

(2004) 08 CAL CK 0044

Calcutta High Court

Case No: Writ Petition No's. 413 and 515 of 2004

Commr. of Cus. (Port)

APPELLANT

Vs

Settlement Commission, Cus.
and C. Ex.

RESPONDENT

Date of Decision: Aug. 23, 2004

Acts Referred:

- Customs Act, 1962 - Section 127H

Citation: (2005) 101 ECC 87 : (2005) 121 ECR 153 : (2005) 179 ELT 386

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: S.K. Kapoor, ASG, P.K. Ghosh, Jayanta Banerjee and Biswanath Somaddar, for the Appellant; S. Pal V.N. Dwivedi and P.K. Tarafder, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.

Both the aforementioned writ petitions are taken up together for hearing, as the issues involved in both the matters are identically same. By the first mentioned writ petition, the petitioner wants to un-settle the statutory settlement made by the learned Settlement Commission, Customs and Central Excise, New Delhi by its final order dated 8th May, 2003, whereas, by the second writ petition, the petitioners want implementation of the same order and direction of the Settlement Commission.

2. Briefly stated fact is as follows :

The respondent No. 2 had imported duty free Non-alloy Steel Billets and Non-alloy Steel Wire Rods, against advance licence under the DEPB scheme under Notification No. 43/2002-Cus., dated 19th April, 2002. The said imported goods landed at the customs check-post and the Bills of Entries were filed showing "nil duty" liability. Upon investigation it was found that the said goods were illegally disposed of instead of using the same as input materials for exportable products. It is the

pre-condition for use of the advance licence that corresponding export obligation has to be fulfilled. As such show cause notice was issued u/s 124 of the Customs Act, 1962. After issuance of the show cause notice, the importers concerned filed an application u/s 127B of the Customs Act, 1962, for settlement of the case, before the Customs and Central Excise Settlement Commission, being the respondent No. 1. The aforesaid application was heard in two stages. At the admission stage, the respondent took a plea that having regard to the facts and circumstances of this case, the respondent No. 1 ought not to have entertained the application u/s 127B as the conditions mentioned therein have not been fulfilled, By an order with detailed reasons, the respondent No. 1 rejected the plea of jurisdiction and found that importers have fulfilled all the conditions to maintain the application and, therefore, decided to hear the application on merit, at subsequent stage.

3. It is pertinent to mention that the said order dated 20th March, 2003, passed while admitting the application, has not been challenged in this writ petition. The final order dated 5th September, 2003 [2003 (162) E.L.T. 770 (Sett. Comm.)] has been challenged. The learned Commission found on merit that the importer applicant had filed five Bills of Entry and claimed clearance of the goods at "nil rate" of duty, on the strength of the aforesaid notification. It was further found that the applicants have admitted a liability of Rs. 11,36,95/189.88p. This amount is in relation to the amount of duty foregone, consequent upon the assessment made in the relevant five Bills of Entry because of exemption. Admittedly, the applicants have not fulfilled export obligation. The fulfilment of such obligation could be total as in this case or could be partial as in some other case. The commission observed that it could not be concluded that since the applicants have filed a Bond, binding themselves to pay differential duty, consequent upon non-fulfilment of conditions stipulated in Notification No. 43/2002-Cus., the assessment has been made at tariff rate. It cannot be said that the levy, assessment and collection are made at the amount as indicated in the Bond. The tariff rate of duty is one thing and the effective rate is another, The Commission has also interpreted the provision of Section 127B and relied on number of decisions, rendered by the Commission itself in other matters.

4. On the date of admission, the commission found that a sum of Rs. 7,60,000/- was paid, and further duty liability was ascertained at Rs. 4,36,35,189.86p and it directed the applicants to pay the same and also to furnish Bank Guarantee of Rs. 1,00,00,000/-. After hearing the matter, as aforesaid, by the said impugned order dated 5th September, 2003, the matter was disposed of finally.

