

(2013) 03 BOM CK 0116

In the Bombay High Court

Case No : Writ Petition No. 1402 of 2012

M/s. Vishnu Steels

APPELLANT

Vs

The Union of India and Another

RESPONDENT

Date of Decision : 15-03-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1), 31(c), 32E, 32E(1), 35E(3)
Land Acquisition Act, 1894 — Section 12(2), 18(1)

Citation : (2013) 4 ALLMR 68 : (2013) 197 ECR 12 : (2014) 299 ELT 292 :
(2013) 21 GSTR 164 : (2013) 4 MhLj 869

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : M.H. Patil with Ms. Aparna Hirandagi, for the Appellant; Y.M. Bhate with Mr. S.D. Bhosale, for the Respondent

Judgement

D.Y. Chandrachud

1. Rule; with the consent of Counsel for the parties returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal. The Petitioner challenges an order passed by the Settlement Commission by which an application u/s 32E of the Central Excise Act, 1944 for settlement of the dispute arising out of a notice to show cause dated 24 June 2010 issued by the Additional Director General, DGCEI, Mumbai demanding differential duty of Rs. 1.73 crores and CENVAT credit of Rs. 8.77 lakhs has been dismissed on the ground that it is not maintainable. The order of the Settlement Commission is on a split verdict. Two members of the Settlement Commission have held that since the application for settlement was filed on 14 January 2011, a day after the order of adjudication dated 13 January 2011, it was not maintainable u/s 32E. The third member of the Settlement Commission has however held, following the judgment of a Division Bench of the Delhi High Court in Qualimax Electronics Pvt. Ltd. Vs. Union of India (UOI) and Others, that an order of adjudication is made on the date on which the adjudicating authority dispatched it to the assessee and since the date of dispatch was after the filing of

the settlement application, the application was maintainable.

2. The Petitioner is engaged in the manufacture of excisable goods falling under Chapter 72 of the Central Excise Tariff. On 24 June 2010, a notice to show cause was issued to the Petitioner by the Additional Director General, DGCEI, Mumbai, demanding differential duty of Rs. 1.73 crores u/s 11A(1) of the Central Excise Act, 1944 and CENVAT credit amounting to Rs. 8.77 lakhs together with interest. During the course of the adjudication proceedings, the Petitioner sought copies of documents, which were relied upon in the notice to show cause, by a letter dated 9 September 2010, and sought an extension of time to respond to the notice to show cause. This request was reiterated in a letter dated 28 October 2010. On 29 October 2010, a letter of the Superintendent (Adjudication) was dispatched to the Additional Director General, DGCEI, Mumbai, calling upon him to arrange for supply of copies of documents which were relied upon in the notice to show cause. On 10 December 2010, the Petitioner reiterated the request for the supply of the documents. In the meantime, the hearing on the show cause notice was adjourned on several dates before the adjudicating authority. On 15 December 2010, the Petitioner reiterated its earlier request for disclosure of documents and informed the adjudicating officer that it was exploring the possibility of filing a settlement application. Since the Petitioner was yet to obtain copies of the documents, it requested that the adjudication may be held in abeyance for a period of three or four weeks. On 10 January 2011, the Petitioner's Advocate addressed a letter to the Commissioner specifically stating that a decision had been taken to file a settlement application u/s 32E of the Central Excise Act, 1944. Together with the letter, which was received by the Commissioner on the same day, the Petitioner enclosed a copy of the GAR-7 challan reflecting the payment of the fee for filing of the settlement application. The letter indicated that the Petitioner was working out the duty liability together with interest since it was required to be paid before the filing of an application before the Settlement Commission. The letter recorded that the Petitioner would file an application for settlement of the case probably within that week itself and requested the Commissioner to keep the adjudication proceedings in abeyance, until a settlement application was filed. On 11 January 2011, the Superintendent (Adjudication) addressed a letter to the DGCEI for supply of documents relied upon in the notice to show cause to the Petitioner. The Commissioner, notwithstanding the request of the Petitioner and without waiting for the supply of documents to the Petitioner as sought, passed an order dated 13 January 2011 adjudicating upon the notice to show cause. The Petitioner filed a settlement application before the Settlement Commission on 14 January 2011. The order of adjudication was dispatched to the Petitioner on 19 January 2011.

