

(2018) 02 GUJ CK 0011
In the Gujarat High Court
Case No : 9353 of 2015

GUARDWELL SECURITY SERVICE P LTD & ANR APPELLANT
Vs
UNION OF INDIA & ANR RESPONDENT

Date of Decision : 16-02-2018

Acts Referred:

[3998](#) Constitution of India, [3998-226](#) Article 226 -
Power of High Courts to Issue certain writs
[3642](#) Central Excise Act, 1944, [3642-32](#) Section 32 -
Customs and Central Excise Settlement Commission

Citation : (2018) 02 GUJ CK 0011

Hon'ble Judges : Akil Kureshi, A.Y. Kogje

Bench : Division Bench

Advocate : NIRAV P SHAH, AVANI S MEHTA

Final Decision : Dismissed

Judgement

1. This petition under Article 226 of the Constitution of India is filed for issuance of an appropriate writ for setting aside the order of the Settlement

Commission. By the impugned order, the application under the scheme of settlement filed under Section 32 of the Central Excise Act, 1944 came

to be rejected.

2. The facts in brief are that the petitioner is engaged in the service of security agency and manpower recruiting agency. It is registered with the

Service Tax Department. Pursuant to the premises visited by the officers of the Service Tax Department on 19.02.2013, a show cause notice

dated 18.04.2013 came to be issued. It is the case of the petitioner that on account of prevailing fluid situation about applicability of the service tax

to security service agency, the service tax was not paid for the particular disputed period. However, after the visit by the officers, the service tax

was substantially paid.

2.1 The petitioner thereafter filed an application, making true and full disclosures of its service tax liability. The application for settlement was heard

by the Settlement Commission. According to the petitioner, the Commission heard the application on 12.06.2014 on the ground of admissibility

and thereafter, by an intimation letter dated 19.12.2014, fixed personal hearing on 08.01.2015 and thereafter, by the impugned order dated

30.01.2015, rejected such application on the ground of non-admissibility.

3. Learned Advocate for the petitioners submitted that the Settlement Commission erroneously rejected petitioners' application on the ground of

non-filing of returns. The petitioners were, in fact, paying the service tax in connection with their other branches. It is submitted that once the

petitioners were heard on the ground of admissibility and the matter was fixed for personal hearing, meaning thereby, the application ought to have

been considered on merits rather than on admissibility.

3.1 Learned Advocate for the petitioners submitted that in view of provisions of Section 32(F)(1), the ground of non-filing of returns is not

sustainable. It is submitted that the observations of the Commission of non-filing of returns is de hors the statute itself.

3.2 It is submitted that the Commission has committed an error in rejecting the application by observing that the petitioners have not deposited the

amount declared in their application. It is submitted that in absence of any dispute to the declaration made by the petitioners, non-deposit of full

amount of the disclosure, may not be the ground for rejecting such application. It is submitted that short deposit is attributable to the human error in

calculating the service tax and interest thereon and was completely unintentional. It is submitted that in any case, the Settlement Commission ought

to have given an opportunity to make good the short payment, which the petitioners, upon realizing the calculation error, would always be ready

and willing to deposit.

4. As against this, learned Advocate for the Department, referring to the affidavit in reply on behalf of the Service Tax Division, submitted that the

order of the Settlement Commission is justified in view of the proviso to Section 32E(1) of the Central Excise Act. It is submitted that for the

period between April 2007 to September 2007, the petitioner has not paid

service tax or filed ST-3 returns. It is submitted that the explanation given with regard to non-filing of returns for such period, was not acceptable as another branch of the petitioner located at Dehradun has filed half yearly returns and ST-3 form for the identical period. It is submitted that the petitioners have also not paid the admitted service tax liability and therefore, in view of proviso to Section 32E(d), the application even otherwise could not have been entertained. It is submitted that the application before the Settlement Commission could not be admitted even on the ground of pending application before the Tribunal in connection with attachment proceedings under Section 87 of the Finance Act. It is submitted that the 3rd proviso to Section 32E(1) prohibits admission of the application by the Settlement Commission in these circumstances.