5. At the time of hearing, the Commission found that the applicants had duty liability to the extent of Rs. 11,36,35,189.86p, out of which the applicants had earlier paid Rs. 700,60,000/- prior to issuance of the show cause notice and a sum of Rs. 4,36,35,190/- was asked to be paid and, indeed paid in compliance with the admission order. Therefore, there was no need to make any payment on account of the duty. By the impugned order, the commission has granted immunity from

prosecution for offence under Customs Act, 1962 and also from paying fine or penalty in relation to the aforesaid case.

6. As far as interest is concerned, the Commission has asked the importers to pay interest at the rate of 10 per cent from the date of import of duty-free input, till the payment of duty on such goods, on pro rata basis which was permitted by the Revenue including the diverted quantity, subject to complete waiver of interest beyond 11th December, 2002.

7. Learned Additional Solicitor General, Mr. Kapoor, while assailing the impugned order submits that the conditions mentioned in Section 127B has not been fulfilled, as there was no mention of un-disclosed duty liability. The application was not based on the admitted and disclosed duty liability, as will appear from the several Bill of Entries and accompanying Bonds. He submits that respondent No. 1, while entertaining application without having conditions fulfilled has acted in excess of jurisdiction. It is submitted by him that though order admitting the application and payment pursuant thereto having been made and accepted, but this does not preclude the petitioner from challenging the question of jurisdiction or authority of the respondent No. 1 to settle the case, he has drawn my attention to copies of several Bill of entries and the Bond. In support of his argument, on the question of jurisdiction, he has brought several decisions of the Supreme Court, which were rendered in case of settlement cases under the Income Tax Act, 1961. He submits that there is no basic difference between the scheme and approach of the settlement provision in the Income Tax Act and those of under the Customs Act, 1962. He has also shown me the relevant provisions of the Income Tax Act, viz. Section 245H and corresponding provision of Section 127B of the Customs Act. Therefore, the question of jurisdiction, as held in the under-mentioned cases, rendered in case of Income Tax matters, are squarely applicable in this case also. These cases are reported in [Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd.](#), , [Commissioner of Income Tax Vs. Hindustan Bulk Carriers](#), , [Commissioner of Income Tax, Mumbai Vs. Damani Brothers](#), , [Commissioner of Income Tax Vs. Sant Ram Mangat Ram Jewellers and Others](#), and [Ghulam Qadir Vs. Special Tribunal and Others](#),

8. From the aforesaid decisions it will appear that unless there has been full and complete disclosure of the duty liability, which was not done before the Assessing Officer earlier, the application for settlement is not maintainable, in other words exercise of jurisdiction, is depending upon proper application having been made and fulfilling of the conditions mentioned in Section 127B of the said Act.

9. He further contends that under the scheme of the aforesaid Chapter, it will appear that the Commission has jurisdiction only to grant immunity against prosecution and penalty. It has no jurisdiction or authority to waive the basic duty or interest, in any form. The said Supreme Court decisions are helpful on this point only. The Commission has no jurisdiction either to grant waiver of interest and it is

not within its competence.

10. Mr. S. Pal, learned Senior Counsel appearing for the respondent No. 2 submits that the petitioner is estopped from raising question of jurisdiction, as the same has been dealt with and decided by the respondent No. 1 at the preliminary stage of hearing with detailed reasons. In fact, the petitioner has not challenged the preliminary order, admitting the application for settlement, and indeed, this contention of the petitioner, raised here, has been over-ruled with detailed reasons and relying on various judgments of the Commission itself. As such, in absence of any specific challenge made herein, the question of jurisdiction should not be examined by this Court. More so the petitioner officials have taken benefit of the order. Rather, this Court may examine the final order, if permissible under law.

11. Mr. Pal contends that the petitioners filed five several Bill of Entries, disclosing duty liability as being "nil" as at that point of time, the petitioner has been enjoying exemption as condition of advance licenses. However, after issuance of show cause notice, the importer found that since its obligation of export of the material could not be discharged on various circumstances, they sold these imported materials in indigenous market and disclosed truly and fully duty liability in order to settle the matter, after issuance of show cause notice, the importer/respondent filed the instant case. The importer's duty liability could be discovered and disclosed later on, when it was found that the petitioner could not fulfil export obligation. Therefore, at the time of filing of Bill of Entries, the duty liability of the petitioner was "nil". He submits that the definition of assessment will be found in Sub-section (2) of Section 2 of the said Act and when the duty liability arises, will appear from Section 12 and Section 17. According to him, "nil duty" is also a duty liability. Therefore, it cannot be construed that the petitioner has failed to disclose non-disclosed duty liability.

