

(2013) 09 DEL CK 0389

In the Delhi High Court

Case No : Writ Petition (C) No. 4376 of 2012

Union of india and Another

APPELLANT

Vs

Dharampal Satyapal and Others

RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11(A), 11AC, 14, 2(a), 32A
Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 17, 28, 4
Income Tax Act, 1961 — Section 245C(1)

Citation : (2013) 298 ELT 653 : (2014) 27 GSTR 484

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Mohan Parasharan, ASG and Mr. Vikas Garg and Mr. N. Meyyappan, for the Appellant; S.K. Bagaria and Dr. Prabhat Kumar and Ms. Suruchi Aggrawal, for the Respondent

Final Decision : Allowed

Judgement

R.V. Easwar, J.—This writ petition under Article 226 /227 of the Constitution of India has been filed by the Union of India, through the Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi and the Assistant Director (Investigation), Directorate General of Central Excise Intelligence, West Block-VII Wing No. VI, Second Floor, R.K. Puram, New Delhi as petitioner Nos. 1 & 2 respectively for issuance of a writ of certiorari or any other order or direction in the nature of a writ quashing and setting aside the majority opinion of the Customs and Central Excise Settlement Commission (Principal Bench, New Delhi) in its order dated 12.03.2012 and for upholding the minority opinion expressed therein, and for issuance of any other directions or orders deemed fit and proper, in favour of the petitioners. A preliminary point was raised in the course of the hearing of the writ petition to the effect that the Assistant Director (Investigation) who is petitioner No. 2, has no locus standi to challenge the order of the Settlement Commission as he is only an investigative authority without

any power of assessment. The learned Additional Solicitor General, purporting to meet the point filed a copy of the Circular No. 44/2011-CUS dated 23.09.2011 and submitted that the petitioner No. 2 came within the scope of the circular and was authorised to file the writ petition jointly with the Union of India. A perusal of the circular shows that consequent to the judgment of the Supreme Court on 18.02.2011 in Civil Appeal Nos. 4294-4295/2002, 2603/2005 and 4604/2005 in the case of Commissioner of Customs Vs. Sayed Ali and Another, an amendment to Section 28 of the Customs Act, 1962 was made w.e.f. 16.09.2011 by insertion of clause (11) which reads as follows:-

(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority all persons appointed as officers of Customs under subsection (1) of section 4 before the sixth day of July 2011 shall be deemed to have and always had the power of assessment u/s 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.

2. The effect of the amendment is that the Assistant Director (Investigation) who is an officer of the DGCEI was retrospectively recognized w.e.f. 06.07.2011 as a "proper officer" for the purposes of Sections 17 and 28 of the Customs Act, 1962. The circular in paragraph 5, however, goes on to say that the officers of the DRI and DGCEI "shall not exercise authority in terms of clause (8) of section 28; in other words, the circular says that there shall be no change in the present practice and officers of the DRI and DGCEI shall not adjudicate the show-cause notices issued u/s 28 of the said Act."

3. We do not think that the amendment or the circular meets the point raised. Section 28 provides for notice for payment of duties, interest, etc. The amendment referred to in the circular was made only to get over the situation arising out of the judgment cited supra and validated the show-cause notices issued prior to 06.07.2011 by Commissionerates of Customs (Preventive), DGCEI and DRI. This amendment does not have anything to do with the filing of petitions before the High Court. There is no authorisation produced before us in favour of the petitioner No. 2 to challenge the order of the Settlement Commission before this Court by way of a writ petition. Even according to the hierarchy, petitioner No. 2 is several levels below the Settlement Commission and the officers manning it. We do not, therefore, think that petitioner No. 2 has any locus standi to challenge the order of the Settlement Commission. We, therefore, delete petitioner No. 2 from the proceedings.

4. However, this does not mean that the writ petition has to be dismissed in limine. Petitioner No. 1 which is the Union of India can by itself challenge the order of the Settlement Commission. We would, therefore, proceed to dispose of the writ petition as if it has been filed only by one petitioner, namely, the Union of India through Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi.

5. The writ petition has been filed in the following circumstances. The first respondent is a private limited company carrying on the business manufacturing of various brands of paan masala, gutkha containing tobacco and mouth freshner. It has 11 factories in all, of which two are located in Noida and the rest all are located in Guwahati, Assam. Respondent Nos. 2 to 5 are directors of the first respondent. Information is stated to have been received by the petitioner that the first respondent was suppressing the production and clandestinely clearing its products which resulted in evasion of payment of excise duty. There was also intelligence to the effect that all the close relatives of the Chairman and CMD of the first respondent were managing all the activities of the first respondent. A search was therefore conducted on 16.07.2008 in the course of which documents showing accounts of purchase of "catechu" and supply of the same to the various units of the first respondent, who is hereinafter referred to as "DSL", were recovered. The following amounts of cash were also recovered: Rs. 47,00,000/- from the residence of Subhash Chand Gupta, a senior member of the family and uncle of respondent No. 2, Rs. 9,00,000/- from respondent No. 2, Rs. 1,50,000/- from the residence of respondent No. 3 and Rs. 4,00,000/- from the residence of respondent No. 5. The cash seized totalled to Rs. 61,50,000/-. According to the petitioner, no proper explanation was available for the cash and, therefore, the same was seized under panchnama. In the course of the search proceedings, DSL and its director, Ajay Kumar Gupta, who is respondent No. 2 in the present proceedings, were asked to furnish the details of purchase of raw materials and to explain the cash but this was not complied with. After some time, however, DSL furnished a list of 35 suppliers of catechu along with their addresses who had supplied catechu to DSL during the period from April, 2004 to June, 2008. The information was supplied by DSL in the form of the chart which showed the quantity of catechu supplied by each of the suppliers during the aforesaid period. These details are reproduced at pages 4 to 6 of the show-cause notice.

6. Summons were issued to all the 35 suppliers calling upon them to furnish the details of the catechu supplied by them to DSL between April, 2004 and June, 2008. 18 suppliers, whose names are given in pages 6 and 7 of the show-cause notice, furnished the details called for. The central excise authority compared the details furnished by DSL with those furnished by 18 suppliers of catechu and found that either the suppliers have supplied excess catechu than what was shown by DSL or supplied less than what was shown by DSL. From a comparison of the details, it appeared to the central excise authorities that DSL was not correctly recording the receipt of catechu supplied by the 18 suppliers and that the same was used in the suppressed production of paan masala, gutkha and mouth freshner.

7. In respect of the other 17 suppliers, summonses were issued by the central excise authorities but they were all returned unserved. The officers of the DGCEI personally visited the premises of the 17 suppliers to collect the details of their supplies of catechu to DSL but they were not found to exist at the addresses

given.

8. The above facts were put to the respondents for rebuttal and they promised that they will locate and contact the 17 suppliers of catechu and direct them to report to the DGCELI along with their ledgers and invoice books for the past 5 years. Despite the assurance no details were submitted. From these facts, the central excise authorities inferred that the information was deliberately being suppressed from them which indicated that the accounts for production of finished goods are not reliable and could have been manipulated.

9. In the course of the search of the premises No. 43/1, Rajpur Road, Delhi a file containing 166 pages was recovered under panchnama dated 16.07.2008. The respondent No. 2, Ajay Kumar Gupta who is a director of DSL stated that he and his father were looking after the purchase of kattha and supari and explained the various entries in the file to the central excise authorities. After considering the explanation of Ajay Kumar Gupta with regard to the papers in the recovered file, it appeared to the central excise authorities that all these papers in the file showed the actual transactions of kattha by DSL from their suppliers. The details available in the file were tabulated by the central excise authorities (page 15-16 of the show-cause notice) and it was noticed that there were several quantities of kattha which, though have been received by DSL, were not shown in the accounts of the suppliers. According to the central excise authorities, DSL has actually received several quantities of kattha which were not accounted for in its books as well as in the books of the suppliers and it was this unaccounted catechu which was used in the production of paan masala, gutkha and mouth freshner which was suppressed and cleared clandestinely without payment of duty. Several persons employed with DSL were examined during the search and their statements were recorded to show unaccounted receipt of catechu and the utilisation thereof. All the information gathered during the search were collated and analysed in the show-cause notice issued to DSL. The gist of the show-cause notice was that the quantities as furnished by the supplier were more than the quantity of purchase as furnished by DSL and the excess was used in the manufacture of products where catechu was used and such production was suppressed and cleared without payment of duty. The central excise authorities also prepared a product-wise chart, in addition to a supplier-wise chart, of production in all their factories from April, 2004 to June, 2008. They worked out the consumption of catechu in each product in each factory for each year and compared the same with the supplies of catechu as furnished by DSL. The comparison revealed that substantial quantity of catechu was purchased by DSL but not shown to have been utilised in the manufacture of their products; the excess quantity of catechu, according to the authorities, had been used in the manufacture of products, which production was suppressed and clandestinely cleared without payment of any excise duty.

10. The show-cause notice contained all the annexures which in turn showed the working, according to the central excise authorities, of the amount of excise duty

sought to be evaded by DSL. According to the show-cause notice, the central excise duty sought to be evaded by DSL amounted to Rs. 245,67,44,509/-. The provisions of Central Excise Rules, 2002 which were circumvented by DSL were also referred to in the show-cause notice. Paragraph 14.1 of the show-cause notice summed up the position, so far as DSL is concerned, as follows:-

14.1 The aforesaid contraventions on the part of M/s. DSL appear to have been committed by way of suppression of facts and willful mis-declaration of the actual facts relating to the manufacture and clearance of excisable goods from their factory premises. Central Excise duty has not been paid by them, Central Excise invoices has not been issued by them, production and clearances has not been accounted in the daily stock accounts. The Central Excise duty was not paid by way of suppression of facts and contravention of above said Central Excise Rules with a deliberate intent to evade payment of duty. Therefore, the duty of excise as detailed in Annexure No. 2, Annexure No. 3, Annexure No. 4 and Annexure No. 5 not paid by them on the goods which were manufactured and clandestinely cleared by them from their registered factory premises in the aforesaid manner, is recoverable by invoking the extended period as provided under sub section (1) of Section 11(A) of the said Act and proviso thereto. They are also liable for penal action u/s 11AC of the Central Excise Act, 1944 and are also liable to pay interest as per provisions of section 11AB of the Central Excise Act, 1944.

