

(2015) 09 AHC CK 0047
In the Allahabad High Court
Case No : Writ Tax No. 538 of 2015

Rmg Polyvinyl India Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11-A, 11AC, 14, 32-E, 32-F
Constitution of India, 1950 — Article 226

Citation : (2015) 10 ADJ 527 : (2016) 37 GSTR 176

Hon'ble Judges : Tarun Agarwala, J;Surya Prakash Kesarwani, J

Bench : Division Bench

Advocate : Pankaj Bhatia, Amit Awasthi and Gopal Verma, for the Appellant;
Ashok Singh, Sr. S.C. and C.B. Singh, Advocates for the Respondent

Judgement

Surya Prakash Kesarwani, J—We have heard, Sri Pankaj Bhatia, assisted by Sri Gopal Verma, learned counsel for the petitioners and Sri Ashok Singh, learned counsel for the respondents.

2. Petitioners have filed this writ petition for the following reliefs:

"i. to issue a suitable writ, order or direction in the nature of certiorari quashing the impugned order No. C-2641/CE/2014-SC(PB) dated 2.6.2015 passed by the Respondent No. 2.;

ii. to issue a suitable writ, order or direction directing the Settlement Commission to hear and decide the Settlement application dated 19.12.2014 filed by the petitioner afresh and in accordance with law."

3. Learned counsel for the petitioners submits that the impugned order passed by the Settlement Commission is contradictory to the provision of Section 32-F of the Central Excise Act, 1944 (hereinafter referred to as the "Act"). The Settlement Commission has committed manifest error of law in remanding the matter which is against the principles of law laid down by Delhi High Court in the case of Asahi India Safety Glass Limited Vs. Union of India (UOI) and Others,

(2004) 114 DLT 145 : (2004) 76 DRJ 543 : (2005) 124 ECR 32 : (2005) 180 ELT 5 , Bombay High Court in the case of JSK Industries Pvt. Ltd. v. Union of India in Writ Petition No. 8028 of 2013 decided on 8.12.2014 and Gujarat High Court in the case of Mann Pharmaceuticals Ltd. Vs. Union of India, (2014) 307 ELT 642 : (2014) 47 GST 511 .

4. Learned counsel for the respondents submits that in view of the detailed facts noted in the impugned order, the Settlement Commission has not committed any error of law to reject the application and to remand the matter to the concerned authority for adjudication. In support of his submission he relied on the Division Bench Judgment in the case of Vinay Wire and Poly Product P. Ltd. Vs. Dir. General of Central Excise, (2014) 307 ELT 438 and the judgment of Madras High Court in the case of Vela Smelters (P) Ltd. Vs. The Customs and Central Excise Settlement Commission .

5. Briefly stated the facts of the present case are that the petitioners are engaged in the manufacture of PVC Sheeting, PVC flooring and coated cotton fabrics, and are registered with the respondents-Department. On 13.4.2012, a search was conducted by the Officers of the Central Excise Department at the factory premises of the petitioners and certain records were resumed. Physical verification of stock was also carried on in which excess stock of finished goods i.e. laminated sheeting, flooring, tiles, met of certain varieties valued at Rs. 1,13,97,502/- involving Central Excise duty of Rs. 14,08,731 was found. The shortage of finished goods of CPO, DBP, NPPX etc. valued at 38,26,266/- involving Central Excise duty of Rs. 4,72,925/- was found. Certain raw materials were also found in excess during the search. Two private ledgers and two writing pads (kachcha records) were recovered from the briefcase found in the official cabin of Sri S.G. Gupta, Executive Director of the petitioner which were resumed. On scrutiny of these ledgers and writing pads, it was revealed that it contained entries of transactions related to clandestine removal of finished goods. On the basis of preliminary scrutiny of resumed records, follow up searches were conducted at 11 different places in which certain records, computer, hard disc and a computer were resumed from the factory situated at Sikandrabad and office premises of the petitioners at Ghaziabad and New Delhi. During investigation, the statements of various persons including Sri S.G. Gupta, Executive Director, were recorded under Section 14 of the Act.

