
(2012) 12 BOM CK 0059

In the Bombay High Court

Case No : Writ Petition No. 3613 of 2011

M/s. Indorama Synthetics (India) Ltd.

APPELLANT

Vs

Union of India, Settlement Commission, Customs and Central
Excise, Commissioner of Central Excise and Directorate
General of Central Excise Intelligence

RESPONDENT

Date of Decision : 19-12-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 1 ALLMR 761 : (2013) 290 ELT 208 : (2013) 18 GSTR 138

Hon'ble Judges : M.S. Sanklecha, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : Sridharan, with Mr. Prakash Shah instructed by PDS Legal, for the Appellant; Vijay Kantharia with Mr. J.B. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Sanklecha, J.—This petition under Article 226 of the Constitution of India challenges the order dated 8/2/2011 of the Settlement Commission, Customs and Central Excise (Settlement Commission) to the extent it (i) rejects the claim of the petitioner for reduction of demand of Rs. 29,65,850 from and out of the demand of duty of excise on special discount; (ii) imposes a penalty of Rs. 15 lacs on the petitioner; and (iii) directs payment of simple interest at the rate of 10% from the period settled amount is due till the date of payment. However, at the hearing, Mr. Sridharan, the learned Senior Counsel appearing for the petitioner has made submissions only challenging imposition of penalty of Rs. 15 lacs by the impugned Order. Consequent to a search, show cause notice dated 30/11/2005 demanding in the aggregate a duty of Rs. 3.30 crores was issued to the petitioner. The notice alleged that during the period April, 2001 to September, 2002 the petitioner had cleared partially oriented yarn (POY) of higher grade by downgrading the variety of POY in its invoices and thus discharging duty on a lower value. Further during the period from 2000-01 to 2002-03 the petitioner had allowed special discount to certain select customers

so as to reduce the value of its goods. This resulted in paying duty on lower value. However, these special discounts were received back by the petitioner from the select customers. Therefore evasion of duty is alleged. Therefore the petitioner was called upon to show cause why equivalent penalty u/s 11AC of the Act should not be imposed as valuation fraud was alleged. The petitioner was also served with another show cause notice dated 30/11/2005 seeking to confiscate POY valued at Rs. 44.30 lacs.

2. On receipt of the show cause notice dated 30/11/2005 the petitioner opted to settle the dispute before the Settlement Commissioner. On 1/6/2006 the petitioner filed a Settlement Application before the Settlement Commission u/s 32E of the Act. In its application the petitioner accepted the duty liability of Rs. 1.89 crores as against the total demand of Rs. 3.30 crores while praying for immunity from penalty, interest and prosecution. In its application for settlement, the petitioner has admitted and accepted the allegations contained in the show cause notice.

3. The Settlement Commission by order dated 8/2/2011 settled the dispute directing the revenue to rework the amounts after granting the petitioner the benefit of cum duty price in respect of the differential price. The impugned order dated 8/2/2011 while granting immunity from prosecution, imposed a penalty of Rs. 15 lacs on the petitioner besides waiving interest in excess of 10% simple interest.

4. Mr. Sridharan, learned Senior Counsel in support of the petition invites our attention to the Paragraph 15 of the impugned order which reads as under:

15- The applicant has come forward with the plea that the duty demands in respect of the two situations discussed above have not been substantiated and that the liabilities have been admitted to avoid prolonged litigation and in the spirit of settlement. In respect of the flow back of the special discount amount, it has been submitted that the payments were against outstanding dues by the respective customers. Further no flow back has been alleged in respect of lower invoicing of good quality POY as non standard material. Leniency in the terms of settlement have been sought on these plea. The Bench, however, does not find it necessary to go into details of these claims as the applicant has already admitted the duty liability, but for the claim of quantity discount and cum duty price benefit as discussed above. The bench also does not consider it appropriate to disregard the valuation fraud committed by the applicant resulting in evasion of duty on the plea of no extra realization from the customers. Accordingly the Bench finds no reason to alter the quantum of penalties and the extent of immunities granted by commission in the earlier order dated 18/1/2008.

(Emphasis supplied)

On the basis of the above he submits that the impugned order has imposed penalty without considering the submissions of the petitioner. It is submitted that the Settlement Commission is a statutory body and obliged to pass reasoned

orders. It is Mr. Sridharan's submission that the breach of law on the part of the Petitioner was not deliberate and thus the impugned order is bad. It is submitted that the petitioner had sought settlement only with a view to avoid prolonged litigation. It was next submitted that merely because duty liability has been admitted by a party it does not follow that the penalty is imposable. In support of the aforesaid submission, he relied upon a decision of the Supreme Court in the matter of Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, . The decision making process has been vitiated and therefore this court should exercise its jurisdiction and set aside the impugned order to the extent it has imposed a penalty of Rs. 15 lacs without any discussions.