12. Mr. Pal submits that under the law there is difference between the levy and collection. The levy may be at any rate inclusive of nil rate but the collection may not be nil. The duty liability is ascertained on the date of presentation of the Bill of Entry for entering goods brought from outside country. Under various provisions of the Customs Act, 1962 "namely Section 2(2), Section 2(15), Sections 12 and 17, the customs duty are assessed. However, question of payment arises only after assessment and levy. Some times the payment of duty is exempted u/s 25 of the Act, so it cannot be said the goods imported are immuned from chargeability. At the time of assessment the petitioner had no actual liability because of exemption granted on the conditions mentioned in the appropriate notification. In this case, therefore, the entire amount of customs duty, which was otherwise leviable and realisable but for customs exemption notification, is additional amount of customs duty with in the meaning of Section 127(B) of the said Act. He says that in numerous cases this has been held by the CEGAT and also various High Courts.

13. On merit, he contends that the provision of Chapter XIX (A) of the Income Tax Act, 1961 and Chapter XIV(A) of the Customs Act, 1962 deal with settlement

business. He further submits that the power of the Settlement Commission under the said Act mentioned in Section 127H of the Income Tax Act is substantially different from corresponding Section 245H of the Income Tax Act, 1961, this will appear from comparative study of both the Sections. Unlike Section are taken up together for hearing, as the of the Income Tax Act, 1961 the Settlement Commission under Customs Act, 1962 has authority to pass appropriate order amongst others with regard to interest whole or in part with respect to the case covered in the settlement. The Settlement Commission has in its discretion passed order asking the respondent importer to pay interest at the rate of 10 per cent per annum. The rate of interest chargeable under Bond was reduced subsequently at the rate of 15 per cent per annum. When a statutory authority has exercised its discretion applying its mind with regard to waiver of interest, this Court in exercise of power of judicial review should not interfere with the same substituting its own discretion. The respondent importer has co-operated having made full disclosure of un-paid duty and in fact in terms of the interim order of the Commission, discharged its duty liability making full payment. This co-operative conduct of the importer respondent has been taken into consideration by the Commission. The department has accepted this payment. Under those circumstances this Court will dismiss the writ petition. In support of his submission he has relied on the following decisions :

[Union of India and others Vs. M/s. Jalyan Udyog and another,](#)

14. Therefore, the writ petition filed by his client should be allowed asking the Department concerned to release the Bank Guarantee and bond both dated 20th May, 2003.

15. I have heard and examined carefully the contention and rival contention of the parties advanced through their learned Counsels. The following three points are involved to decide both the matters :

(1) Whether the Settlement Commission had or has jurisdiction to exercise its power under Chapter XIV(A) of the Customs Act, 1962 to entertain the application of the respondent/importer on the given facts and circumstances.

(2) Whether the Commission has power to waive interest chargeable under the Customs Act and the Rules framed thereunder under the aforesaid Chapter.

(3) If so whether the Commission is justified in waiving interest above 10 per cent on pro rata basis flatly in this case.