6. Thereafter, a show cause notice dated 26.4.2013 was issued to the petitioners requiring them to show cause as to why duty amounting to Rs. 4,72,926/-, 3,98,60,686/-, 7,18,514/- and Cenvat Credit of Rs. 42,904/- be not demanded under Section 11-A of the Act and penalty be imposed under Rule 25 of the Central Excise Rule 2002 read with Section 11AC of the Act. Penalty was also proposed to be imposed on Sri S.G. Gupta, Executive Director and Sri Arvind Goyanka, Director, under Rule 26 of the Rules.

7. The petitioners moved a Settlement Application under Section 32-E of the Act. During the course of hearing of the application the petitioners accepted the

allegations in the show cause notice only for those documents in the seized records which were marked as "R" on the ground that only these documents pertain to the petitioners' company. They claimed that the other invoices do not pertain to the petitioners' company but are the private business record of Sri S.G. Gupta.

8. The Settlement Commission found that the averment of the petitioners are contradictory in nature inasmuch as they accepted the documents marked with "R" representing clandestine clearances of goods and on the other hand they stated that they do not accept the charge of clandestine clearances of all the goods. Settlement Commission came to the conclusion that once the petitioners accepted part of the information given in the private record, they cannot simply brush aside the other information. The Commission found the claim of the petitioners to be an afterthought. It also noted that Sri S.G. Gupta, had accepted that the cash recorded in his private ledger was part of the sale proceeds of the goods and differential amount of under valued goods sold to the buyers. The said statement was not contradicted by Sri S.G. Gupta, which was recorded under Section 14 of the Act.

9. Accuracy of stock taking at the time of the search was not objected by the petitioners. No explanation was offered for unaccounted cheques. Six buyers whose statements were recorded by the Revenue, several of them stated that they were purchasing goods from the petitioner and the records of such sales were found in the kachcha records and either no invoices in their name were found in the statutory records or the statutory invoices showed a smaller value. It was also noticed that statutory invoices were issued in the name of non existing buyers. The specific instances of clandestine removal of goods, discrepancies of value recorded in the invoices and those recorded in the private record against the same invoice numbers and use of parallel invoices as alleged in the show cause notice, were not explained. The Settlement Commission also found that the stand taken by the applicant and the Department are at huge variance inasmuch as the petitioners merely accepted 10% of the demand and has contested the evidence collected by the Revenue without any convincing explanation. The Settlement Commission also referred the uncontroverted statement of Sri S.G. Gupta, dated 18.3.2013 under Section 14 of the Act with respect to question Nos. 9, 10 and 11.

10. After considering the application in detail, the Settlement Commission held in paras 32 to 37, 43 and 44 as under:

"32. The Bench has gone through the application filed and considered the rival submissions made orally as well as in writing both by the applicant and the Revenue. The Bench observes that this is a case of alleged clandestine clearance, under valuation, shortage of finished goods and shortage of raw material used for the manufacture of the said finished goods. The applicants have accepted all allegations in the SCN only for those documents in the seized records which are marked with an "R", on the grounds that only these documents pertain to their

company. The other invoices, they claim, do not pertain to the applicant, but are the private business of Shri S.G. Gupta, their Executive Director. The applicant in his application, on one hand, has stated that they do not accept the charge of clandestine clearance of all the goods, but on the other hand they have accepted the fact that the invoices marked with "R" pertain to the applicant firm and are clandestine clearances. The averments of the applicant are contradictory in nature. They have not even any reason for their non acceptance of the genuineness of the invoices in the private record other than those marked with "R". Further, the plea that only invoices marked with "R" pertain to the applicant firm was not taken by them during the investigation. This has come out only in the affidavit of Shri Gupta given as late as in December, 2014 i.e. much after the issuance of the SCN. He was the executive Director of the unit, and it is not credible that he was clearing some of their goods on his private account at a higher price clandestinely to the same buyers who could receive the goods at a lower price legally from the company directly.

33. Once the applicant has accepted a part of the information given in the private record, he cannot simply brush aside the other information at a later stage. The claim that all the private records other than those found with an "R" in the private account of their executive Director, is an afterthought and this aspect was not informed to the investigating officers during the giving of statements. Shri Gupta in his statement has accepted that the cash in his private ledger was part of the sale proceeds of the goods and differential amount of under valued goods sold to the buyers. The applicant has not contradicted this statement of Shri Gupta.