5. As against the above, Mr. Vijay Kantharia, Counsel appearing for the revenue relies upon the order of the Settlement Commission and submits that impugned order calls for no interference. This is particularly so as the petitioner has itself opted to forgo the normal process of adjudication and seek settlement. Further, the impugned order has exercised discretion and imposed a penalty of Rs. 15 lacs and not an equivalent penalty as proposed in the show cause notice.

6. We have considered the submissions. It is an undisputed position that the petitioner had opted to go before the Settlement Commission to settle the dispute when show cause notices dated 30/11/2005 issued to it were pending adjudication before the Commissioner of Central Excise, Nagpur. The Settlement Commission has been constituted as an extra ordinary measure to enable a defaulting person to make a full and complete disclosure/confession to have the matter settled. It is not a place where one can challenge the show cause notice on merits. In this case the petitioner has made a conscious decision of not going ahead with pending adjudication proceeding but availing the remedy of settlement provided under the Act. Full and complete disclosure is a sine qua non to invoke the jurisdiction of the Settlement Commission. In an application made u/s 32E of the Act, an applicant has to make a full and true disclosure of his duty liability including admission of short levy on account of misclassification, under valuation etc. In light of the above admissions, made by the petitioner in its application for settlement as set out in Paragraph 1 thereof is as under:

1- Details of information which has not been correctly declared in the monthly return:

The applicants submit that during the period from April 2002 to Sept.2002 they had cleared partially oriented yarn of higher grade by down grading the variety and by discharging duty on the lower value. The invoices showed the down graded variety of POY whereas the packing slip and other documents showed clearance of higher grade. Further, during the period from 2000-01 to 2002-03 the applicants had allowed special discounts to select customers and duty was paid on the reduced value. The special discount allowed was received back from the customers. On these two amounts the applicants had not discharged duty as proposed in the show cause notice at the time of removal of goods.

Further, in the application for settlement and seeking immunity from penalty, interest and prosecution the petitioner has submitted in Paragraph 38 of its application as under:

The applicant submit that the present application is being filed before this Hon"ble Settlement Commission admitting and accepting the allegations contained in the show cause notice.

It is very pertinent to note that the show cause notice dated 30/11/2005 has alleged deliberate mis-declaration i.e. valuation fraud and the manner in which it was done. Thus the acceptance of undervaluation and the allegation of a deliberate and fraudulent undervaluation is an accepted position.

7. In the light of the above, once the allegations in the show cause notices are admitted by the petitioner, it is not open to the petitioner to contend that the Settlement Commission ought to have passed a detailed reasoned order before imposing a penalty of Rs. 15 lacs. It is also important to note that the Settlement Commission in the impugned order while settling the matter proceeded on the basis of the admission of the petitioner and applied the same test while imposing penalty. It is most relevant to note that in the spirit of settlement the Settlement Commission has imposed a penalty of only Rs. 15 lacs and not equivalent penalty as proposed in the show cause notice issue for adjudication.

8. The contention of the petitioner by relying upon the Apex Court in the matter of Sir Shadi Lal Sugar and General Mills Ltd. (supra) that even if the duty liability is accepted, penalty is not ipso facto imposable is inappropriate in the present facts. In the above case the Apex Court was dealing with the order of Tribunal which is a final fact finding and adjudicatory body under the Income Tax Act. While considering the order of the Tribunal, the Apex Court held that any admission for the purpose of tax would not necessarily lead to the conclusion that it was also an admission that amount was concealed. It was held that, in such cases, the revenue has to prove mens-rea on the part of the assessee before imposing any penalty. In this case there is an admission on the part of the petitioner with regard to conduct which alleges deliberate mis-declaration under valuation. Thus in the present facts mens rea was an admitted position and therefore not an issue before the Settlement Commission. Therefore, the Apex Court order in Sir Shadi Lal Sugar and General Mills Ltd. (supra) would have no application. Further we find that the impugned order does indicate/disclose the reasons for imposing a penalty. In para 15 of the impugned Order the Settlement Commission decided not to consider/examine the pleas of the petitioner on merits of duty demand as the same was admitted by the petitioner and for that very reason also does not disregard the valuation fraud for the purposes of imposing penalty. In the circumstances, there has been no breach of law in the decision making process and the order imposing penalty does disclose the mind of the Settlement Commission in imposing penalty. In any case in view of the admission of the petitioner, no prejudice is caused to it in case a penalty of Rs. 15 lacs is imposed. Therefore, we find that there is no fault with the decision

making process and are not inclined to interfere.

9. We wish to make it clear that in the peculiar facts of this case we have not examined the issue whether it is open to challenge a part and accept the other part of the order of the Settlement Commission even when admittedly an order of the Settlement Commission is in the nature of a package deal. In view of the above, we see no reason to entertain the petition. The petition is dismissed with no order as to costs.