11. In the other paragraphs of the show-cause notice the specific charges against the other respondents in the present proceedings were made.

12. The show-cause notice summarizing the aforesaid facts and seeking the explanation of DSL and its directors was issued on 14.07.2009 by the Additional Director General of DGCEI, New Delhi. The respondents, after participating in the proceedings pursuant to the issue of the show cause notice for some time, approached the Settlement Commission and filed settlement application Nos. S.A. (E) Nos. 2693/20011 to 2697/2011 on 01.08.2011. On 19.08.2011 the Settlement Commission sought the views of the DGCEI on the settlement applications filed by the respondents u/s 32E of the Central Excise Act, 1944. In response to the same the DGCEI objected to the settlement application by reply dated 05.12.2011 (Annexure P-1 to the writ petition). In this reply, which is brief, objection was raised to the application on the ground that there was no full and true disclosure of the duty liability, which is a condition precedent u/s 32E of the Central Excise Act for approaching the Settlement Commission, that DSL has not disclosed its full and true duty liability in the application which was not disclosed before the central excise authorities, that DSL has not also disclosed the manner in which the duty liability was derived and other relevant particulars in respect of which it admitted short levy on account of mis-classification, under valuation, clandestine manufacture or clearance, etc. It was pointed out, relying on the judgment of the Supreme Court in the case of Ajmera Housing Corporation and Another Vs. Commissioner of Income Tax, and Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd., that there has to be a full and true

disclosure by the applicant before the Settlement Commission of the additional duty liability and the Settlement Commission has to be first satisfied that this condition has been complied with, and that if the central excise authorities were in possession of material to establish fraud on the part of the assessee, the consequent proceedings cannot be permitted to be defeated by making an application to the Settlement Commission. It was submitted that the applicant had disclosed liability in a paltry amount of Rs. 81,75,625/- as against liability of Rs. 245,67,44,509/- raised by the show-cause notice and this prima facie showed that the applicant had not made a full and true disclosure of its duty liability before the Settlement Commission. It was also pointed out to the Settlement Commission that the stand of the applicants before the Settlement Commission was contradictory in the sense that at one breath they say that there was no clandestine manufacture/clearance of catechu and at the same breath they say that there are some doubts raised with regard to the entries regarding purchase of catechu and, therefore, they want to pay commensurate duty on the same. It was prayed, for the above reasons, that the settlement application should not be entertained.

13. Another reply was filed, which was a detailed reply, on 19.12.2011 before the Settlement Commission by the DGCEI, a copy of which is annexed as Annexure P-2 to the writ petition. After reiterating the earlier submissions by letter dated 05.12.2011, the DGCEI placed the following further objections to the processing of the settlement applications:-

(a). The applicants before the Settlement Commission have adopted a contradictory stand. Though they have deposited the duty liability of Rs. 81,71,625/- along with interest of Rs. 66,91,245/-, yet they maintain in their application that the entry for the receipt of 2700 kg catechu on 03.05.2005 in the bunch of documents contained in the seized file, was a mere accounting mistake. There is thus no full and true disclosure.

(b). The applicants have taken a new plea regarding the weight loss during the process of pulverization of the catechu cake/biscuit into catechu powder and on this basis, have claimed a huge reduction in their duty liability. This point was never raised by the applicants at any stage of the investigation. Accordingly their claim of weight loss of 9.91% made for the first time before the Settlement Commission was devoid of substance and should not be permitted. Apparently its only a ploy to cover up the unaccounted receipt of catechu. In any case and without prejudice, it is not possible to arrive at the actual quantity of weight loss during the daily pulverization of the catechu cake into powder due to variation in the moisture content and difference in quality from supplier to supplier and even from batch to batch in respect of the same supplier. Accordingly, the claim of weight loss was only presumptive.

(c). It is matter of record that the applicants did not maintain any books of accounts regarding the amount of catechu which was meant for clandestine production.

(d). DSL did not cooperate in the investigation conducted after the search and that it failed to produce the correct addresses of 17 suppliers of catechu, despite the fact that they claim to have purchased catechu from those suppliers. On personal or spot inspection these 17 suppliers were not found to exist at the addresses given by DSL.

(e). The explanation for the seized cash of Rs. 61.5 lakhs is vague and unsupported. The cash represented the amount generated by the sale of clandestinely cleared excisable finished goods. The applicants did not come clean before the Settlement Commission about this aspect also. The actual source of the amount has not been shown to the Settlement Commission.

(f). There is no acceptance by DSL that they have evaded the payment of central excise duty on clandestine clearances of products manufactured out of procurement of unaccounted catechu, which constituted the raw material. The applicants have attempted to divert the focus from the real issue by taking a stand that they are merely unable to provide any clarification in respect of receipt of 2000 kg of catechu as reflected in the seized file.

14. On the basis of above submissions, strong objections were raised to the Settlement Commission proceeding with the settlement applications. Objection was also taken to the request for dropping the penalty proceedings u/s 11AC of the Central Excise Act, 1944 and for granting immunity from prosecution of the case. Parawise comments on the points raised in the settlement applications were made.

15. The parawise reply is somewhat important and may be noticed in some detail. It contained the following assertions by the DGCEI:

(a). The true and complete facts relating to the manufacturing operations at Noida and north-east factories were not submitted to the Settlement Commission. The applicants have planned a systematic evasion of huge amounts of excise duty.

(b). Show-cause notice is based on solid documentary evidence recovered through the search, including details of catechu received from the suppliers, which are corroborated by various persons including directors and employees of DSL. Despite ample opportunity given, the seized records were not properly explained by the applicants.

(d). The interpretation placed by the applicants upon the entries of purchase of catechu in the seized records is contrary to what was reflected in the private records and the written submissions of the parties. The explanation of the applicants before the Settlement Commission is nothing but an afterthought.

(e). The explanation of the applicants that they had no incentive to evade excise duty since they would be entitled to refund of the duty is facile because according to the scheme the refund of the excise duty, which would be credited to an escrow account can only be utilised for further investment in plant and

machinery, civil, social or infrastructure projects, etc. in the north-eastern States which is approved by the appropriate authority and verified by the jurisdictional Commissioner. If all the production is shown in the books of accounts, the resultant refund of the excise duty will have to be invested in the north-eastern States only. However, if the goods are cleared clandestinely, the proceeds thereof could be enjoyed and utilised in whatever manner the applicants wished.

(f). The clandestine sale of the products are confirmed from the recovery of cash of Rs. 61,50,000/- from the directors of DSL. This was also confirmed by the private records maintained by the directors of DSL at their residence.

(g). The claim of the applicants that there was moisture loss which occurs when the catechu cake is powdered cannot be accepted straightaway, since this is a matter of investigation. The moisture content may vary from batch to batch and supplier to supplier. The applicants did not produce any reports or record related to the content of moisture. It was not also disclosed before the Settlement Commission. This claim is also, therefore, an afterthought. Moreover, there is no evidence to show that the catechu cakes were powdered in the Noida factory. Thus the claim of moisture content is entirely a new claim, supported only by the report of FICCI Research & Analysis Centre, New Delhi. Moreover, most of the catechu suppliers were non-existent which further shows that the very claim of moisture loss or weight loss during conversion is only an afterthought.

(h). The plea of the applicants that the discrepancies pointed out in the show-cause notices are due to clerical error is totally misleading.

(i). The further explanations of the applicants that they had maintained a consolidated account of all the catechu suppliers was never put forth before the investigating officer. It was being raised for the first time before the Settlement Commission.

(j). The seized file containing 166 pages shows the actual quantity of catechu received by the applicants. A large number of entries in the file tally with the details furnished by the suppliers of catechu; however, there is an equally large number of entries showing receipt of catechu in the file, which are not reflected in the books of accounts of the suppliers who sold catechu to DSL. It is, therefore, clear that all the 166 pages of the recovered file show the actual transactions of the catechu by DSL. It is thus apparent that DSL has actually received the excess catechu which has not been accounted for in its books as well as in the books of accounts of the supplier. There can be no other objective except to use such catechu in the production of the products such as paan masala, gutkha and mouth freshner with katha which was suppressed and cleared without payment of duty.

(k). All the statements recorded from the employees and the directors of DSL confirmed that DSL was actually receiving more quantity of catechu but indulging in fudging their accounts by showing such receipt with the sole intent to use the suppressed quantity for clandestine manufacture and sale without duty.

15. The above is a brief summary of the parawise reply of DGCEI to the settlement applications filed by DSL and others. Thereafter the issues for settlement were pointed out to the Settlement Commission in the following paragraph:-

ISSUES for Settlement

As per provisions of Section 32E of Central Excise Act, 1944, Applicant has to make a full and true disclosure of the duty liability which has not been disclosed before the Central Excise officer, but in this case applicant has not made full and true disclosure of the duty liability before the Settlement Commission. Further applicant failed to provide the information of (i) quantity of gutkha/pan masala/ mouth fresheners of different retail sale price clandestinely cleared with value of the products (ii) Premises of production of goods, (iii) Documents under which clearances have taken place, (iv) Purchaser of clandestinely cleared goods. In view of this it is requested that the application filed by the applicant may be rejected. The case may be directed to be proceeded under adjudication proceedings already started by the concerned Commissioner.

16. It would appear that the letter dated 19.12.2011 written by the DGCEI objecting to the Settlement Commission proceeding with the settlement applications and requesting that the case be relegated to the adjudication authorities already started by the Commissioner by the issue of show-cause notice was considered by the Settlement Commission which forwarded the same to the Commissioner (Investigation) for verification. A report of the Commissioner (Investigation) was forwarded to the DGCEI from the office of the Settlement Commission on 10.01.2012 for comments. On 01.02.2012, the DGCEI, through its Additional Director General, furnished a 5 page reply to the report. In this reply, strong objection was taken to the manner in which the investigation was carried by the Commissioner (Investigation) and it was pointed out that several crucial points of the Revenue were not considered by the Commissioner (Investigation). In particular the following points were highlighted:-

(a). The Commissioner (Investigation) has considered the submissions of the applicants which were never made before the investigating authorities. The Commissioner has accepted them which is beyond the mandate of the show-cause notice.