3. On these facts, a majority of two members of the Settlement Commission held that u/s 32E, an application to the Settlement Commission has to be filed by an assessee to have a case settled before adjudication. The majority held that the settlement application, which was filed on 14 January 2011, was not maintainable since the Commissioner had already adjudicated upon the notice to

show cause on 13 January 2011. In the view of the majority, though the Petitioner had informed the Commissioner by a letter during the course of the hearing on 8 January 2011 of his intention to file settlement proceedings, the settlement application was filed "as late as on 14 January 2011". The majority held that there was no explanation as to why the Petitioner had not filed the settlement application between 24 June 2010 and 13 January 2011. Hence the application was held to be not maintainable. On the other hand, the dissenting member of the Settlement Commission held that in view of the judgment of the Delhi High Court in Qualimax Electronics Private Limited (*supra*), an adjudication is complete upon the adjudicating authority placing the order of adjudication beyond its control by dispatching it to the assessee. In the present case, it was held that since the dispatch took place on 19 January 2011, the application which was filed before the Settlement Commission on 14 January 2011 was maintainable.

4. Section 32E of the Central Excise Act inter alia provides as follows:-

SECTION 32E. Application for settlement of cases. --

(1) An assessee may, in respect of a case relating to him, make an application, before adjudication, to the Settlement Commission to have the case settled, in such form and in such manner as may be prescribed and containing a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction, the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by him and such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification, undervaluation, inapplicability of exemption notification or CENVAT credit or otherwise and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless, --

(a) the applicant has filed returns showing production, clearance and Central excise duty paid in the prescribed manner;

(b) a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant;

(c) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and

(d) the applicant has paid the additional amount of excise duty accepted by him along with interest due u/s 11AB:

Provided further that no application shall be entertained by the Settlement Commission under this subsection in cases which are pending with the Appellate Tribunal or any court:

Provided also that no application under this sub-section shall be made for the

interpretation of the classification of excisable goods under the Central Excise Tariff Act, 1985 (5 of 1986).

5. The expressions "case" is defined in Section 31(c) which reads thus:-

"case" means any proceeding under this Act or any other Act for the levy, assessment and collection of excise duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 32E is made:

Provided that when any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause;

6. Section 32E stipulates that an assessee may, in respect of a case relating to him, make an application before adjudication to have the case settled. The assessee is, however, required to make a full and true disclosure of its liability which has not been disclosed to the Central Excise officer, the manner in which such liability has been derived, the additional amount of excise duty which is accepted to be payable and such other particulars as may be described. The expression "case" is defined to mean any proceeding under the Act or in any other Act for the levy, assessment or collection of excise duty which is pending before an adjudicating authority on the date on which an application u/s 32E(1) is made. Section 32E provides two points in time which define the maintainability of an application before the Settlement Commission. The first point in time is a point before which an application cannot be filed for settlement of a case. Proviso (b) stipulates that an application cannot be filed unless a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant. The second point in time is a point after which an application for settlement cannot be filed. An application for settlement has to be filed before adjudication. In other words, no application for settlement of a case is maintainable after adjudication. The issue in the present case turns upon the meaning to be ascribed to the words "before adjudication".

7. The Supreme Court had occasion to consider similar issues in the context of a variety of statutory provisions. In certain situations a statutory provision may set out a period of limitation to seek recourse to a remedy against an order. Where the making of the order provides for the commencement of limitation, the issue arises as to when the order is said to be made. In *Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another*, , the Supreme Court construed the provisions of Section 18(1) of the Land Acquisition Act, 1894, the proviso to which stipulates that where the person seeking a reference was not present before the collector at the time when the award was made, the period of limitation would be six weeks of the receipt of the notice from the Collector u/s 12(2) or within six months from the date of the award of the Collector whichever

expires first. The Supreme Court held that where the rights of a person are affected by an order and limitation is prescribed for the enforcement of a remedy by the person aggrieved against the order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the order to the party concerned. In the context of an order of suspension against a government servant, *State of Punjab Vs. Khemi Ram*, the Supreme Court held that an order of suspension against a government servant would take effect once it was issued and sent out to the government servant no matter when it was actually received. In *Collector of Central Excise, Madras Vs. M.M. Rubber and Co., Tamil Nadu*, the Supreme Court held, while construing the provisions of Section 35E(3) of the Central Excise Act, 1944 that if an authority is authorised to exercise a power or to do an act affecting the rights of the parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made; that is to say when the adjudication officer ceases to have any authority to tear it off and draft a different order and when he ceases to have any *locus penitentiae*.

