

(2017) 04 AP CK 0032
In the Andhra Pradesh High Court
Case No : 6871 of 2017

M/s. Concrete Constructions

APPELLANT

Vs

The Union of India And others

RESPONDENT

Date of Decision : 17-04-2017

Acts Referred:

Central Excise Act, 1944, Section 37C,
Section 32E - Service of decisions, orders, summons, etc. -
Application for settlement of cases

Citation : (2017) 04 AP CK 0032

Hon'ble Judges : V. Ramasubramanian, J. Uma Devi

Bench : DIVISON BENCH

Advocate : S. Vivek Chandrasekhar, B. Narasimha Sarma

Judgement

1. The petitioner, who is engaged in the business of construction, has come up with the present writ petition challenging an Order-in- Original passed by the 4th respondent herein, demanding payment of service tax to the tune of Rs.1,20,92,847/-, together with interest and penalty.
2. Heard Mr. S. Vivek Chandrasekhar, learned counsel for the petitioner and Mr. B. Narasimha Sarma, learned standing counsel for the respondents.
3. By a Show Cause Notice dated 19-04-2016, the 3rd respondent called upon the petitioner to show cause as to why service tax, interest and penalty for the period from October 2010 to March, 2015 should not be levied. It appears that even before the show cause notice was issued, the petitioner had made payment of a sum of Rs.50,00,000/- on 07-08-2015 and Rs.20,00,000/- on 16-04-2016. Immediately after receipt of the show cause notice, the petitioner also paid the balance of service tax in a sum of Rs.50,92,847/- on 10-05-2016.
4. It appears that the petitioner also submitted a reply to the show cause notice and participated in the personal hearing.
5. Thereafter, the petitioner decided to go before the Settlement Commission by

invoking the provisions of Section 32E of the Central Excise Act, 1944 and hence, sent a letter dated 27-12-2016 requesting the 4th respondent to defer the adjudication to enable them to approach the Settlement Commission. To prove their bona fides, the petitioner also made payment of a sum of Rs.75,73,898/- on 31-12-2016 towards interest component. The factum of payment of interest was also informed by the petitioner to the 4th respondent by a letter dated 03-01-2017.

6. However, the petitioner was served on 18-01-2017, with an Order-in-Original dated 24-12-2016 confirming the demand for payment of service tax. It was followed by attempts to take coercive steps. Therefore, contending that their right to approach the Settlement Commission under Section 32E has been destroyed by the impugned Order-in-Original, the petitioner has come up with the present writ petition.

7. The issue arising for consideration in this writ petition is very simple and lies in a narrow campus. Section 32E of the Central Excise Act, 1944 enables an assessee to make an application to the Settlement Commission before adjudication. In the case on hand, the Order-in-Original bears the date 24-12-2016. But it was served on the petitioner on 18-01-2017 as seen from the acknowledgment. Another copy sent by speed post was received by the petitioner on 25-01-2017.

8. Therefore, the contention of the petitioner is that since they made a request on 27-12-2016 itself to defer the adjudication to enable them to go before the Settlement Commission, much before the order of adjudication was served on them, the Order-in-Original is liable to be set aside. It is the contention of the learned counsel for the petitioner that the words before adjudication appearing in Section 32E has to be understood to mean the communication of the order of adjudication in accordance with the procedure prescribed under Section 37C of the Act. In other words it is the contention of the petitioner that till the order of adjudication is actually served on the petitioner, the right conferred by Section 32E cannot be taken away.

9. We have carefully considered the above submissions.

10. It is true that no order passed by an administrative or quasi-judicial authority will take effect unless it is served on or communicated to, the person affected by such order. It is this fundamental principle that finds statutory recognition in Section 37C.

11. But there are different types of rights that accrue to a person against whom proceedings for adjudication are initiated. One type of rights are those that flow either out of or against an order of adjudication. Another type of rights are those that are available live, till an adjudication is made.

