted immunity from prosecution. Thereafter on 12.04.2011, M/s. Rohit Ferro-Tech Ltd. again approached the Settlement Commission vide their application No. 664/2011. This matter related to removal without payment of Central Excise Duty of 85.4 MT. The duty involved in this case was Rs. 4,16,663/-. The duty in this case was settled at Rs. 3,16,663/- along with interest and a penalty of Rs. 50,000/- was imposed on M/s. Rohit Ferro-Tech Ltd. and immunity was granted from prosecution. M/s. Rohit Ferro-Tech Ltd. again approached the Settlement Commission on 16th February, 2012, vide their application No. 803/2012. In this case, they had incorrectly availed Cenvat Credit amounting to Rs. 30,83,857/-. The duty in this case was settled at Rs. 30,83,857/- along with applicable interest. A penalty of Rs. 1,50,000/- was imposed on M/s. Rohit Ferro-Tech Ltd. The Bench also granted immunity from prosecution. Now, M/s. Rohit Ferro-Tech Ltd. have again approached the Settlement Commission under Application No. 953 of 2013 which involves evasion of Rs. 19,80,703/- as Central Excise Duty.

25. In all the earlier orders passed by this bench in respect of the applicant, nowhere the applicability for the provisions of section 32-O(1)(i) has been even remotely examined, even though the fact that the applicant has been penalized by Settlement Commission, earlier is clearly noted.

26. ....

27. ....

28. Four such orders have been issued by this Bench in the case of the applicant earlier. In three of these cases, penalty has been imposed on the applicant. First time, penalty was imposed on them, vide order dated 26.11.2010 and after that two more applications from them were admitted and also settled by the bench. This is in contravention of the provisions of section 32-O(1)(i) of the Central Excise Act, 1944. M/s. Rohit Ferro-Tech Ltd. stood debarred from applying to the Settlement Commission in any matter after 26.11.2010, when a penalty was imposed on them. All sub-sequent orders of settlement have been issued ignoring the provision of section 32-O(1)(i), which by no stretch of imagination can be treated as a precedent.

"To perpetuate an error is no heroism. To rectify it, is the compulsion of the judicial conscience" (Supreme Court in Appeal (crl.) 978 of 2004 in the matter of Nirmal Jeet Kaur vs. The State of Madhya Pradesh And Anr.)

29. In view of the above discussions and findings, I conclude that M/s. Rohit Ferro-Tech Ltd. are not eligible to apply to Settlement Commission in any matter and the application filed by M/s. Rohit Ferro-Tech Ltd. as well as the applications filed by co-applicants are liable to be rejected. Accordingly, the applications No. 953 to 955/2013 are hereby rejected.

30. ....

31. ....

32. ....

33. ....

34. We agree with the Learned Member (Shri Koran K. Sharma) that the bar of Section 320(1)(i) of the Central Excise Act, 1944 applies in this case. At paragraph 19, the Learned Member has mentioned the case of M/s. Shakambhari Overseas Trades Private Limited. In the said case a detailed order has been passed by a 3-Member Bench (Final Order number F-412/CE/2014-SC(KB)-REJ. Dated 26.03.2014) holding that the bar of Section 320(1)(i) applies to cases where penalty has been imposed on the applicant for concealment of duty liability particulars by an order passed under Section 32F(5) of the Central Excise Act, 1944 in respect of an application filed under Section 32E of the Act. The present case of M/s. Rohit Ferro-Tech Limited is also a case where the applicant, in earlier cases, was show caused for demand of duty interest and penalty. Penalty was imposed by the Settlement Commission. It has been held by the 3-Member Bench in the case of M/s. Shkambhri Overseas Trade Private Limited that the bar of Section 320(1)(i) of the Act applied in such a case as the present one and the party is barred from filling a sub-sequent application for settlement.

35. The applicant M/s. Rohit Ferro-Tech Limited has come for the fifth time to get his application settled by the Settlement Commission. He had been earlier penalized. The provisions of Section 32-O(1)(i) are clear. The bar against filling of subsequent application under Section 32-O(1)(i) is attracted in this case 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 with the main applicant is not eligible to come before the Settlement Commission. In terms of Section 32-O(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."

(Emphasis supplied)

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 four show cause notices were 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(1)(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(1)(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 a non-disclosure 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 any of the subsequent applications were filed. To put the facts in proper perspective, it is to be noted that the Commission had disposed of the first application of settlement filed on 22nd August, 2005 by order dated 3rd March, 2006 by directing the respondents to pay duty of Central Excise. Thereafter, pursuant to the notice to show cause dated 25th May, 2010 for the period 3rd July, 2008 to 9th September, 2008, the respondents had filed an application for settlement on 22nd July, 2010 which was disposed of by order dated 26th November, 2010 by imposing penalty and interest. Then again pursuant to the show cause notice dated 9th July, 2010 the petitioner had filed an application for settlement on 12th April, 2011 which was disposed of by the Commission by passing an order imposing penalty. 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. In this context it is to be noted that a show cause notice was issued on 11th November, 2011 and the respondent had filed an application for settlement on 16th May, 2012 admitting the duty liability which was disposed of by order dated 12th October, 2012 by imposing penalty.

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 judgment under challenge had overlooked paragraphs 24, 25, 28, 34 and 35 of the order dated 28th March, 2014 passed by the Commission dealing specifically with the earlier proceedings and the orders passed thereon, as noted hereinbefore. The said orders, under section 32M, are conclusive. That apart, as evident from the records, the respondents had accepted each of those orders passed by the Settlement Commission. It is clear from the order dated 28th March, 2014, particularly paragraphs 24 and 35 thereof, that earlier on four occasions 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 judgment 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 four occasions 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 Prakash 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 versus Ind-Swift Laboratories Ltd. (supra), in Vinod Kumar Mathur (supra) and in Exotica Global (supra) are not applicable.

13. 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.

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