8. These decisions have been made having regard to the statutory provision involved and the underlying purpose and object of the provision. The common thread in the line of authority is that a purposive meaning has to be ascribed to the making of an order. Where an authority, by making an order affects the rights of parties, the order or decision takes effect from the date on which the order or decision assumes a character such that the maker of the order places it out of his control. Where the statute provides a period of limitation for challenging an order, the period of limitation for a person aggrieved by the order commences to run from the date of the communication of the order. On the other hand, if it is a case involving a limitation for an authority to make an order, the date of exercise of that power and in the event of the exercise of the *suo motu* power the date on which such power was exercised are relevant dates for determining the period of limitation.

9. In the context of Section 32E, an application before the Settlement Commission cannot be filed before the receipt of a notice of the Central Excise Officer for the recovery of duty. An application can be filed before adjudication, to the Settlement Commission. An application before the Settlement Commission is not maintainable after adjudication. A purposive interpretation has to be placed on the expression "before adjudication". An adjudication cannot be regarded as being complete merely upon the signing of an order by the adjudicating authority. If the adjudicating authority were to keep the order in his own drawer without dispatching it to the assessee the latter would have no means of knowing of the making of the order. An order of adjudication must be placed by the adjudicating authority out of his control by dispatching it to the assessee. For it is once that stage is achieved that the adjudicating authority ceases to have any

locus poenitentiae. Once the authority dispatches the order, the adjudicator places it out of his control. There can be no possibility then of the adjudicating authority tearing off the order or making a different order.

10. As a principle of interpretation, it is well settled that while the charging provisions of a taxing statute are to be construed strictly, provisions which lay down a machinery have to be construed so as to make it workable. Machinery provisions have to be read in a reasonable, practicable and liberal manner. This principle has been elucidated in Justice G.P. Singh's treatise on Interpretation of Statutes which read thus:

It must also be borne in mind that the rule of strict construction in the sense explained above applies primarily to charging provisions in a taxing statute and has no application to a provision not creating a charge but laying down machinery for its calculation or procedure for its collection, and such machinery provisions have to be construed by the ordinary rule of construction. *Gursahai Saigal Vs. Commissioner of Income Tax, Punjab*, One important consideration in construing a machinery section is that it should be so construed as to effectuate the liability imposed by the charging section and to make the machinery workable-ut res magis valeat quam pereat. *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, Similarly a machinery provision which enables the assessee to avail of a concession or benefit conferred by a substantive provision in the Act is liberally construed. *Commissioner of Income Tax, Punjab Vs. Kulu Valley Transport Co. P. Ltd.*, And on the same principle statutory provisions touching and conferring a right of appeal have to be read in a reasonable, practical and liberal manner. *Commissioner of Income Tax, A.P. Vs. Ashoka Engineering Co., Grafik India and Syed Jaffar and Sons, Secundrabad*,

11. In *Qualimax Electronics Private Limited (supra)*, a Division Bench of the Delhi High Court, after referring to the judgments of the Supreme Court on the subject, held that u/s 32E the adjudication of a case by an adjudicating authority closes the window of opportunity which the assessee had for seeking a settlement of the case. The Delhi High Court held that the date of receipt of an order in original is not of any significance for the purpose of Section 32E since the Settlement Commission can only proceed to settle a case which is pending adjudication on the date the settlement application is received by it. In that context, the Delhi High Court observed as under:-

32. Of course, there is the danger that to prevent an assessee from seeking a settlement of his case, the adjudicating authority may quickly pass the adjudication order the moment he gets an inkling that the assessee is about to approach the Settlement Commission. There is also the danger that the adjudicating authority may back date an order. Adjudicating authorities are not supposed to behave in this manner and are presumed to function within the boundaries of law but, these things can happen. Would not a literal construction of the provisions then come in aid of such errant officers and run counter to the

legitimate hopes of assesseees who want to come clean, pay their taxes and have their cases settled by the Settlement Commission? The answer to this would lie in construing the date of adjudication to be the date on which the adjudicating authority loses his locus poenitentiae, or opportunity to tear off, destroy or alter the adjudication order. In other words, when the order goes out of his control. And, that happens when the order is signed and the one-way process of sending it to the assessee is put in motion either directly or indirectly through some other agency.