(b). The Commissioner (Investigation) has not appreciated the evidentiary value of the statements recorded from the assessee u/s 14 of the Central Excise Act. On the contrary, he has accepted the statement of the assessee that wrong figures were provided at the time of investigation due to oversight and, therefore, the present claim must be accepted. The information submitted by the applicants u/s 14 of the Act cannot be repudiated or withdrawn since they are judicial proceedings and the acceptance of the claim that incorrect figures were given during investigation due to oversight "would make a mockery of the

settlement proceedings".

(c). After receipt of the show-cause notice, DSL manipulated their records and furnished untenable reasons without supporting evidence, which are all contrary to the statements of the directors and employees of DSL recorded u/s 14 and contrary also to the private records recovered from the premises of the directors of DSL. The Commissioner (Investigation) has accepted the reasons given by the applicants without further verification.

(d). The applicant did not make any full disclosure of the facts during the investigation, nor were these facts given to the Commissioner (Investigation). Despite this, the Commissioner (Investigation) has not taken any action or attempted to investigate the actual status of untraceable/non-existent suppliers of catechu. Not only that, they have also accepted the assessee's reasons without any supporting documents.

(e). Several contentions of the Revenue were not considered at all by the Commissioner (Investigation) and these are as under:-

(i). The statements made u/s 14 of the Act have not been controverted or explained in the report of the Commissioner (Investigation).

(ii). The Commissioner (Investigation) has ignored the fact that all the units are independent entities under the law and the supplies of catechu have to be treated accordingly.

(iii). The findings of the Commissioner (Investigation) are based on the ledger and many other documents prepared by the applicants, which were not produced before the investigating authority in the course of the investigation. The authenticity of the documents produced before the Commissioner (Investigation), is in serious doubt.

iv). The report of the Commissioner (Investigation) is based on inadequate details and simply accepts the submissions of the applicants without verifying the same. Verification ought to have been done with third party documents, bank accounts of the units, details of payments which can be corroborated with every single entry; return of the goods should have been examined with the help of transporters or other third agencies in addition to the records of the applicants and its suppliers. The absence of any investigation in this direction has left a huge gap in the evidence and erodes the credibility of the report.

(v). No proper weight was given to the fact that the applicant could produce only 18 correct addresses of the suppliers of the catechu and the other 17 suppliers were found to be non-existent. This itself underlines the fact that DSL was manipulating its purchase date to suit its requirement.

(vi). Quite contrary to the evidence on record, the Commissioner (Investigation) was not justified in accepting the plea of the applicants which is based on incorrect information such as ledger accounts, etc., whose authenticity and

veracity is highly doubtful. These ledgers were not brought before the investigating agency during the investigation. The applicants were thus allowed by the Commissioner (Investigation) to bring post-facto explanation and information and even documentary evidence which suited them, which was accepted by him without further verification. It is quite improbable that there could be so many mistakes and oversights which could occur and by accepting the explanation of the applicants that the entries were incorrectly made, the entire investigating proceedings became a mockery.

(f) The Commissioner (Investigation) has lost sight of the fact that the time gap between the issue of show-cause notice and the filing of the applications before the Settlement Commission was sufficiently long "to manipulate their records cleverly to accommodate the entries which they could not have explained" and for this purpose they may have created forged ledger, forged documents showing return of catechu, etc. which the Commissioner (Investigation) has taken as sacrosanct document. The applicants have thus thrown a challenge to most of the allegations in the show-cause notice on the basis of which the demand of duty has been worked out. Such an issue can only be sorted out before the proper adjudicating authority and cannot be taken to the portals of the Settlement Commission. The adjudicating authority is equipped with sufficient investigative powers and authority and has an effective machinery to deal with the explanations and replies of the applicants and to examine the authenticity of the documents such as transactions with the banks, goods-receipts of the transporters, entries recorded at the end of the suppliers.

17. It will thus be seen that the DGCEI had strongly objected to the correctness of the conclusions and the manner in which the Commissioner (Investigation) had carried out the investigation into the settlement applications filed by the respondents. To the reply, the DGCEI also attached an Annexure containing its comments on the claim of the applicants and the views expressed by the Commissioner (Investigation) in a columnar form.

18. On 02.02.2012, brief written arguments/preliminary objections on behalf of the central excise department were filed before the Settlement Commission by the special counsel for DGCEI and a copy thereof is marked as Annexure P-4 to the writ petition. These were followed up on 09.02.2012 with additional written arguments/preliminary objections which are marked as Annexure P-5 to the writ petition. It is necessary and important to refer to them in a summarised form.

19. We may first take up the brief written arguments filed on 02.02.2012. Therein it was stated on behalf of the central excise department that the settlement applications are liable to be rejected on the ground that there was no full and true disclosure of any additional duty liability as required by Section 32E of the Central Excise Act. It was pointed out that a meager sum of Rs. 81,75,000/- was offered towards settlement of the liability of the applicants as against the duty demand of Rs. 245,67,00,000/- raised in the show-cause notice. It was stated that the show-cause notice raises several disputed questions of fact

and law. The applicants had even disputed the statements recorded by senior intelligence officers u/s 14 which are deemed to be judicial proceedings having evidentiary value. Considering the nature and intensity/complexity of the investigation required, the applicants cannot rush to the Settlement Commission. It was further submitted that the Settlement Commission cannot enter into questions of law and facts, which are intensely and seriously disputed by the parties and these should be left to the adjudicating authority constituted under the Act. It was further submitted that the Settlement Commission cannot enter into the realm and domain of the adjudicating authority and must in the very nature of things leave the disputed facts and legal position for adjudication. It was further submitted that the Settlement Commission is not vested with the power to decide disputed questions of law and fact and cannot play the role of the adjudicating authority. According to the Central Excise Department, the legislature has conferred sufficient powers and authority upon the adjudicating officers/forums before whom the assessee may challenge or dispute any question of fact or law but that is not possible before the Settlement Commission which was constituted to deal with errant taxpayers who want to turn a new leaf and settle all their disputes. It is not possible, according to the central excise department, to convert the Settlement Commission into an adjudicating body to deal with disputed question of fact and law nor was it an appellate body examining the merits of the show-cause notice. There are separate forums in which the applicants before the Settlement Commission can take such matters and contest them, but not before the Settlement Commission. The Settlement Commission is a forum of surrender and not a place to challenge the legality of the show-cause notice, the statements recorded u/s 14, etc. nor is the Settlement Commission constituted to compute the duty liability of the applicants by examining hotly contested issues. It is required of any applicant who wants to approach the Settlement Commission to make a full and true disclosure of his duty, liability which has not been disclosed before the Central Excise Authorities and to also disclose the manner in which such liability has been derived. There should be a spirit of settlement and not a spirit of contest. The Central Excise Department further stated that if the stand taken by the applicants before the Commission, viz., that data/evidence adduced by them were wrong because of oversight or typographical errors or wrong entries made in the records of the suppliers, etc., such matters can be sorted out in the proceedings pursuant to the show-cause notice and there is no justification for approaching the Settlement Commission. In addition, since there was sufficient time from the date of the show-cause notice till the date on which the applications were filed before the Settlement Commission, the applicants had every opportunity to manipulate the record to suit their defence reply. Thus, the very authenticity of the records produced before the Commissioner (Investigation) in the course of the proceedings before the Settlement Commission is under challenge. In such a situation it is not for the Settlement Commission to entertain the applications and it would be more appropriate that the applicants are relegated to the adjudicating authority. It was also pointed out that several new pleas have been

raised by the applicants including the plea of 9.91% moisture loss which occurred during the process of powdering and drying of catechu. All these new pleas and facts can be dealt with only by the adjudicating authority and not by the Settlement Commission.

20. In the additional submissions the attention of the Settlement Commission was invited to the judgment of the Supreme Court in the case of Ajmera Housing Corporation and Another Vs. Commissioner of Income Tax, wherein it was held that Settlement Commission must record a finding of satisfaction with respect to the full and true disclosure made by the applicant in order to exercise its jurisdiction. Reliance was also placed on the following judgments:-

(i) Australian Foods Ltd. Vs. Commissioner of C. Ex.,

(ii) Ashwani Tobacco Company Pvt. Ltd. v. Union of India & Ors. [W.P. (C) No. 9104/2009 decided by the Delhi High Court].

21. The provisions of Section 32E, 32I, etc. of the Central Excise Act were analysed and it was submitted before the Settlement Commission that there is a distinction between an adjudication before the adjudicating authority and settlement before the Settlement Commission which has been brought out in the judgment of the Delhi High Court cited above. It was the duty of the Settlement Commission to weigh the additional evidence/disclosure made by the applicant to ensure that there was a true and honest disclosure. Attention was drawn to the fact that the department has found various incriminating documents during the search which contain strong evidence of duty evasion involving huge revenue and the applicants cannot be permitted to approach the Settlement Commission when fraud is about to be unraveled and the department is in possession of adequate material to do so, just to enable the applicants to settle their dispute and obtain immunity from penalty, prosecution, etc. Reliance for this proposition was placed on the judgment of the High Court in Kuldeep Industrial Corporation etc. Vs. Income Tax Officer and others, . Instances of incorrect information supplied by the applicants in order to mislead the excise department in the course of the investigation were also furnished in the reply.

22. The Settlement Commission passed the impugned order on 12.03.2012. The principal Bench of the Settlement Commission which heard the settlement applications consisted of the Chairman and two members. The Chairman and one of the members wrote the majority opinion whereas the minority opinion was written by the other member. The majority opinion narrated the facts leading up to the filing of the settlement applications and the arguments advanced before them as well as report of the Commissioner (Investigation) and the objections thereto as well as written submissions/objections filed by the Central Excise Department in the first 41 paragraphs of the order. The consideration of these arguments and their decision is contained in paragraphs 42 to 65 of the majority opinion. The minority opinion starts from paragraph 66 and ends at paragraph 91.