34. It is noted that after reducing the shortage of finished goods of Rs. 38,26,266/- from the excess of finished goods received, the excess stock of finished good comes to Rs. 75,71,236/- which is equal to their two and half day's production. This excess cannot be on account of line rejection as claimed. Line rejections would normally occur only in one day or two production periods. This gives the impression that there was clandestine clearance of goods which were not entered in the statutory records. The applicant did not object to the accuracy of the stock taking at the time of search, hence the present objections appear to be an afterthought. The applicant has argued about the decreasing quantum of electricity used by them. Since this argument is offered in defence it is for the applicant to substantiate his case. However, the applicant apart from making this statement has not offered any cogent reason to support his case. The applicant has not offered any explanation of the unaccounted for cheques, not shown in the bank statements. Further, out of the 6 buyers whose statements were obtained by the Revenue, several stated that they were purchasing goods from the applicant, and records of such sales, in crores, were found in the kuccha records, but either no invoice in their names was found in the statutory records, or the statutory invoices showed a smaller value and were in other names. Statutory invoices were issued in the names of non existing buyers. The Bench observes that the Revenue in the SCN have cited specific

examples of clandestine removal of goods, discrepancy in values recorded in invoices and those recorded in private records against the same invoice numbers, instances of use of parallel invoices. None of these allegations in the SCN has been explained. The applicant has also claimed that the private records pertained only to private dealings of Shri S.G. Gupta, but has not offered any evidence to substantiate this claim. The applicant has in fact admitted to details in the private ledger of Shri Gupta which is marked "R". The approach of the applicant lends a belief that the disclosure is neither truthful nor complete.

35. The Bench also observes that the applicant has only accepted 10% of the demand and has contested the evidence collected by the Revenue. They have rejected all the other evidence given by the Revenue in respect of their duty demand without convincing explanations. From these facts, it can be inferred that there is no true and correct disclosure by the applicant.

36. Further, the Bench observes that in this case the stand of the applicant and the department are at huge variance. For an issue to be settled by the Commission there has to be convergence and agreement on fundamental facts which is lacking in this case.

37. The Bench observes that Settlement Commission is a forum where the applicant/applicants should come in the spirit of surrender disclosing the full facts and not in a spirit of contention. In the present case as seen from the rival submissions narrated in the preceding paragraphs, the applicant has approached the Commission treating it as an adjudication forum and not in good faith of settling their case which is a prime requirement in a proceeding before the Commission. It is to be borne in mind that the Settlement Commission is not an adjudicating authority. It is an arbitration forum where a dispute is settled in the interest of both the parties within the framework of law. This principle has clearly been enunciated by the Hon''ble High Court of Bombay in the case of Amrut Ornaments Vs. Sett. Commission for Cus. and C. Ex., (2014) 305 ELT 365 : (2014) 28 GSTR 462 , by the Hon''ble Delhi High Court in the case of Union of India and Another Vs. Dharampal Satyapal and Others, (2013) 298 ELT 653 : (2014) 27 GSTR 484 , by the Hon''ble Allahabad High Court in the case of Vinay Wire and Poly Product P. Ltd. Vs. Dir. General of Central Excise, (2014) 307 ELT 438 and also by the Hon''ble Madras High Court in the case of Australian Foods Ltd. Vs. Commissioner of C. Ex., (2010) 254 ELT 392 .

43. In view of the foregoing discussions, the Bench observes that the applicant has not only not accepted a substantial part of the demand but has contested the evidence collected by the Revenue after the issue of the SCN. They have claimed certain facts which need further investigation. Therefore the Bench observes that the case is not one that can be settled in this forum. In view of the complex issues of fact raised by the rival parties to the case, it would be more appropriate that the case is adjudicated by the proper Officer after appreciation of facts and evidence now produced before the Commission by the applicant.

44. The Bench, by virtue of the powers vested in it in terms of Section 32L(1) of the Central Excise Act, 1944, sends the case back to the Adjudicating authority for adjudication in accordance with the provisions of the law. The adjudicating authority will decide the case as if no application for Settlement has been filed by the applicant in this regard."

11. We do not find any error of law in the findings recorded by the Settlement Commission in the impugned order. The impugned order is within the four corners of the provisions of Section 32-F of the Act.

