(2009) 03 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 31012 of 2007

Gujarat Cypromet Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 27-03-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 32E(1A), 32F(1), 32F(7), 32K(1) , 32K(2)
Constitution of India, 1950 — Article 136, 226

Citation : (2010) 254 ELT 455

Hon'ble Judges : S.R. Brahmbhatt, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Mihir Joshi and Utkarsh B. Jani, for the Appellant; Harin P. Raval and Kalpesh N. Shastri, for the Respondent

Judgement

D.A. Mehta, J.—Petitioner has approached the High Court challenging order dated 1-8-2007 made by the Settlement Commission, Additional Bench, Customs & Central Excise, Mumbai, u/s 32-F(7) of the Central Excise Act, 1944 (''the Act''), to the extent the impugned order imposes penalty of Rs. 20,00,000/- and directs charging of interest at the rate of 10% per annum on duty payable on all goods removed from the date of removal up to the date of payment of duty thereon.

2. The principal contention on basis of which the impugned order is assailed partially, namely to the extent of imposition of penalty and levy of interest, is that the Settlement Commission has not assigned any reason while arriving at the figure of Rs. 20,00,000/- while imposing penalty and applying rate of 10% per annum while directing levy of interest. In support of the submissions made reliance was placed on an unreported judgment of this Court rendered on 25-9-2008 in case of Nissan Copper Ltd., Unit No. 1 & 2 v. Union of India Through Secretary & 1, in Special Civil Application No. 4896 of 2008 and cognate matters, to submit that when no reasons are assigned, the order of Settlement Commission cannot be upheld. It was submitted that the impugned order should be set aside and restored to the file of Settlement Commission for deciding the

aforesaid issues afresh. Learned Counsel also placed reliance on judgment of Bombay High Court in the case of West Coast Ingots Pvt. Ltd. v. Union of India 2008 (232) E.L.T. 21, to submit that in a case where it is shown that there was non application of mind, the Court can always interfere. The next judgment was in case of Competent Engineers v. Commissioner of C.Ex., Jalandhar 2007 (220) E.L.T. 36 , to submit that non assigning of reasons for rejection of a claim would give rise to a situation where the Court can exercise discretionary jurisdiction under Article 226 of the Constitution. Apex Court judgment in case of C.B. Gautam Vs. Union of India and Others, was also pressed into service to submit that assigning of reason was always necessary even if the provision did not envisage such a requirement. Lastly, Madras High Court decision in case of Shri Renuga Soft-X Towels, (Spinning and Towels Division) represented by its Shri Renuga Soft-X Towels, (Spinning and Towels Division) and Others Vs. The Commissioner of Central Excise and The Customs and Central Excise Settlement Commission, (Additional Bench), was pressed into service.

A further submission was that considering the financial position of the petitioner company, Settlement Commission ought to have granted appropriate relief by way of waiver of penalty & interest, but Settlement Commission had failed to consider the same, and hence the impugned order was vitiated.

3. Learned Counsel for the respondent authority invited attention to judgment of this Court in case of Kashish Silk Mills Pvt. Ltd. v. Union of India, rendered on 13-9-2004 in Special Civil Application No. 12919 of 2003, to submit that once there was absence of jurisdictional error in the impugned order, it was not open to the High Court to exercise extraordinary jurisdiction under Article 226 of the Constitution. Responding to the submissions of the otherside, learned Counsel placed reliance on the following two decisions of the Apex Court to submit that assigning of reasons is not always necessary, as held by the Supreme Court: (1) Union of India and others Vs. E.G. Nambudiri, (2) Jyotendrasinhji Vs. S.I. Tripathi and others, . Inviting attention to the pronouncement made in paragraph No. 16 of the second judgment, learned Counsel submitted that the entire proceedings before Settlement Commission were in the form of a package deal, and the Court had limited jurisdiction while examining order of Settlement Commission. The Court could only examine as to whether Settlement Commission had followed procedure which was legal and whether the order was contrary to any of the provisions of the Act. Beyond that the Court had no jurisdiction as held by the Apex Court.

4. The facts are not in dispute. It is not necessary to set out the other facts in detail. The petitioner is not aggrieved with the order of Settlement Commission made in relation to the amount of duty under the Act which is settled at a sum of Rs. 1,64,02,180/-. The challenge is only to the part of the order where-under a direction is given to charge interest at the rate of 10% per annum on the duty payable on all goods removed clandestinely from the date of removal up to the date of payment of duty and levy of penalty of Rs. 20,00,000/-.

5. On facts, it is not possible to accept the contention raised on behalf of the petitioners that no reasons are assigned. It is well settled that the order is to be read as a whole and a particular part of the order cannot be read and grievance made while ignoring the remaining part of the very same order. For better appreciation of the contentions relevant part of the order of Settlement Commission as is material for the present matter be reproduced.