23. We may first examine the majority opinion and attempt to summarise their

findings. Referring to the arguments raised on behalf of the DGCEI questioning the jurisdiction of the Settlement Commission to entertain the applications, the majority held that merely because the statements were recorded u/s 14 of the Act, which are deemed to be judicial proceedings, it cannot be said that the applications cannot be entertained by the Settlement Commission. In the view of the majority, factual mistakes committed while recording the statements u/s 14 can be corrected on the basis of documentary evidence and that those statements need not be believed as "gospel truth". The Settlement Commission referred to the statement of Ajay Gupta, one of the directors of DSL and a respondent herein, tendered u/s 14 on 09.06.2009. According to the majority the statement was given in the absence of other documents such as ledgers and had these been available with him, his statement would not have contained any mistake. According to the majority of the Settlement Commission, if later Ajay Gupta wants to correct those statements on the basis of the ledgers and other documents, it cannot be said that he is denying his statement. It is only a case of elaboration or clarification. The Settlement Commission thus held that to say that a statement recorded u/s 14 which is a judicial proceeding and, therefore, any deviation or attempt to clarify the statement would involve a question of fact and law which the Settlement Commission cannot examine, has no basis and would be opposed to the scheme of the law.

24. The Settlement Commission (majority) agreed with the contention of the Revenue that the settlement proceedings are different from adjudication proceedings, but at the same time observed that merely because the settlement proceedings also involved or required appreciation or evaluation of evidence, particularly in cases where the applicants do not admit in full the duty liability as demanded in the show-cause notice, it cannot be said that wherever appreciation of evidence is involved, there can only be adjudication proceedings and not settlement proceedings. The Settlement Commission agreed in principle with the contention of the Revenue that the question of adjudication would arise where there is a huge gap between the duty demanded in the show-cause notice and the amount of duty admitted by the applicant and the applicant does not accept the amount of duty, which appears to the Settlement Commission to be payable by him, on looking at the evidence produced by both the sides during the proceedings before the Settlement Commission. However, with regard to the specific cases of the applicants, it was observed by the majority that an enquiry was ordered to be conducted by the Commissioner (Investigation) only to satisfy themselves that a full and true disclosure of the duty liability had been made by the applicants.

25. Referring to the judgment of the supreme Court in the case of Ajmera Housing Corporation (*supra*), in the context of the argument of the counsel for the Revenue that the applicants have not made a full and true disclosure of the duty liability, the Settlement Commission observed that in the case before the Supreme Court the applicants had revised their settlement applications in the course of the proceedings before the Settlement Commission which itself was

held by the Supreme Court to indicate that full and true disclosure of the undisclosed income had not been made originally; according to the majority of the Settlement Commission in the present case there was no revision of the applicants of the quantity of catechu that was admitted in the original settlement applications and, therefore, the ratio of the judgment would not apply.

26. The majority also held that under the scheme of law as it exists, the additional amount of duty to be admitted by the applicant before the Settlement Commissioner has to be over and above what was disclosed in the ER-1 returns and that there was no prescription that the additional duty liability admitted before the Settlement Commission should be over and above the amount demanded in the show-cause notice, as contended on behalf of the Revenue. The Settlement Commission thereafter proceeded to hold that even in cases involving fraud, an application can be made for settlement and that the Settlement Commission has been regularly settling such cases as they are not excluded from their jurisdiction. Reference was made to the judgment of the Bombay High Court in *Union of India (UOI) Vs. Horganas India Ltd. and Others*, in which the judgment of the Supreme Court in the case of *Ajmera Housing Corporation (supra)* was distinguished to hold that under the Customs Act, an applicant before the Settlement Commission can approach the Settlement Commission only after a show-cause notice is issued and in this aspect the provisions of customs law are different from the provisions of the Income Tax Act with which *Ajmera Housing Corporation* was concerned and that under the customs provisions, it was only a person who had committed fraud or smuggling or deliberate mis-declaration who would receive a show-cause notice and, therefore, there was no question of the application before the Settlement Commission being voluntary under the Customs Act and that even if the show-cause notice alleges fraud, the Settlement Commission can be approached. On the basis of the judgment of the Bombay High Court, the Settlement Commission observed that even in cases of fraud an application can be made (under the Central Excise law) for settlement, but hastened to add that in the present case "we are not convinced that the applicant has committed any fraud". According to the Settlement Commission, the question was whether the applicant (DSL) received any unaccounted catechu which it used for the clandestine manufacture and removal of its products and that in case the DGCEI had collected, information showing further duty evasion, nothing prevented them from issuing further show-cause notices to the applicants.

27. Thereafter the majority of the Settlement Commission proceeded to examine the question as to whether on merits the assessee had admitted its full duty liability before it. It referred to the report of the Commissioner (Investigation) and noted that the report has been made after a detailed scrutiny and verification of the facts which were not contested by the counsel appearing for the Revenue. As regards the challenge to the very reliability or authenticity of the record produced by the applicants before the Commissioner (Investigation) such as ledgers, goods returned receipts and debit notes, etc. which were not

produced at any time during the investigation before the investigating officers, the Settlement Commission found no merit in the challenge on the reasoning which runs like this:-

Firstly, no one can know what case is going to be made against him, and therefore, cannot be expected at the time of investigation to submit an explanation or the documents that could be found to be relevant in defending the case made against him. Secondly, we observe that DGCEI has found from the records of the applicant that they have recorded both excesses and shortages in receipt of catechu. It does not appeal to sense that a person intending to clandestinely manufacture and remove goods without payment of duty shall enter in his records, quantities of raw materials that have not been supplied by the suppliers thereof. The very nature of discrepancies noticed by DGCEI in the applicant's raw-material account is, therefore, nothing but mere accounting discrepancies.

Thirdly, we find that strangely the investigating officers did not visit the factory premises of the applicant, where they could have resumed all these documents. In any case, unless proved to the contrary, the Commission would like to believe in the genuineness of the documents submitted before us, as any order of settlement obtained on the basis of false evidence would make the applicant liable to the consequences thereof in terms of Section 32K(3) of the Act.

28. So far as the argument of the Revenue that the demand made in the show-cause notice involves complex issues of fact and law and, therefore, the Settlement Commission should not convert itself into an adjudicating authority overlooking its primary function as a settlement authority and it should not enter the domain of the adjudicating authorities, is concerned, the majority found no merit in the contention on the ground that "This is a simple factual issue relating to the receipt and accounting of one raw material namely catechu and no complex investigation/enquiries are involved in verifying these mismatches". It referred to the judgment of the Supreme Court in the case of CIT v. Express Newspapers Ltd. (supra) and Kuldeep Industrial Corporation v. ITO (supra) and observed that in these cases it was held that in ascertaining the complexity of investigation even the material brought after the date of receipt of the settlement applications and till the date of furnishing the report of the Commissioner can be considered. It was held that the Commissioner (Investigation) as pointed by it has conducted an investigation and rendered his findings only after considering the documents and explanations provided by both the sides. The Settlement Commission thereafter proceeded to provide examples of how the Commissioner (Investigation) had gone about the matter. After elaborately referring to the investigation of the Commissioner (Investigation), the Settlement Commission at the end of para 66 of the majority opinion observed that from the evidence produced by the applicant, "we are satisfied that the explanation submitted by the applicant regarding the difference between the quantity of catechu consumed as per bill of material and quantity of catechu

processed during the period under question is acceptable".

29. Turning to the cash of Rs. 61.5 lakhs seized from various persons during the search, the Settlement Commission (majority) observed that the Commissioner (Investigation) has found that no evidence has been produced by the DGCEI to link the cash with the sale proceeds of the goods removed, allegedly, clandestinely. The reasons given for this conclusion in paragraph 57 are:-

(a). That first of all there is no evidence to hold that there was clandestine manufacture and removal of goods and;

(b). There is no evidence to connect the seized cash with the sale proceed of the goods of the applicant firm. According to the Settlement Commission, the explanation given by the co-applicants before the Settlement Commission may not be satisfactory regarding the source of the cash but that by itself was not sufficient to connect the seized cash with the goods of the DSL. The Settlement Commission further opined that if the explanation was not satisfactory, it was for the income tax authorities and not for the DGCEI to question the same and try to connect the cash with clandestine sales.

(c). Though the department was not required to mathematically prove the illicit manufacture and removal of goods, it would at least need to establish the allegation with certainty and this burden was not discharged. The DGCEI, according to the Settlement Commission, did nothing for collecting corroborative evidence to support such huge evasion of duty beyond pointing out the clerical mistakes in the catechu account and seizing some cash in the hands of various persons. The Settlement Commission summed up the position in the following words:-

The SCN does not indicate that they investigated into other raw materials; consumption of electricity; deployment of labour; payments for receipt of unaccounted raw material, if any; transportation; buyers of clandestinely removed goods and payment thereof etcetera. They appeared to be in a haste to erect a tall tower on sinking sand without laying any foundation; once the accounting mistakes in the catechu account are reconciled, the sand sinks and the tower collapses. In the facts of the case before us, there is neither any unexplained discrepancy in the receipt of catechu except the 2000 Kgs., which the applicant has already admitted, nor DGCEI has been able to produce any worthwhile evidence to support their allegation of illicit manufacture and removal of goods in the absence of which their allegations cannot be sustained.

30. As regards the contention of the DGCEI that the applicants did not make a full and true disclosure of the duty liability, the Settlement Commission observed that the only basis for the allegation is the fact that the applicant DSL could not explain 2000 kg of catechu, which it has admitted before the Settlement Commission. In respect of all other quantities of catechu, the applicant has explained all of them and it does not lie in the mouth of DGCEI to assail the basis adopted by the applicant to admit the duty liability of unexplained quantity of

2000 kg catechu or to allege that it has not made a full and true disclosure of the duty liability and the manner in which the liability was incurred.