12. In so far as the first category of rights is concerned, the procedure prescribed by Section 37C of the Act would automatically come into play. Unless

and until an order of adjudication is communicated to an assessee, he will not acquire a knowledge or right to challenge the same in a manner known to law. Service of the copy of the order of adjudication is a sine qua non for the period of limitation for filing of an appeal to commence.

13. In fact Section 35 (1), which deals with first appeals to Commissioner (Appeals) and Section 35B (3), which deals with appeals to the Appellate Tribunal, take care of the contingency that an order of adjudication may be passed and kept in the shelf of the adjudicating officer and that the right to file an appeal cannot be defeated by non-communication of the orders of adjudication. Section 35 (1) uses the words from the date of the communication to him of such decision or order. Similarly, Section 35B (3) also uses the words from the date on which the order sought to be appealed against is communicated. Section 35EE, which provides for a revision to the Central Government, also uses the words from the date of communication in sub-section (2). Similarly, Section 35G, which provides for an appeal to this Court, also uses the words the order appealed against is received by the Commissioner or the other party.

14. Therefore, it is clear that wherever the statute deals with a right flowing as against an order of adjudication, the statute used the words from the date of communication or communicated or from the date of communication or the date on which the order was received.

15. In contrast to the words used in 4 different provisions, namely Section 35(1), Section 35-B(3), Section 35-EE(2) and Section 35-G(2)(a), the statute uses the expression before adjudication in Section 32-E(1). This is due to the fact that the right to approach the Settlement Commission conferred by Section 32E is a completely different type of right than the rights that an assessee or department would have, as against an order of adjudication passed under the Act. Once this distinction between these two types of rights is understood, then it will be clear that the words before adjudication appearing in Section 32E (1) cannot be given the same meaning as is normally given to orders, decisions or judgments.

16. Drawing our attention to the amendment brought forth by Amendment Act 22 of 2007 to Section 32E (1), it was contended by Mr. S. Vivek Chandrasekhar, learned counsel for the petitioner that before the amendment, the right to approach the Settlement Commission was available at any stage of a case. The expression case was defined under Section 31 (c) to mean any proceeding under the Act for the levy, assessment and collection of excise duty or any proceeding by way of appeal or revision. Therefore, before the coming into force of Amendment Act 22 of 2007, an application before the Settlement Commission could be filed even after disposal of an adjudication. But by the Amendment Act 22 of 2007, the words at any stage of a case have been deleted and the words before adjudication has been inserted. Therefore, it was contended by Mr. Vivek Chandrasekhar, learned counsel for the petitioner that after the amendment, the petitioner cannot even make an application, after the adjudication and that

therefore, a narrow and strict interpretation may destroy the very object of Section 32E.

17. We have carefully considered the above submissions.

18. It is true that Section 32E (1) as it stood before the amendment of 22 of 2007 enabled an assessee to make an application at any stage of a case. But the first proviso to Section 32E (1) even before amendment made it clear that no application can be entertained by the Settlement Commission in cases, which were pending with the Appellate Tribunal or any Court. The same prescription is retained under the third proviso to Section 32E (1), even after amendment. In other words, what was the first proviso under Section 32E (1) before amendment has now become the third proviso after amendment. The only area where there was some difference was that the definition of the word case under Section 31 (c) underwent a drastic change by the Amendment Act 22 of 2007. Prior to amendment, the filing of an appeal or revision after the expiry of the period of limitation, was treated to be not a proceeding pending within the meaning of the clause. This was under the proviso to Section 31 (c). But this proviso has now been substituted by a new proviso.

19. Therefore, the question as to whether the assessee would have a right after adjudication does not arise any more, after Amendment Act 22 of 2007. The right is conferred by Section 32E (1) only before adjudication and not after adjudication, at least after Amendment Act 22 of 2007.