16. To consider the first point, order passed at the admission stage by the Commission is to be examined so far as its legal implication is concerned. On 20th March, 2003 the Commission considered and decided the question of entertainability of the application. Upon detailed discussion and consideration of the relevant provision of the law. It over-ruled objection of the Revenue. By this order which is in nature of an interim one, the learned Commission directed the

importer respondent to pay admitted duty liability of Rs. 43,63,51,898.86/- within 30 days from the date of receipt of the copy of the order and also directed the Revenue to adjust the amount of Rs. 7,10,60,000/- towards the admitted liability of the duty of the Customs. Indisputably the aforesaid direction has been complied with by the importer and the Revenue has accepted the balance amount, The aforesaid order was never challenged nor has been challenged seriously by making any prayer for setting aside and quashing of the aforesaid order in the present petition. It is true while challenging the final order one can raise plea of jurisdiction of the authority who passes the order. The learned Additional Solicitor General (Mr. Kapoor) says the question of jurisdiction goes to the very root of the matter and if on a given facts and circumstances the concerned authority could not entertain the application under the law the order passed in relation thereto even if accepted by the parties, can be challenged at the final stage. Certainly the aforesaid contention based on the legal proposition, can be looked into and examined at any stage. It is also equally true and settled position of law that all sorts of questions of jurisdiction cannot be examined by the superior court at any point of time, if it is a question of inherent lack of jurisdiction and/or power this can be questioned and examined at any stage even in a co-lateral proceeding. The question of jurisdiction arises on various ways namely inter alia, lack of power altogether, lack of authority having regard to subject matter, refusal to exercise jurisdiction having authority, illegal and improper exercise of power. In this case while appreciating the case I think it is nobody's case of inherent lack of power or jurisdiction of the Commission. It is at the most lack of authority to exercise power having regard to the subject matter of the application, In the first type of case the authority concerned could not receive the application at all. In this case going by the statement in the application made out by the importer, the Commission has rightly entertained the application, since it has considered in great details, whether the conditions mentioned in Section 127B of the said Act has been fulfilled or not. I accept the argument of Mr. Kapoor (the learned Additional Solicitor General) that the Commission will have lawful jurisdiction to exercise its power under the aforesaid Chapter, if an application discloses full and true duty liability which has not been disclosed before the appropriate officer, the manner in which such liability has been incurred, the additional amount of duty of customs accepted to be payable by him on any ground whatsoever. The Commission found that the importer respondent fulfilled all the conditions. It is further found that there was full and true disclosure of the duty liability of the additional customs duty accepted to be payable by the importer. The Commission with clarity has held that entire amount of the duty is chargeable and leviable, but for exemption, is the additional duty to be paid. In my view the Commission has jurisdiction to decide the question of entertainability and/or maintainability of the application and when it has decided with reasons which do not seem to be absurd, this Court will not substitute its own reasoning.

17. Mr. Pal has rightly said in this context that as question of entertain-ability and maintainability of the application has been lawfully decided and accepted by the parties without any demur, this court will not accept the contention of the Revenue now. In my opinion this question of jurisdiction could have been raised immediately after the decision at the admission stage was rendered and without accepting the direction and order. Therefore, the principle of waiver and estoppel will be applicable though the question relates to jurisdiction. Therefore, I over rule the contention raised by the learned Additional Solicitor General that the Commission had no jurisdiction to entertain this application.

18. Now coming to the second point as formulated above, I think the argument of Mr. Additional Solicitor General that the Commission has no power to waive interest at all relying on the various Supreme Court decisions, has no merit. The decisions in this context cited by Mr. Additional Solicitor General rendered by the Supreme Court in relation to the provision for settlement under the Income Tax Act, 1961 and if corresponding provision of Income Tax Act is read and examined then it will appear the Commission established under the Income Tax Act, 1961 has no expressed power to grant waiver of interest at all and while interpreting the said section namely Section are taken up together for hearing, as the and proviso thereunder the Hon"ble Apex Court held the Settlement Commission cannot pass order, waiving interest contrary to the provision of the Income Tax Act. It will be very useful to set out the relevant provision of Section are taken up together for hearing, as the of the Income Tax Act:

"245H(1). - (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement u/s 245C has cooperated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also (either wholly or in part) from the imposition of any penalty under this Act, with respect to the case covered by the settlement:

Provided that no such immunity shall be granted by the Settlement Commission in case where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application u/s 245C."

19. I find considerable strength in the submission of Mr. Pal that the decisions cited in this context by Mr. Kapoor are not at all relevant in this case, for the corresponding provision of Section 127H of the Customs Act is not an absolute paramateria. From the Section as above it is clear that the Commission has been empowered by the Legislature amongst others to waive interest under this Act. So it is appropriate to set out Section 127H(i) of the Customs Act.