31. In fine the majority of the Settlement Commission held as follows:-

(a). The applicants have made full and true disclosure and have cooperated in the settlement proceedings;

(b). The case is settled for a duty liability of Rs. 81,75,625/- in respect of the 2000 kg of catechu and interest thereon of Rs. 66,91,245/-. These amounts have already been paid by the applicants and nothing further needs to be deposited, except that the Revenue was authorised to check the calculation of the interest and inform the applicant accordingly for any balance due.

(c). This is not a fit case to grant full immunity from penalty. A penalty of Rs. 5,00,000/- is imposed on DSL. Immunity was granted for penalty in excess of the said amount. The amount of Rs. 5,00,000/- was to be paid within a period of 30 days from the receipt of the order.

(d). The cash of Rs. 61,50,000/- was directed to be returned within 30 days from the date of the receipt of the order.

(e). The applicant DSL and all the co-applicants are granted immunity from the prosecution under the Central Excise Act, 1944 and the rules thereunder.

32. The minority dissenting opinion runs from paragraphs 66 to 91 of the order. The dissenting member did not express any reservation with regard to the question that the settlement application was rightly entertained and allowed to be proceeded with. He agreed with the majority that full and true disclosure does not mean that the applicant before the Settlement Commission has to accept liability for the full duty demanded in the show-cause notice plus Rs. 3,00,000/- more. He was also inclined to agree with the majority that the proceedings before the Settlement Commission would necessarily involve adjudication to a limited extent since even for the purpose of setting a case, the Settlement Commission may be required to exercise its adjudicatory function within the parameters of Section 32F(5) so as to give finality to the settlement order and for the purpose of carrying out the object or the scheme of settlement provided in the Act.

33. However, on certain important aspects, the dissenting member could not agree with the majority. He noted that the acceptance of the duty liability of Rs. 81,71,625/- by the applicant and the claim that huge duty demand of Rs. 245.67 crores in the show-cause notice should be set-aside in view of the submissions and evidence produced along with the settlement application cannot be viewed in isolation, as the two aspects were inter-related. According to him, the acceptance of the duty liability to the extent of Rs. 81,75,625/- required examination of the matter in the light of the provisions for settlement contained in Chapter-V of the Central Excise Act, 1944 whereas the second aspect, namely, the setting aside of the duty demand raised in the show-cause notice required

appreciation of evidence. The dissenting member then proceeded to refer to the settlement application under the heading "amount of duty admitted in the application and basis thereof". He referred to entry No. 3 of the table in para 5.6 of the show-cause notice, which was sought to be explained in the settlement application. He noted that the explanation of the applicant was as under:-

However, with regard to entry No. 3 in the said table corresponding to purchase of 135 cases (2700 Kg) on 03.05.2005 noted on Page No. 127 of 166 papers recovered from the residence of Late Shri S.N. Gupta, the supplier M/s. Girdhari Lal & Sons in his account statement provided to DGCEI has admitted supply of only 35 cases (700 Kg.) under invoice No. 867 dated 12th May, 2005 which has been duly accounted for DSL in their account.

The only plausible explanation to the aforesaid discrepancy is that there is a mistake while recording or entering the quantity on the said papers (Page No. 127) which was recovered from the residence of Late Shri S.N. Gupta. Unfortunately, Shri S.N. Gupta is no more to explain the said discrepancy.

In absence of an explanation from Late Shri S.N. Gupta, who expired on 16th May, 2009, it may appear that DSL has received excess quantity of 2000 Kg. which has neither been accounted by the supplier nor by DSL. Presumption of excess purchase of 2000 Kg. (Page 127) of Kattha could be drawn against the applicant although no such quantity was actually received and no dutiable final products were manufactured, cleared or sold.

34. The dissenting opinion thereafter referred to the annexure to the settlement application under heading "duty liability accepted out of the total duty demanded in the show-cause notice issued and the manner in which such duty liability has been derived". It is not necessary to reproduce the contents of the annexure; suffice to note that it was stated therein that it has not received any quantity of catechu/kattha in excess of the quantities entered in its books of accounts, that it has not consumed any quantity (of catechu) for clandestine manufacture of any final product and has not clandestinely removed or sold any dutiable final product without payment of duty and that, however, it would like to settle the issue by considering the entries in the file, where some doubt may exist, to be actual or correct. The applicant also stated that the discrepancies of 2000 kg of catechu is plausibly a mistake or typographical error which had occurred while recording or entering the quantity of catechu, which could be explained by S.N. Gupta, who unfortunately passed away on 16.05.2009 and, therefore, could not be present to give the explanation. It was ultimately stated that DSL would like to settle the excess receipt of 2000 kg of catechu by agreeing to pay the duty amount with interest. The dissenting member of the Settlement Commission was not prepared to consider the above annexure and the statements made therein as full and true disclosure within the meaning of Section 32E(1) of the Central Excise Act. He referred to the report of the Wanchoo Committee and the reason for the establishment of Settlement Commission both under the direct and indirect taxes regime and noted that the provisions relating to the settlement

under both of them are meant for errant tax evaders who resort to concealment of facts relating to their transactions in statutorily prescribed records. According to him, "The instant case is such where the applicant asserts that he has not concealed any thing which, if disclosed, would fasten him with additional duty liability. His admission of duty is on a presumption: that is, a presumption by default, that since the concerned person, who made an entry in the private documents is no more, a presumption could be drawn that Catechu relating to the entry had been procured which was not accounted and was used in the clandestine manufacture and clearance of excisable goods on which duty works out to be Rs. 81,75,625/-".

35. Apart from the above observation, the dissenting member also referred to the fact that out of the list of 35 suppliers of catechu provided by the applicant, only 18 could be located at their addresses and in respect of 17, the applicant did not disclose their correct address or whereabouts. Though he opined that this may not amount to non-disclosure *ex facie*, its relevance and bearing on the case cannot be ignored. He observed that the details supplied in respect of the 18 suppliers and the record recovered during the search disclosed discrepancies; therefore, in the absence of any information from the remaining 17 suppliers whose correct addresses were not given, a presumption could be drawn that similar discrepancies would have been found had those 17 suppliers also been made available or were existing. Moreover, on the one hand the applicant had not made known the whereabouts of the 17 suppliers, but on the other hand it has relied upon the documents which contain figures of catechu supplies from these 17 non-existent suppliers, in defence. For these reasons, the dissenting member found himself unable to brush aside the objections of the Revenue that full and true disclosure has not been made by DSL.

36. The dissenting member referred to one more aspect of the case, that is the claim of weight loss due to pulverisation of the catechu cake into powder. The weight loss claim was to the extent of 9.91% during the period of demand which involves substantial amount of duty. The Revenue has disputed this claim as being "an afterthought" because no mention of any weight loss had been made in the course of the investigation or while recording the statements of the directors of DSL in charge of catechu or in the statements of General Manager (Legal and Excise) or even in the statement of the Mixing Supervisor or Product Head or Product Manager. The dissenting member opined that if weight loss is such a critical element, nothing prevented the persons who gave the statement during the investigation from bringing the same to the attention of the investigating officers. The claim raised in the proceedings before the Settlement Commission regarding weight loss was disputed by the Revenue on the ground that it was not possible to arrive at the actual quantum of weight loss during the daily pulverisation process for a period of time from April, 2004 to June, 2008, during which period the moisture content, if any, would have definitely varied from supplier to supplier and from batch to batch of each supplier. The dissenting member found force in the objections of the Revenue, though he also found

substance in the claim of processing loss due to powdering. He, however, opined that unless an empirical study by an expert in the field based on the data from other manufacturers of similar products in the country is made, the claim of the DSL cannot be decided. He, however, felt that the Settlement Commission was not the proper forum to undertake any inquiry into such matter or pass any order on the claim made by an applicant to appoint an expert committee for the said purpose.

37. The dissenting member thereafter proceeded to summarise the rival claims before the Settlement Commission and express the following view regarding the complexity of the nature of the case:-

90. In a case like this, a noticee has right to cross examine any witness whose statement is relied upon in the allegations made against him. In support of his defense, he has a right to produce evidence before the adjudicating authority. As already mentioned, to prove their case, the applicant had requested the Commissioner to allow cross examination of 13 persons who tendered statements or furnished other information before the Investigating Officers. At the same time, Revenue cannot be deprived of its right to cross examine the witnesses including deposition of the authors of the documents relied upon by the applicant/noticee when Revenue doubts authenticity thereof. Further, in respect of the defense contention about returned goods verification enquiry from the third party documents like Bank/transporter records may be necessary. Since Revenue has made out their case on the basis of alleged non-accountable of catechu purchased (which is not a dutiable product), they would be required to establish their case with sufficient evidence while rebutting the defence" strong contention that the case has been made out on presumption and assumption only as there are no corroborative evidence and that the investigating officer had even not gone to the factory where all the relevant records were maintained. Only after the evidence of both sides is put to such a test that a fair and impartial appreciation thereof could be done to arrive at decision on the matter. This type of quasi-judicial proceeding/inquiry can be done only in a regular Adjudication proceedings. The Settlement Commission is not a proper forum to undertake such inquiry/adjudication proceeding. In *Picasso Overseas*, Hon"ble Delhi High Court has observed that in case Settlement Commission finds that there are highly complex and disputed question of fact for which detailed enquiry is necessary, then in such a case, it ought to refer the matter back to the Adjudicating Officer to be taken up the stage from which the matter was before such Adjudicating Officer just before making of the application before the Commission. In my view, the instant case is of such type.

91. In view of discussion in the foregoing paras, I am of the view that the disclosure of the admitted duty liability by the applicant in the instant case is not the disclosure of additional duty liability envisaged in Sec. 32E(1) of the Act. There also does not appear to be full and true disclosure of the applicant's duty liability. Further, the detailed enquiry required to determine the sustainability of

duty demand in the SCN is such that it cannot be undertaken by the Commission. The case is, therefore, ordered to be sent back to the Adjudicating Officer who shall dispose it of in accordance with the provisions of law.

