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**(2013) 09 BOM CK 0079**

**In the Bombay High Court**

**Case No : Writ Petition No. 4970 of 2013**

Mr. Kantilal B. Mohite

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision : 25-09-2013**

**Acts Referred:**

**Citation :** (2014) 2 BomCR 396 : (2014) 306 ELT 51 : (2013) 42 GST 173

**Hon'ble Judges :** Mohit S. Shah, C.J;M.S. Sanklecha, J

**Bench :** Division Bench

**Advocate :** Sanjiv Sawant instructed by Ketan Joshi and Sameer Kale, for the Appellant; A.S. Rao and Mr. N.V. Kalantri, for the Respondent

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## **Judgement**

1. Rule. By consent, rule made returnable forthwith. At the instance and request of the Counsel both the petitions are taken up for hearing. What is challenged in these two petitions under Article 226 of the Constitution of India is the common order dated 12 December 2011 of the Settlement Commission u/s 32F of the Central Excise Act, 1944 ("the Act").

2. Since we propose to set aside the impugned order only on the ground of failure to grant a personal hearing with liberty to the Settlement Commission to pass a fresh order after hearing the petitioner, it is not necessary to set out the facts in detail. Suffice to state that the petitioner in Writ Petition No. 4970 of 2013 is the applicant before the Settlement Commission to whom a show cause notice has been issued demanding excise duty while the petitioner in Writ Petition No. 4971 of 2013 is the co-applicant before Settlement Commission to whom a show cause notice has been issued proposing a penalty.

3. In view of the admitted position, learned Counsel for the petitioner submitted that in view of failure of granting a hearing to the petitioners, the Settlement Commission has not fully appreciated the petitioners' submissions while dismissing both the applications. It is the case of the petitioners that in their facts there arose no occasion to file returns showing production and clearance of

the goods manufactured as they were only at the stage of trial production. It support of this submission reliance is placed upon Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008. Reliance is also placed upon the decision of the Supreme Court in R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another, wherein it was held in the context of Income Tax Act, 1961 that Settlement Commission is required to observe procedural fairness and follow the principles of natural justice.

4. Learned Counsel for the respondent-department submits that the condition precedent in terms of the first proviso to Section 32E of the Act requiring that the applicant before the Settlement Commission should have filed returns showing production and clearance of goods is admittedly not satisfied. Therefore, the applications cannot be entertained. In support, reliance is placed upon the decision of the Gujarat High Court in R. Builders vs. Union of India (223) ELT 348 (Gujarat) and the decision of the Delhi High Court in J.R.B. Engineering Works Vs. Customs and Central Excise Settlement Commission and Another, .

5. We have heard the learned Counsel for the parties. We find that at first blush the submissions of the learned Counsel for the respondent-revenue that the impugned orders of the Settlement Commission calls for no interference as condition precedent for making an application u/s 32E of the Act is not satisfied appears attractive. Even though the requirements of Section 32E of the Act as provided in the first proviso thereto are threshold requirements for making an application for settlement yet in the present facts, the rejection of the application on the above basis without considering the context would lead to injustice. The case of the petitioner before the Settlement Commission was that in its case the filing of returns of production was an impossibility because there was no commercial production and therefore, the requirement should be ignored. The Settlement Commission has refused to believe the petitioner's case that there was only trial production and no commercial production. This question could have been appropriately considered only after giving the petitioner an opportunity of hearing as the impugned order itself makes a reference to an earlier order passed by the Settlement Commission on 17 October, 2007 wherein the application was entertained holding that filing of returns was not a legal necessity for the purposes of admitting an application for settlement. Therefore in the above context, a personal hearing was necessary before the Settlement Commission finally decides whether to proceed or not with the applications.

6. We are conscious of the fact that Section 32F(1) of the Act provides for seeking an explanation in writing from the applicants as to why the applications should be proceeded with, while Section 32F(5) of the Act mandates giving of personal hearing while disposing of the application at the final hearing. However, Section 32F(1) of the Act does not prohibit the Settlement Commission from granting a personal hearing in respect of explanation offered by the applicant if the context so requires. This would be so even if one does not read the necessity

of giving a personal hearing into Section 32F(1) of the Act, as applicable in all cases. In the facts of this case not giving of a hearing to the petitioners does cause prejudice to the petitioners. At the personal hearing they could have explained the manner in which the earlier order dated 12 October 2007 of the Settlement Commission is applicable to their case. In this case the granting of personal hearing was in the context of the facts not an empty formality but required so as to do complete justice in the matter. The case law relied upon by the respondent-revenue does not deal with the issue of the Settlement Commission dismissing the applications without hearing the applicants before it and also do not have the peculiar facts of this case.

7. In view of the above, we set aside the impugned order and direct the Settlement Commission to decide the matter afresh after giving an opportunity of personal hearing to the petitioners. We make it clear that we have expressed no opinion either on the merits of the application before the Settlement Commission or on maintainability of the application. It is for the Settlement Commission to decide the applications as it deems fit in accordance with law. Rule is made absolute in terms of the above direction. No order as to costs.