3. The final hearing of the case was held on 31-7-2007, when Shri Vipin Kumar Jain, Advocate, assisted by S/Shri Vishal Agarwal, C.A., and Sakat Patwari, C.A., represented the applicant and the co-applicants. The ld. Advocate submitted that the applicant had deposited the entire duty liability of Rs. 1,64,02,118/-. However, due to severe financial constraints Rs. 3,00,000/- was deposited after 30-06-2007 i.e. Rs. 2,00,000/- on 17-07-2007 and Rs. 1,00,000/- on 28-07-2007. He further submitted that though as per the amended Sub-section (1A) to Section 32E, the applicant had to deposit the entire duty liability by 30-6-2007, the Commission can condone the delay if the Commission was of the opinion that there was good reasons for the delay, as the wording used in the Section was ''shall be liable to be rejected''. He also referred to the following judgments of the Hon''ble Apex Court in support of his contentions.

(i) Ganesh Prasad Sah Kesari and Another Vs. Lakshmi Narayan Gupta,

(ii) Superintendent and Remembrancer of Legal Affairs to Government of West Bengal Vs. Abani Maity,

The ld. Advocate finally submitted that the applicant had admitted the entire duty liability as demanded in the Show Cause Notice and had paid it albeit late due to financial constraints. In fine he pleaded for immunity from interest, penalty and prosecution to the applicant and co-applicants.

4. None represented the Revenue. The Revenue, however, vide their report dated 23-11-2005 furnished in terms of Section 32F(1) of the Act have opposed the grant of immunities to the applicant and co-applicants as it was a straight forward case of clandestine removal by the applicant.

5. We have gone through the records of the case and submissions made on behalf of the applicants. Though the applicant failed to deposit Rs. 3,00,000/- out of the admitted duty liability of Rs. 1,64,02,118/- within 30th June 2007, as per amended Section 32E(1A) of the Central Excise Act, 1944, it does not appear to be a deliberate delay. The Bench is satisfied that though this makes their application liable for rejection, but this can be condoned in the circumstances of this case and their application can be taken up for final settlement. The Bench has gone through the facts of the case on record and submissions made by both sides. The Bench, therefore, settles the case u/s 32F(7) of the Act with following terms and conditions:

Central Excise Duty : The amount of Central Excise Duty is settled at Rs. 1,64,02,118/-. This amount already stands paid.

Interest : An interest @ 10% to be charged on duty payable on all goods removed clandestinely from the date of removal upto the date of payment of duty thereon, which shall be paid by the applicant within 30 days from the same is conveyed to him by the jurisdictional Commissioner after due calculation. Immunity from interest over and above 10% is granted.

Penalty : A penalty of Rs. 20,00,000/- (Rupees Twenty Lakhs only) is imposed on the applicant and immunity is granted to him from penalty beyond above amount. Immunity from penalty is granted to the co-applicants.

Prosecution : Immunity from prosecution is granted to the applicant and all co-applicants.

12. The above immunities are granted u/s 32K(1) of the Act. Attention of the applicant is also drawn to the provisions of Sub-section (2) and (3) ibid.

6. When one reads the entire order, it becomes apparent that Commission was conscious of the financial constraints faced by the petitioner as pleaded in paragraph No. 3 and, therefore, the delay in making payment of duty as re-cored in paragraph No. 5 of the impugned order stands condoned. Therefore, the petitioner is not justified in making a grievance that the financial position of the petitioner has not been considered by the Settlement Commission. In so far as levy of interest is concerned, Settlement Commission has fixed the rate at 10% per annum in relation to duty payable on all goods removed clandestinely between the specified period while granting immunity from interest, over & above 10%. Similarly in relation to penalty, the same has been sustained only at a figure of Rs. 20,00,000/-, while immunity from penalty has been granted beyond the said amount and co-applicants have been granted immunity in totality. This aspect has to be appreciated in light of the fact that the principal applicant was the limited company, while as many as six individuals were the co-applicants. Furthermore, all the applicants have been granted immunity from prosecution. If one accepts the contention of the petitioner, no reasons are found in the order as to why duty amount has been fixed at that particular figure, or why all the applicants have been granted immunity from prosecution; and yet the petitioner has no grievance against that part of the order. The petitioner cannot be permitted to pick and choose some part/parts out of the order, when the other part/parts of the order reflect identical consideration and treatment. In the circumstances it is not possible to read the impugned order of Commission as being an order made without application of mind so as to warrant interference.