38. Chapter-V of the Central Excise Act, 1944 provides for "settlement of cases" by a Settlement Commission appointed by the Central Government. The jurisdiction and powers of the Settlement Commission are outlined in Section 32A. Section 32E describes the procedure for making an application before the Settlement Commission for settlement of a case. "Case" has been defined in clause (c) as any proceeding under the Act or any other Act for the levy, assessment and collection of excise duty pending before an adjudicating authority on the date on which the application is made. This definition is new, having been substituted w.e.f. 01.06.2007 and would, therefore, govern the present case because the application for settlement has been made on 01.08.2011. The proviso to the clause is not relevant for our purpose. The condition to be satisfied before an application is made to the Settlement Commission is that some proceeding for the levy, assessment and collection of excise duty should be pending before an adjudicating authority. Section 2(a) defines "adjudicating authority as any authority competent to pass any order or decision under the Act, but excluding the Central Board of Excise and Customs, Commissioner of Central Excise (Appeals) or the Customs, Excise and Service Tax Appellate Tribunal". Going back to Section 32E, sub-section (1) thereof provides that 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 and such application should be in the prescribed form and manner "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 mis-classification, under valuation, inapplicability of exemption notification or cenvet credit or otherwise.....". The proviso to the sub-section does not permit an application to be filed unless the applicant has filed returns showing the production, clearance and the central excise duty paid in the prescribed manner, show-cause notice for recovery of the duty has been received by the applicant, the additional amount of duty accepted by the applicant exceeds Rs. 3,00,000/- and the applicant has paid the additional amount of excise duty accepted by him along with interest due u/s 11AB.

39. Once an application is made before the Settlement Commission, the procedure for processing the same is prescribed in Section 32F of the Act. We will notice only the more important and relevant provisions thereof, having regard to the case before us. Sub-section (1) provides that within 7 days from the date of receipt of the application, the Settlement Commission shall issue a notice to the applicant to explain in writing as to why the application should be allowed to be proceeded with. Once the explanation is filed by the applicant,

within 14 days from the date of the notice, the Settlement Commission shall take into consideration the explanation and allow the application to be proceeded with. It may also reject the application upon which the application will abate. The proviso to the sub-section says that if no notice has been issued by the Settlement Commission or no order has been passed within the period prescribed by subsection (1), the application shall be deemed to have been allowed to be proceeded with. Once an order is passed allowing the application to be proceeded with or it is deemed that the application has been allowed to be proceeded with the Settlement Commission shall call for a report along with the relevant records from the Commissioner of Central Excise having jurisdiction. This shall be done by the Settlement Commission within 7 days from the date of the order allowing the application to be proceeded with. The report shall be furnished by the Commissioner of Central Excise within 30 days of the receipt of communication.

40. On receipt of the report from the Commissioner of Central Excise the Settlement Commission is empowered to order a further inquiry or investigation, if it is found necessary, after reasons are recorded by the Settlement Commission. Thereafter it is open to the Settlement Commission to have the matter investigated by the Commissioner (Investigation) and direct a report to be filed within a particular time period. Such report shall relate to the matters covered by the settlement application and any other matter relating to the case.

41. Sub-section (5) provides for passing of the order of settlement. After taking into account the records received from the Commissioner of Central Excise and the report of the Commissioner (Investigation) and after hearing both the sides and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may pass "such order as it thinks fit" on the matters covered by the application and any other matter relating to the case but not covered by the application, which is referred to in the report of the Commissioner of Central Excise or Commissioner (Investigation). This order passed by the Settlement Commission shall be in accordance with the provisions of the Central Excise Act.

42. Sub-section (7) provides that the materials brought on record before the Settlement Commission shall be considered by the Members of the Bench before passing any order under sub-section (5).

43. Under sub-section (8), the order passed under sub-section (5) shall provide for terms of settlement including any demand by way of duty, penalty or interest, the manner in which the sums due under the settlement shall be paid and all other matters to make the settlement effective; in case the settlement application is rejected, the order shall provide the reasons therefor. The proviso says that the order of the Settlement Commission shall not provide for a duty liability that is less than the duty liability admitted by the applicant. Sub-section (8) also provides that if it is subsequently found by the Settlement Commission that the order has been obtained by fraud or mis-representation of facts, the

settlement shall be void and it shall be so stated in the final settlement order.

44. Section 32-I describes the powers and procedure of the Settlement Commission. In addition to the powers conferred on the Settlement Commission under Chapter-V, it shall have all the powers that are vested in the Central Excise Officer. During the pendency of the proceedings before the Settlement Commission, it has exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise Officer. The provisions of the Act continue to operate in so far as they relate to matters other than those before the Settlement Commission, in the absence of any express direction to the contrary issued by the Settlement Commission. It has the power to regulate its own procedure in respect of all matters arising out of the exercise of its powers and discharge of its functions.

45. Section 32K confers powers upon the Settlement Commission to grant immunity to the applicant from prosecution and penalty if it is satisfied that the applicant "has cooperated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability". In such a case, the Settlement Commission can grant immunity to the applicant from prosecution for any offence under the Act and also, wholly or partly, grant immunity from the imposition of any penalty or fine under the Act with respect to the case covered by the settlement.

46. The Wanchoo Committee report provided for settlement of huge tax disputes and immunity from criminal proceedings by a Commission to be constituted by the Central Government, when approached without objection from the Income Tax Department. These recommendations were made in the Chapter titled "Black Money and Tax Evasion". In partial implementation of the report, Chapter XIX-A was introduced into the Income Tax Act, 1961 by the Taxation Laws (Amendment) Act, 1975. In the Central Excise Act, Chapter V providing for a Settlement Commission to settle cases was inserted by Act 21 of 1998 w.e.f. 01.08.1998.

47. It has been held in several judgments that the primary condition for approaching the Settlement Commission is that the application shall contain a full and true disclosure of the duty liability and the manner in which it was derived. There are identical provisions in the Income Tax Act relating to the Settlement Commission proceedings. In *Ajmera Housing Corporation* (supra) the Supreme Court held that disclosure of full and true particulars of undisclosed income and the manner in which such income was derived are the pre-requisites for a valid application u/s 245C(1) of the Income Tax Act. It was observed that the Settlement Commission has to record its satisfaction on this aspect and without recording of the satisfaction it will not have jurisdiction to pass any order on the matter covered by the application. This is the position prior to the amendment to Chapter XIX-A of the Income Tax Act w.e.f. 01.06.2007. The position under the Central Excise Act prior to the amendment made w.e.f. 01.06.2007 to Chapter V of the Act was considered by a Division Bench of this

Court in Commissioner of Central Excise v. Woods Pvt. Ltd. in W.P. (C) No. 21055/2005. The judgment was rendered on 10.11.2005. In that case it was held by this Court that the requirement of a full and true disclosure is a continuing requirement that needs to be satisfied from the beginning of the proceedings till the conclusion thereof and if at any stage of the proceedings it appears to the Settlement Commission that the disclosure made by the assessee was incomplete or untrue, the settlement application can be thrown out. The position is no different u/s 32E(1) of the Central Excise Act even after the amendment made w.e.f. 01.06.2007. The requirement continues to be that the application shall contain a full and true disclosure of the duty liability which has not been disclosed before the Central Excise Officer and the manner in which such liability was derived. It is true that on and after 01.06.2007 the Settlement Commission need not call for a report from the Commissioner before the settlement application is allowed to be proceeded with. However, the requirement that the settlement application shall contain a full and true disclosure continues to remain in the statute and it is, therefore, the duty of the Settlement Commission to examine this aspect by itself on the basis of explanation provided by the applicant.

48. The other principle which has been set down in several judgments of this Court is that the Settlement Commission is not a substitute for adjudication proceedings before the central excise authorities and where complex issues of fact and law are involved for which a detailed inquiry is necessary, settlement proceedings cannot act as a proper substitute for the adjudication proceedings. In Picasso Overseas and Others v. Director General of Revenue (Intelligence) and Another [W.P. (C) No. 1495/2007 and W.P. (C) No. 4401/2007] decided on 03.08.2009 by a Division Bench of this Court, the point directly arose for consideration. The issue posed before this Court was: ".....can the settlement commission substitute itself for the adjudicating officer and arrive at a decision on highly contentious issue requiring detail and complex investigation for arriving at an adjudication of such facts". In paragraph 9 the following principles were set out:-

(i) The Settlement Commission cannot substitute itself for the adjudicating officer by deciding complicated and highly disputed or contentious questions and issues of facts themselves, because the expression "settlement" is used in the Customs Act in contra-distinction with "adjudication" and the very scheme of the settlement provisions is to settle and not adjudicate.

(ii) All the provisions make it abundantly clear that what is required of the Settlement Commission is a decision when there are terms of settlement agreed to by the applicant and a duty liability which is accepted by him; he could not be fastened with the liability which he never intended as accepted to be payable by him.

(iii) Section 127(1) as it stood then, used the expression "complexity of the investigation" which shows that highly complex and contentious questions of fact

cannot even be admitted for processing.

49. It was thus held that if the case involves highly complex and disputed questions of fact for which detailed inquiry is necessary, the Settlement Commission should refer the matter back to the adjudicating officer to be taken up from the stage from which the matter was before such officer just before the making of the settlement application.

50. The above principles were reiterated by two other judgments of this Court:-

(i) Ashwani Tobacco Co. Pvt. Ltd. Vs. Union of India (UOI) and Others,

(ii) Director General of Central Excise Intelligence Vs. Murarilal Harishchandra Jaiswal Pvt. Ltd. and Others,

51. In the second of the above decisions, this Court observed that "where at the admission stage u/s 127C(1) the case throws a high degree of variation between the facts and contentions of both the parties before the Settlement Commission, then in such a case the Settlement Commission should not even admit an application because it is clear that the Department of Customs does not accept the duty which an applicant feels is payable by him and, therefore, is bound to inquire into highly disputed questions of facts". The Division Bench, however, hastened to add that these observations will not apply to demands which are totally unsupported.