12. A plain reading of the provisions of sub-section (5) and sub-section (8) of Section 32-F of the Act makes it clear that the Settlement Commission, after considering the facts and evidences and after hearing the parties, pass such order as it thinks fit on the matters covered by the application and also any other matters relating to the case not covered by the application but referred to in the report of the Commissioner of Central Excise and Commissioner (Investigation) under sub-section (3) or sub-section (4). The order passed by it under sub-section (5) shall provide for the terms of Settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make settlement effective and in case of rejection contain the reasons therefor. An order of Settlement Commission shall be void if it is subsequently found by the Settlement Commission that it was obtained by fraud or misrepresentation of facts. From the perusal of the impugned order of the Settlement Commission, we find that the order contains sufficient reasons for rejection of the case.

13. In the case of *Vinay Wire and Poly Product P. Ltd. v. Dir. General of Central Excise* (supra) Division Bench of this Court considered the provisions of Section 32-F and 32-L of the Act and held that a plain reading of provisions of sub-sections (5) and (8) of Section 32-F makes it clear that the Settlement Commission has to pass such order as it thinks fit and it has the power not only to provide the terms of the settlement but also to reject the application, in which eventuality, reasons have to be recorded. The power conferred on the Settlement Commission under Section 32-L to send the case back to the Central Excise Officer is in addition to the aforesaid powers of the Settlement Commission. Such a power given to the Settlement Commission under Section 32-L can be exercised, if it finds that any person who has made an application for settlement under Section 32-E, has not co-operated with the Settlement Commission in the proceedings before it. This power given to the Settlement Commission under Section 32-L does not and cannot take away the powers conferred on the Settlement Commission under sub-section (5) and (8) of Section 32-F. After interpreting the provisions, the Division Bench in *Vinay Wire and Poly Product P. Ltd.* (supra) held in para 17 as under:

"This submission cannot also be accepted. The Settlement Commission has given good and cogent reasons for sending the case back to the adjudicating authority. The Settlement Commission noticed that the applicants had not accepted a

substantial part of the duty liability and had in fact contested the evidence collected by the Revenue as being fabricated and tampered with. It also noticed that the Revenue had given reasons to substantiate its position regarding the investigation as well as the quantification of duty liability. In such a situation, the Settlement Commission thought it appropriate, particularly when the applicants had not made a full and true disclosure and that complex questions of fact, which required appreciation of evidence, were required to be settled through adjudication. A fair amount of discretion has to be given to the Settlement Commission in cases where matters are placed before it for Settlement keeping in mind the well settled principle that Settlement is not akin to adjudication. Unless it is established that the discretion has been exercised in an arbitrary or perverse manner or that it is not based on relevant considerations or has taken into consideration irrelevant matters, Courts will not interfere in the exercise of such discretion by the Settlement Commission under Article 226 of the Constitution."

14. Learned counsel for the petitioners has heavily relied upon the decision of Delhi High Court in the case of Asahi India Safety Glass Limited (supra). From the perusal of the judgment, we find that in para 23 and 33, the Court held that when the Court finds that the order of the Commission is contradictory to any of the provisions of the Act or the Rules made thereunder, it becomes the duty of the Court to examine the matter and to pass an appropriate order in accordance with law. From the fact of the present case, we find that the impugned order of the Commission is not contrary to any of the provisions of the Act or Rules made thereunder. Thus this judgment is of no help to the petitioners.

15. The judgment of Gujarat High Court in the case of Mann Pharmaceuticals Ltd. (supra) relied by learned counsel for the petitioners, is also clearly distinguishable on the facts of the present case. In the said case the facts were that the assessee accepted duty liability to a large extent along with interest thereon and deposited the same and also satisfied all the requirements of Section 32-E of the Act. However, without passing any final order under Section 32-F(5), the Commission rejected the application by an order under Section 32-L. The facts of the present case are different as discussed in the foregoing paragraphs. Thus, this judgment also does not help the petitioners.

16. In view of the aforesaid, we find no merit in the writ petition. The writ petition lacks merit and, therefore, deserves to be dismissed.

17. In the result, the writ petition fails and is hereby dismissed. However, there shall be no order as to costs.