We respectfully concur with this view.

12. In the present case, the detailed narration of events in the order of the dissenting member of the Settlement Commission would indicate that on 13 September 2010, 28 September 2010 and 15 December 2010, the Petitioner had sought before the adjudicating officer a disclosure of documents which were relied upon in the notice to show cause. On 29 October 2010, a letter had been dispatched by the Superintendent (Adjudication) to the Additional Director General, DECEI, Mumbai calling upon him to arrange for the supply of documents which were relied upon in the notice. On 15 December 2010, the adjudicating officer was informed by the Petitioner that it was contemplating the possibility of filing a settlement application and requested that the proceedings may be adjourned since even the documents had not been received from the DGCEI. On 10 January 2011, the Advocate for the Petitioner informed the Commissioner that the Petitioner had decided to file a settlement application and produced a copy of the GAR-7 Challan reflecting the payment of the fee for filing the settlement application. The Commissioner was informed that the duty and interest components were being worked out and the settlement application would be filed probably within that week itself. On 11 January 2011, a further letter was addressed by the Superintendent (Adjudication) to DECEI for supply of the documents relied upon in the notice to show cause. However, the Commissioner, without waiting for receipt of the documents of which disclosure was sought and without paying heed to the request of the assessee proceeded to pass an order of adjudication in haste on 13 January 2011. The order was actually dispatched to the assessee on 19 January 2011 when the assessee had already moved a settlement application on 14 January 2011. The adjudicating officer put his order of adjudication out of his control by dispatching it to the assessee only after the filing of the settlement application. In these circumstances, the settlement application could not have been dismissed as being not maintainable. The view which has been taken by the majority of two members of the Settlement Commission is patently erroneous. The view of the majority postulates that the moment the order of adjudication was signed by the adjudicating officer, no application for settlement could be maintainable. Such a construction would defeat the object and the underlying purpose of the statute. Section 32E stipulates that no application for settlement can be filed before a notice to show cause is received. An application for settlement has to be filed before adjudication. The expression "before adjudication" u/s 32E must be given a

purposive interpretation. The object of Section 32E is to enable an assessee to come before the Settlement Commission with a clean, complete and candid disclosure and with a payment of the excise duty with interest. A literal construction of the words "before adjudication" would defeat the purpose and intent of Parliament. As this case itself shows, the Commissioner proceeded in undue haste, without waiting for the supply of documents to the assessee and even after being informed that the assessee was in all probably moving the Settlement Commission during the course of the week. The majority of the Settlement Commission was of the view that there was no reason for the assessee not to have filed a settlement application before 13 January 2011. What this view clearly misses is that proceedings before the adjudicating officer were pending. The assessee was still to obtain copies of the documents which were relied upon in the show cause notice. As a matter of fact, two letters had also been addressed to the DGCEI by the Superintendent (Adjudication) for such a disclosure on 29 October 2010 and 10 January 2011. Despite the assessee informing the Commissioner on 10 January 2011, that it had paid the filing fee and would file the settlement application within a week, the Commissioner proceeded to pass an order in utter haste on 13 January 2011. A purposive interpretation as we have indicated earlier will provide a safeguard against such and other abuses of power by adjudicating officers and will further the legislative intent implicit in Section 32E and other cogent provisions of the Chapter.

13. For these reasons, we are of the view that the settlement application which was filed by the assessee before the date of the dispatch of the order of adjudication is maintainable before the Settlement Commission.

14. In view of the aforesaid finding, we allow the petition by setting aside the order of the Settlement Commission dated 18 January 2012 holding that the settlement application was not maintainable. The settlement application shall accordingly stand restored to the file of the Settlement Commission for further disposal in accordance with law.

15. In consequence we also set aside the order of the Commissioner of Central Excise dated 13 January 2011 since we have held that the application which was filed before the Settlement Commission on 14 January 2011, prior to the dispatch of the order of adjudication, was maintainable. We clarify that we have done so without expressing any opinion on the merits of the allegations contained in the show cause notice issued to the assessee. Unless this consequential relief were to be granted as prayed, two parallel proceedings would result, namely (i) arising out of the order of the Commissioner of Central Excise and, (ii) before the Settlement Commission which the statute does not contemplate. Hence, for these reasons the order of the Commissioner of Central Excise dated 13 January 2011 is also set aside. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.