52. The majority and minority opinions in the present case are agreed that the Revenue's contention that an applicant for settling his case has to accept full duty demanded in the show-cause notice plus Rs. 3,00,000/- more is an erroneous impression of the existing legal provisions and merely because the huge demand raised by the excise duty authorities in the show-cause notice is not accepted by the applicant, it does not mean that the applicant has not made a full and true disclosure of the duty liability. The dissenting member joins issue with the majority opinion on the facts of the present case. It is his view that having regard to the amount of duty admitted in the application and the basis thereof and the statements made in the Annexure to the settlement application, it cannot be said that there was full and true disclosure of the duty liability. According to him, the applicant has not accepted any procurement of unaccounted catechu or any clandestine manufacture of excisable goods therefrom without payment of applicable duty. The applicant has also asserted that all the quantity of excisable goods have been duly reflected in the returns filed with the Central Excise Officer. According to the dissenting member this does not satisfy the requirement of a full and true disclosure. All that the applicant has stated is based on a presumption and even the admission of duty on the basis of 2000 kg of catechu is also a presumption by default and what has been stated by him is merely that the person who made the entry (S.N. Gupta) is no more and, therefore, a presumption could be drawn that the catechu relating to that entry have been procured and not accounted for and used in the clandestine manufacture and clearance of goods on which the duty liability comes

to Rs. 81,75,625/-. The dissenting member found this to be unacceptable as a full and true disclosure of the duty liability. There was no admission by the applicant about the unaccounted purchase of 2000 kg of catechu or the clandestine manufacture of the goods out of the same.

53. The other reason which prompted the dissenting member who wrote the minority opinion to say that there was no full and true disclosure by the applicant is the fact that the applicant did not provide the correct addresses of 17 suppliers of catechu out of 35 suppliers. Mere non-furnishing of the full and correct addresses, according to him, may not "per se" amount of untrue disclosure; however, he has taken the view that the applicant was required to furnish the correct addresses of the 17 suppliers since it was required of him not only to dispel the inference drawn by the investigating authorities that in the absence of the details of supplies by these 17 suppliers it was open to them to draw the inference that the purchases made from them stood on the same footing as those made from the 18 suppliers, but also because the applicant itself was relying upon the documents containing the figures of catechu by these non-existent 17 suppliers in its defence.

54. The third reason which prompted the dissenting member to hold that the applicant had not made a full and true disclosure is that it raised a plea of weight loss due to pulverisation of the catechu cake into catechu powder to the extent of 9.91% during the entire period of the demand (April, 2004 to June, 2008) which involved substantial amount of duty. This point was never raised during the course of investigation, as found by the dissenting member. He thought it unusual that if the weight loss involving substantial amount of duty was so critical, then the applicant could not have omitted to bring it up during the investigation and it is no part of the functions of the Settlement Commission to enter into a detailed inquiry into the claim by appointing an expert committee for this purpose.

55. The dissenting member has also taken the view that the question of weight loss which would involve a detailed inquiry by an expert committee, for which a request was made before the Settlement Commission by the applicants, would involve complicated issues and facts which are properly left to the adjudicating authorities for decision. He also found that just as the applicants had requested for cross-examination of 13 persons who tendered statements or furnished other information before the investigating authorities u/s 14 of the Act, the Revenue also cannot be deprived of its right to cross-examine the witnesses including the deponents of the statements relied upon by the applicants, when the Revenue doubts the very authenticity thereof. For instance, the ledger accounts, transport documents and third party documents such as bank statements, etc. have to be put to strict proof by the revenue since these documentary evidences were not adduced in the course of the investigation but were produced before the Commissioner (Investigation) in the course of the proceedings before the Settlement Commission. According to the dissenting member, the apprehension

of the revenue that the applicants had sufficient time to manipulate their records to accommodate all the entries which they could not adduce in the course of the investigation, cannot be brushed aside as unfounded. The authenticity of the documentary evidence can be proved only after necessary verification and this would involve strong rival positions the resolution of which would be beyond the scope of the proceedings before the Settlement Commission as it would impinge on the adjudicatory proceedings. The statements made u/s 14 of the Central Excise Act, as noticed by the minority opinion, have not been retracted by the concerned persons. This would be another line of investigation which would be beyond the scope of the settlement proceedings. For these reasons the dissenting member has concluded that neither was there full and true disclosure of the applicant's duty liability nor can the Settlement Commission undertake adjudicatory proceedings which are indispensable having regard to the complexity of facts and issues of law.

56. It appears to us, on a fair reading of both the majority and the minority opinion, that the better view is the one taken by the minority. In coming to this conclusion, we have fully taken note of the limits of judicial review of the orders of the Settlement Commission. The limits have been set out clearly in the judgment of the Supreme Court in the case of *State of U.P. and Another Vs. Johri Mal*, The gist of the judgment is that though the power of judicial review is more about the decision-making process rather than the merits of the decision itself, while examining and scrutinizing the decision making process, it becomes inevitable to also appreciate the facts of a given case so as to test the decision on the touchstones of illegality, irrationality or procedural impropriety. An evaluation of the facts of the case would necessarily be involved even to record a finding that the decision is irrational. With particular reference to orders of the Settlement Commission, the following judgments may be referred to where the limits of judicial review of the orders of the Settlement Commission have been adumbrated:-

- (1) *R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another*,
- (2) *Jyotendrasinhji Vs. S.I. Tripathi and others*,
- (3) *Shriyans Prasad Jain Vs. Income Tax Officer and others*,
- (4) *Kuldeep Industrial Corporation etc. Vs. Income Tax Officer and others*,

A careful study of both the majority and the minority opinions expressed by the Settlement Commission shows that on the basic principles that are applicable to the proceedings before the Settlement Commission, there is no major disagreement. All the three members, including the Chairman, are agreed that it cannot be said that there was no full and true disclosure of the duty liability merely because the applicant did not admit the duty liability mentioned in the show cause notice which, in the present case, is Rs. 245.56 crores. They are also agreed that if the case involves a detailed adjudication into complex facts and

issues of duty liability, the proper forum would be the adjudicating officer and not the Settlement Commission. It is only in the application of these principles to the facts of the case that there is disagreement between the members, the Chairman and one member constituting the majority holding that the applicant has made a full and true disclosure of the duty liability and the case also does not involve any adjudication, and the lone dissenting member taking the view that on the facts of the case there was no full and true disclosure of the duty liability and further that the case involves adjudication and not settlement.

57. Taking the question of full and true disclosure first it seems to us that the majority opinion has rested its case on the fact that the Commissioner (Investigation) appointed by the Settlement Commission to investigate and report on the contents of the settlement applications could not find fault with the disclosure made by the applicants. The majority opinion rightly posed the question to themselves that the real question is whether the applicant has accounted for all the catechu bought by it and whether any duty liability was incurred by utilizing the unaccounted catechu for the purpose of clandestine manufacture and clearance of the goods. However, it appears to us that they did not examine the question with the insights and incisiveness which the dissenting member employed in examining the question. The majority opinion was content with accepting the claim that it was plausible that there can be mistakes and calculation errors and so on in the maintenance of the records relating to the receipt and utilization of 2000 kgs of catechu which could only be explained by the person who maintained the records who was unfortunately no more at the time of the investigation. This explanation of the applicant did not cut ice with the dissenting member, who took the view that this is no disclosure of additional duty liability by the applicant nor can it be treated as full and true disclosure of the additional duty liability. According to him, it was a presumptive statement and the admission of duty itself was on a presumption coupled with the assertion that there was no concealment which would fasten the applicant with additional duty liability. This crucial aspect has been overlooked by the majority which preferred to accept the claim that the records plausibly contained mistakes and errors which alone was being admitted as additional duty liability. The view taken by the dissenting member, which is the minority view, commends itself as the only rational view.

58. The understanding and appreciation of the judgment of the Supreme Court in the case of Ajmera Housing Corporation & Another (*supra*), and the applicability of the ratio to the facts of the present case by the majority opinion is, with respect, untenable. The emphasis in the judgment was on the full and true disclosure of the additional duty liability; it so happened that in the case before the Supreme Court, the revised settlement application filed by the assessee disclosing higher income than the original application was itself taken as indicating that the assessee had not come out with full and true disclosure in the original application. The majority opinion however, brushed aside the contention of the revenue based on the judgment to distinguish the judgment on the ground

that in the present case, the applicants did not file any revised applications upwardly revising the quantity of the catechu or the additional duty. This, with respect, shows the skewed consequences of distinguishing a judgment in total disregard of its ratio. The majority opinion has placed reliance on the judgment of the Bombay High Court in *UOI Vs. Hognas India Ltd.* (supra), in which proceedings for settlement of customs case were distinguished from proceedings of settlement of income tax case and it was held that in every customs case there is a show cause notice and it is only thereafter that a person can approach the Settlement Commission and the issue of the show cause notice does not in any way take away the voluntary nature of the settlement application; in fact, it was held that there cannot be any voluntary application before the Settlement Commission in the Customs Act. In that context the High Court observed that an application under the Customs Act before the Settlement Commission can be made even if the show cause notice alleges fraud. Relying on the observation made in a different context, the majority opinion has proceeded to observe, rather startlingly, that even in a case involving fraud an application can be made for settlement; they have hastened to add that in the present case, the applicant has not committed any fraud. When confronted with the fact that the addresses of 17 suppliers given by the applicant were found to be non-existent, the majority opinion proceeded to meet the same by saying that this by itself did not constitute a fraudulent act and that if the suppliers were not available at the given addresses, the applicant cannot be faulted. They have even gone to the extent of saying that "there was nothing which stopped DGCEI to make their own independent enquiries in whatever manner they thought fit to locate them and obtain the requisite information." This statement is wholly irrational as the dissenting member has pointed out. According to him the furnishing of incorrect address of the 17 suppliers by the applicant has to be seen in the context that it would be open to the investigating authority to infer that, if by investigation discrepancy could be detected in respect of supplies made by the 18 existing suppliers, similar discrepancies would have been found had the 17 suppliers been available or existing. In other words, what he implied was that it was only in order to forestall an investigation that the correct addresses of the 17 suppliers were not furnished. He also found force in the point made by the revenue that even while not making known the whereabouts of the 17 suppliers, the applicant has itself relied on the documents which contained figures of catechu supplied by these 17 non-existing suppliers in its defense. Taking note of these two crucial angles of the case the dissenting member has held, and in our opinion rightly, that the applicant cannot be said to have made a full and true disclosure of the additional duty liability.