7. In the case of Jyotendrasinhji (supra), the Apex Court was called upon to decide the scope of powers available to the High Court under Article 226 of the Constitution and powers available to the Apex Court under Article 136 of the Constitution. In this context after referring the contention of the learned Counsel for the respondent authority the Apex Court recorded that there was some force in the submission that the order of Commission was in the nature of a package deal, and that it was not possible to disect the order and an assessee cannot be

permitted to accept what is favourable and reject what is not. The Apex Court further goes on to observe that whether reasons are assigned or not, the inquiry in this context would be only to the extent as to whether the Commission did act in accordance with the provisions of the Act. In other words the Apex Court has laid down, as to whether the order of Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the assessee, is the only inquiry which is permissible in a petition under Article 226 of the Constitution. This is of-course apart from the grounds of bias, fraud, and malice which constitute a different category by itself. The Court has further held that the scope of judicial review in a petition under Article 226 of the Constitution is only in relation to the decision making process and not the decision itself nor the validity of the order. The relevant part of he Apex Court judgment reads as under:

May be, there is also some force in what Dr. Gauri Shankar says viz., that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the asessee should not be permitted to accept what is favourable to him and reject what is not. According to learned Counsel, the Commission is not even required or obligated to pass a reasons order. Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to give reasons for its order. Even if it gives reasons in given case, the scope of enquiry in the appeal remains the same as indicated above viz., whether it is contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (audi alteram partem) has been incorporated in Section 246-D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same - whether the order of the commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant. Apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another, which too was a appeal against the orders of the Settlement Commission. Sabyasachi Mukharji, J, speaking for the Bench comprising himself and S.R. Pandian, J, observed that in such a case this Court is "concerned with the legality of procedure followed and not with the validity of the order." The learned Judge added "judicial review is concerned not with the decision but with the decision-making process". Reliance was placed upon the decision of the House of Lords in Chief Constable of the N.W. Police v. Evans (1982) 1 WLR 1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that the order of the commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant.

8. The contention on behalf of the petitioner that the aforesaid judgment of the Apex Court was in relation to interpretation of trust deed and violation of provisions of Income Tax Act, 1961, and therefore, the extracted portion reproduced herein before should not be read as ratio of the judgment, does not merit acceptance. The Apex Court has categorically stated that it was not necessary to go into correctness of interpretation placed upon the trust deed by the Settlement Commission and it was enough if the Court confines itself to the question whether order of Commission was contrary to the provisions of the Act. Only for the purpose of completeness the Court then proceeded to examine whether the order of Commission was vitiated by any such wrong interpretation. From the findings recorded in paragraph No. 17 of the said judgment of the Apex Court, it is not possible to state that every order of Settlement Commission has to be a reasoned order, otherwise the same would stand invalidated in law. In this context, the unreported judgment of this Court in case of Nissan Copper Ltd. Unit No. 1 & 2 (supra) on which a great deal of emphasis was laid may be considered. As recorded in paragraph No. 9 of the judgment, the controversy before the Court was limited to the group of petitions wherein, in one set of orders Settlement Commission had assigned reasons for waiver of interest and/ or penalty, while in another set no reasons were assigned. It is in the aforesaid context that the Division Bench of this Court has held in paragraph No. 13 as under:

13. Therefore, as no reasons are assigned for deviating from the normal practice of levying the penalty and fine and as there is no discussion or reason or justification, it is required to be set aside. It is required to be appreciated that in respect of the administrative orders, the reasons are necessary as it reflects about the decision making process and also the justification for exercise of discretion one way or the other.

Therefore, even this judgment does not lay down that any detailed reasons are required to be assigned by the Settlement Commission in all cases in all circumstances..

9. Similarly, it is not necessary to deal with various other decisions cited on behalf of the petitioners. In so far as the case of C.B. Gautam (supra) is concerned, the Apex Court has made the relevant observations in paragraph No. 32 of the judgment in context of the challenge to constitutional validity of Chapter XX-C of the Income Tax Act, 1961, whereunder property of a citizen was provided to be compulsorily acquired in the circumstances laid down in the provisions of the said chapter. Therefore, even the said judgment cannot assist the case of the petitioners.

10. In the aforesaid facts & circumstances of the case, the impugned order of Settlement Commission does not suffer from any legal infirmity so as to warrant interference. It is necessary to reiterate the fact that the petitioner is aggrieved only by one part of the order, while being satisfied with the other part of the order in relation to the fixation of liability to pay duty and the assessee being granted immunity from prosecution. Therefore also it is not permissible to undertake an exercise to disect the order and hold that the part with which the petitioner aggrieved is bad in law, while the decision making process qua other part of the order is correct and justified, because the nature and format of entire order is the same.

11. The petition is accordingly rejected. Notice discharged. There shall be no order as to costs.