"Section 127H. Power of Settlement Commission to grant immunity from prosecution and penalty. - (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement u/s 127B has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also either wholly or in part from the imposition of any penalty, fine and interest under this Act, with respect to the case covered by the Settlement:

Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application u/s 127B,"

20. The contention of Mr. Kapoor as regard Law Ministry's opinion as to the power of remitting interest, is not accepted by me. Mr. Pal has rightly pointed out that legislative intention cannot be defeated by any delegatee or by any other extraneous body. The opinion of the Law Ministry is not binding factor. Such contention is patently absurd. I find in several cases the Commission has waived either partially or wholly interest apart from granting immunity from prosecution and penalty. The reported decisions of the Commission have been placed before me and I think as regard power of waiver of interest either fully or wholly is expressly given by the legislature. Under those circumstances the principle laid down by the Supreme Court in relation to the Income Tax Act is not at all applicable, for the decision of the Supreme Court cannot defeat expressed provision of other law which was not even dealt with by the Apex Court nor even the same had been in issue. The contention of Mr. Kapoor in this regard thus fails.

21. As far as the third point is concerned I have carefully examined the provision of Section 127H of the Act and it appears to me the power of the Settlement Commission is relatable to waiver either partial or full amount of interest under the Act only. In this case the importer was and is under obligation to pay interest not under the provision of the Act, but under the bond at the rate of 24 per cent in terms of exemption notification. I am of the view though Bond furnished in terms of statutory decision, but then contractual character is not destroyed. I am unable to comprehend how the learned Commission could overlook the implication of bond in relation to payment of interest thereunder. It seems to me it has wrongly equated payability of interest under the bond with the expressed provision of the said Act. Unlike Civil Court the waiver either of full or of partial interest in contractual bargain cannot be granted by the Commission without consent of both the parties. To clarify the position had it been a case of chargeability or payability of interest under expressed provision of the Act the Commission would have jurisdiction. This point once was brought for decision before Bombay High Court in the case of [Pratibha](#)

[Syntext Ltd. Vs. Union of India \(UOI\)](#), Their Lordships of the Division Bench however did not deal with the same as the facts and situation of the case did not warrant. In Paragraph 16 it was observed by their Lordships as follows :

".....although the Settlement Commission has levied interest at a percentage, much less than what was agreed to pay by the petitioners in their bond and legal undertaking, the same being not an issue in this petition, we are not expressing any opinion in that behalf."

22. The petitioner took fullest advantage of the exemption notification at the time of assessment and also at the time of payment of other dues. I think it is not the question of co-operation rather under compulsion they were forced to disclose their duty liability to overcome the difficulty of possible prosecution and penalty. The Commission has altogether ignored binding effect of bond given by the importer binding itself to pay interest at the rate of 24 per cent in case of failure to fulfil export obligation. The aforesaid rate of interest of 24 per cent was not the interest chargeable under the Act but under bond, which is contractual document in nature, this contractual question has not been examined by the Commission. It is true the bond was furnished in connection with the statutory notification and but has got force of deal of private character. The power of waiver is relatable to the interest chargeable under the Act. However, subsequently it was found that the rate of interest stipulated in the bond was reduced to 15 per cent on and from October, 2002, in place of 24 per cent. This reduction can be termed to be variation of the terms of the Contract subsequently and this has not been rejected by the importer.

23. Since the importer committed breach, they are to pay interest at the rate of 15 per cent from the date of the submission of Bill of Entry on the total amount of duty up-to-date of payment of first instalment and thereafter on pro rata basis till entire payment having been made.

24. As far as direction for nullification of entries made in DEEC Book and revalidation of adverse licenses is concerned the same is also without jurisdiction because the same has to be dealt with under the different Act, not under Customs Act, 1962. The learned Commission has no power to do so. Accordingly, this direction is set aside.

25. Thus both the applications are disposed of.

There will be no order as to costs.