59. The majority opinion has taken a view that though in principle, a case involving deep or intensive investigation into complex issues of facts of law is not to be brought within the purview of the Settlement Commission, the present case does not involve such an adjudication and therefore can be settled. They have preferred to look upon the need for testing a statement recorded u/s 14 of the

Act as one which does not involve any complexity of facts or law and that merely because the statements may have to be tested by cross-examination, either at the instance of the applicant or at the instance of the revenue, it cannot be stated that the case is complex. The dissenting member has however met this finding effectively by pointing out in the quote extracted earlier that this is not the complete picture on the basis of which complexity of facts and law and the need for adjudication was put forth by the revenue. He has noticed that both the revenue and the assessee are to be accorded the right of cross-examination and this procedure is not conducive for a settlement of the case and it properly belongs to the domain of adjudication by the adjudicating authority. We are inclined to agree with this view taken by the dissenting member as against the rather simplistic view of the issue taken by the majority. The majority of the Settlement Commission have expressed the opinion that "the question of adjudication would arise where there is a huge gap between the duty demanded in the SCN and the amount of duty admitted by the applicant and the applicant does not accept the amount of duty, which appears to the Commissioner, as payable by him, on looking at the evidence produced by both the sides during the proceedings before the Commission." The amount of duty admitted by the applicant is only Rs. 81,75,625/- along with the interest at Rs. 66,91,245/- as against the demand of Rs. 245.65 crores raised in the show cause notice. Therefore, even on the very opinion expressed by the majority, it would be a question for adjudication and not settlement. In fact, the Division Bench of this Court in the case of DGCEI Vs. Murarilal Harish Chandra Jaiswal Pvt. Ltd. & Ors. (supra) have expressed the view that in a case where at the admission stage the case shows a high degree of variation between the facts and contentions of both the parties before the Settlement Commission, then in such a case the Settlement Commission should not even admit the application because it is clear that the department of customs does not accept the duty which an applicant feels is payable by him and therefore the Settlement Commission would be bound to enquire into highly disputed question of facts. The Division Bench of course excluded from the sweep of their observations cases of astronomical demands raised by the revenue which may be totally unsupported even by the admitted facts appearing from the records.

60. There is also another view point in the present case as to why it was held by the dissenting member to be a case fit for adjudication and not for settlement. According to him, the applicants did not produce the documentary evidence such as ledgers, GR receipts, third party documents etc. in the course of the investigation but chose to produce them before the Commissioner (Investigation). According to the dissenting member, the revenue has contested the authenticity of the documentary evidence which were not produced during the investigation but were produced two years later before the Commissioner (Investigation) who was directed by the Settlement Commission to make an investigation into the settlement applications. The dissenting member has found justification for the claim of the revenue and has observed that the authenticity

of the evidence which has been challenged by the revenue can be proved only after necessary verification of the furnished data by adjudicating upon third party documents such as those of the banks, the transporters and also the ledger which was allegedly got up for the occasion. We are unable to say that the dissenting member committed any error of law in finding justification for the apprehension of the revenue. It was firstly for the applicant to produce all the evidence in its possession before the central excise authorities while submitting its reply to the show cause notice. The fundamental rule of law is that every litigant is to adduce his entire evidence at the earliest point of time. The applicant did not do so. Further, they produced the documentary evidence before the Commissioner (Investigation) who gave a clean chit to them by accepting the evidence. Surprisingly, the majority opinion has not found fault with this procedure. There was a sufficiently long gap of time between the investigation proceedings and the settlement proceedings. The applicants undeniably had not only the time to prepare the documentary evidence, but they also had the motive. This should have prima facie raised suspicion in the minds of the Settlement Commission. However, the members constituting the majority did not consider it fit to ponder over this question and preferred to rest content with the report of the Commissioner (Investigation) who accepted the documentary evidence not adduced earlier, to whom also somehow this did not appear unusual or irregular. The majority dealt with this matter in para 52 of its opinion and gave three reasons, which we have quoted earlier, as to why they did not find merit in the argument of the revenue. The first reason given is that since no one can know what case would be made against him, he cannot be expected at the time of the investigation to submit the document that can be found to be relevant in fighting the case made against him. This statement, besides shocking the conscience of this Court, also is contrary to the basic principle that every litigant is expected (without being prompted) to adduce all the evidence in his favour at the earliest opportunity. It is not denied that the central excise authorities had issued show cause notice raising a huge demand of Rs. 245.65 crores. Investigation proceedings had taken place consequent to the search and the applicant had also submitted reply to the show cause notice. These are opportunities given to the applicant to adduce all the evidence, oral and documentary, in its favour. The ledgers, bank statements and goods receipts of the transporters were all produced before the Commissioner (Investigation) in the course of the settlement proceedings fully supported the claim of the applicant and were accepted without demur. If such was the weight of the evidence, it was for the applicant to explain what prevented it from adducing them when it had enough opportunity in the course of the investigation and adjudication proceedings. The second reason is that the DGCEI has found from the records of the applicant that there are both shortages and excesses recorded in the receipt of catechu. The third and last reason given by the majority, namely that they found it strange that the investigating officers did not visit the factory premises of the applicant from where they could have recovered all these documents and that they would like to believe in the genuineness of the

documents submitted before them, since any settlement obtained on the basis of false evidence would make the settlement order void in terms of Section 32K(3) of the Act, again shocks the conscience of this Court. Even assuming that there was a lapse on the part of the investigating authorities in not visiting the factory premises, how can that wean the applicant away from the duty of adducing the documentary evidence before the investigating authorities or the adjudicating officers? If really the applicant had those documents in its factory, the most natural thing to do was to place them before the investigating authorities or the adjudicating authorities in an attempt to clear themselves of the charge of clandestine manufacture of goods and consequent evasion of excise duty. It is true that there should be evidence to prove that the documents are not genuine or authentic and it may also be true that in the absence of such evidence the Settlement Commission was right in presuming their genuineness or authenticity. However, the revenue cannot be found fault for raising the issue of the authenticity of the documentary evidence on grounds of delay in submitting them, when the applicant had everything to gain by submitting them in the course of the investigation or the adjudication, but did not. The genuineness or the authenticity of the documentary evidence is a contentious issue which the adjudicating authority is more suited to examine as he is vested with all powers including the power to refer the documents to handwriting experts. The mere fact that the Settlement Commission is also vested with such powers cannot transpose the proceedings, which are essentially the proceedings in the domain of adjudication, into proceedings for settlement. Moreover, the fact that the applicant would be liable to serious consequences if it is later found that the order of settlement was obtained by fraud or for submitting false evidence is neither here nor there; we are concerned with the decision making process adopted by the majority members of the Settlement Commission and not with the consequences that may visit the applicant if and when malpractices are proved.

61. There is one more reason given by the majority, which is facile, to say the least. In the course of the search, cash aggregating to Rs. 61.5 lakhs was seized from various persons at different places. They were all connected to the applicant. This is an important piece of evidence. The majority however has expressed the view that the DGCEI has not produced any evidence whatsoever to connect the cash with the sale proceeds of clandestinely removed goods. They have stated that in addition to the absence of any evidence to show clandestine manufacture and clearance there is no evidence to connect the seized cash with the sale proceeds. They have further expressed that the co-applicants have tendered their explanation about the source of the cash seized from them and it is for the income tax authorities to question the source and not for the DGCEI. We are wholly unable to follow this line of reasoning. The majority was not justified at all in disconnecting the seized records showing unaccounted purchases of catechu from the seized cash. They have put on blinkers and have overlooked the normal course of human conduct and the probabilities and have

failed to scratch the surface to find out the truth. If there are records to show unaccounted purchase of catechu, which is used in the manufacture of pan masala, gutka etc. and there is unaccounted cash which is also seized, it requires no knowledge of rocket science to draw the inference, which would be quite reasonable and in conformity with the normal course of human conduct and probabilities, that the unaccounted cash represents sale proceeds of clandestinely removed goods. It may be that the income tax authorities would also be required to be apprised of the seizure of the cash. That is an entirely different aspect, but it is unacceptable to say that the seized cash is not connected to the clandestine manufacture of the goods. We are unable to see what further evidence was required to connect the seized cash with the clandestine sales. One would be inclined to think that the seizure of the unaccounted cash substantiates the charge of clandestine manufacture and removal of goods. We have earlier referred to judgments of this Court wherein it has been held that a case involving complexity of issues both of facts and law and disputed questions of fact for which detailed enquiry is necessary ought to be referred to the adjudicating officer by the Settlement Commission, to be taken up from the stage at which the matter was before the adjudicating officer, which is before the filing of applications before the Settlement Commission. The present case clearly appears to us to be eminently a case for adjudication and not for settlement. The decision making process adopted by the majority of the Settlement Commission is flawed; and to that extent interference under Article 226 /227 is necessary and justified. We are not to be understood as having said anything on the merits or demerits of the case. That has to be examined by the adjudicating authority under the Central Excise Act in accordance with law and the provisions of the Act. We are quite aware of the limits of judicial review as contoured by the authorities to which we have referred earlier. The view taken by the majority in the present case appears to us, with respect, vitiated by irrationality, procedural impropriety and illegality. The majority clearly erred in holding that the applicant has made a full and true disclosure of the duty liability which was not admitted before the central excise authorities and the manner in which such liability was derived. They also erred in holding that the case was simple and did not involve any dispute or complex questions of fact or law which can only be decided by the adjudicating authority and therefore it was a case for settlement by the Settlement Commission. We accord our approval to the reasoning and conclusion arrived at by the dissenting member who constituted the minority. The opinion of the majority is accordingly, quashed and the minority opinion is upheld. The writ petition is accordingly allowed with costs which we assess at Rs. 25,000/-.