20. Mr. S. Vivek Chandrasekhar, learned counsel for the petitioner placed heavy reliance upon the decision of the Bombay High Court in Vishnu Steels v. Union of India . The said decision arose out of very peculiar facts. In the said case, an application for settlement was filed on 14-01-2011, a day after the order of adjudication was passed on 13-01-2011. Two Members of the Settlement Commission held that since the application was made after adjudication, the application was not maintainable. But the Third Member held the application to be maintainable, on the basis of the decision of the Delhi High Court in Qualimax Electronics Private Limited v. Union of India [(2010) 257 ELT 42]. In Qualimax Electronics Private Limited, the Delhi High Court held that a literal construction of the words before adjudication may lead to the danger of adjudicating authorities preempting the assessee from approaching the Settlement Commission, either by hastily passing orders of adjudication at the last minute or by back dating the orders. Therefore, instead of taking either the date reflected in the order of adjudication or the date on which the order was actually served on the assessee, the Delhi High Court struck a via media by holding that the application before the Settlement Commission could be filed till such time the order of adjudication was signed and the one way process of sending it to the assessee is put in motion either directly or indirectly through some other agency. In other words, the Delhi High Court avoided taking both extreme positions. If an order of adjudication had been signed and there was proof of dispatch, irrespective of whether it was actually served on the assessee or not, the date of such dispatch, according to

the Delhi High Court, may shut the door for an assessee to approach the Settlement Commission. It was this view of the Delhi High Court in Qualimax Electronics Private Limited that was accepted by the Division Bench of the Bombay High Court in Vishnu Steels. Going a step further, the Division Bench of the Bombay High Court also held that the expression before adjudication should receive the purposive interpretation.

21. But, with great respect, we are unable to accept the views of the Delhi High Court in Qualimax Electronics Private Limited and that of the Bombay High Court in Vishnu Steels. The reason is that when the statute carefully and deliberately employs a particular expression, in a particular provision and such language stands in contrast to the language used in the other provisions of the same statute, there is no scope for the Court to give a purposive interpretation. As we have pointed out earlier there are two types of rights conferred upon the assessee under the Central Excise Act, 1944. One set of rights is placed on fight mode. The other set of rights is placed on settlement mode. At all places where the statute dealt with the rights of the assessee in the fight mode, the statute used the words from the date of communication or from the date of receipt or the date on which it was communicated etc. But while dealing with the rights on the settlement mode conferred upon the assessee, the statute carefully avoided the words date of communication or date of receipt etc., but chose to employ the words before adjudication. That the choice of the language was consciously made with the intention of depriving persons on the fight mode, the right to seek settlement, is made clear by the manner in which Section 32E (1) was amended under the Amendment Act 22 of 2007. As we have indicated earlier, the right to approach the Settlement Commission before the Amendment Act 22 of 2007 was at any stage of the case. After amendment it is only before adjudication. Therefore, the communication or service of the copy of the order of adjudication, gives rise to a different set of rights and it should not be confused with a right to approach the Settlement Commission. As rightly pointed out by a Division Bench of the Punjab and Haryana High Court in Ankush Khullar v. Union of India , the order of adjudication denudes the Settlement Commission of its jurisdiction to entertain an application. Therefore, in as much as the order of adjudication bears the date 24-12-2016, the request made by the petitioner on 27-12-2016 and the service of the copy of the order of adjudication upon the petitioner on 18-01-2017 or 25-01-2017 will not enable the petitioner to exercise the right under Section 32E (1).

22. As a matter of fact the petitioner has not approached the Settlement Commission even till date. By the letter dated 27-12-2016, the petitioner merely requested the 4th respondent not to pass an order of adjudication, so that he could go before the Settlement Commission. At least if the petitioner had made an application on 27- 12-2016 before the Settlement Commission claiming ignorance of the order of adjudication dated 24-12-2016, he may be entitled to raise all the legal issues, which we have discussed in the preceding paragraphs. But even till date the petitioner has not made any application before the

Settlement Commission. But admittedly the order of adjudication has been served at least on 18-01-2017. Therefore, the petitioner is not even entitled to raise any of the above issues.

23. Hence, the writ petition is dismissed leaving it open to the petitioner to file a statutory appeal as against the Order-in-Original. In case there is any delay on the part of the petitioner in filing an appeal, the Appellate Authority may deal with the question of delay leniently. No costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.