5. The Court has heard rival submissions of the parties and has gone thorough the documents produced on record. The order of the Settlement Commission is passed on three findings. Firstly, the Settlement Commission was not convinced with the explanation offered by the petitioner regarding the circumstances for not filing the returns referred to in sub-clause-(a) to proviso to Section 32E(1), secondly, impliedly, the petitioners have not made true and full disclosure and thirdly, that the case was pending for decision before the CESTAT in an appeal filed by the Revenue.

6. At the outset, it would be appropriate to refer to the provisions of Section 32F(1), which read as under:-

Section 32F. Procedure on receipt of an 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.

7. In view of the aforesaid provision, it is provided that upon receipt of the application under Section 32E, the Settlement Commission is required

to issue notice within seven days on receipt of such application, calling upon such applicant to explain in writing why the application made for

settlement should be allowed to be proceeded with. The explanation, if offered, upon being taken into consideration within fourteen days from the

date of the notice, the Settlement Commission is to pass an order to allow the application to be proceeded or rejecting the application. The proviso

to the Section provides that where no notice has been issued or no order has been passed within the period mentioned in the Section, the

application shall be deemed to have been allowed to be proceeded with. From the record, it appears that the application before the Settlement

Commission was moved on 21.01.2014, which was received on the same day (Annexure-B) and the settlement application was listed for hearing

on 12.06.2014, wherein the petitioners were represented through their Advocates and the Department was represented through the jurisdictional

Commissioner. Thereafter, in connection with the hearing, a communication dated 19.12.2014 came to be issued, informing the petitioners about

date of hearing on 08.01.2015. In-between, there does not appear to be any communication with regard to the application before the Settlement

Commission. The affidavit in reply on behalf of the Department also does not indicate any proceedings in-between.

8. With regard to the ground regarding pending appeal before the CESTAT, it would be pertinent to mention that the so called pending proceeding

referred to by the Settlement Commission pertains to coercive action initiated under Section 87 of the Finance Act, 1994 freezing five bank

accounts of the petitioners. The appeal of the petitioners came to be allowed by the Commissioner (Appeals) by its order dated 23.12.2013,

against which the Department has preferred appeal before the CESTAT. In the opinion of this Court, such proceeding, for the purpose of this

case, cannot be considered as a restriction under 3rd proviso to Section 32E(1) to entertain the application for settlement.

9. However, insofar as the question of payment of admitted tax is concerned, case of the department requires closer scrutiny. According to the

department, the petitioner had short-paid a sum of Rs.27,40,979/- towards admitted liability. The petitioner however claims that certain deposits

though made were ignored for computing such outstanding liability. Nevertheless, the petitioner admits that sum of Rs.8,87,434/- remained unpaid.

10. It would thus appear that admittedly the petitioner had not paid the full tax on admitted liability. Settlement Commissioner was therefore,

correct in not entertaining the application for settlement on this ground. The statute requires that along with the application, the applicant must

deposit the entire tax on admitted liability. On this ground, the order of the Commissioner is required to be upheld.

11. Even if such liability was discharged later on particularly after the order of Settlement Commission was passed, same would not cure the initial

defect of not paying the tax on admitted liability while applying for settlement. Counsel for the petitioner however, submitted that there is nothing in

the statute to prevent the petitioner from applying again for settlement by demonstrating that the tax has now been paid and as long as case is

pending as defined under the relevant provision, the Settlement Commission would be obliged to entertain such an application.

12. We are not called upon to decide this issue and, therefore, do not make any conclusive observations with respect to this last contention of the

counsel for the petitioner.

13. In the result, in view of the above discussion, petition is dismissed. Rule is discharged. I.R. granted earlier stands vacated.