

DEED, IN NEED, INDEED - II

SC FOR ST

(By S. Jaikumar, Advocate, Swamy Associates)

Settlement Commission! Born in 1998, with much hype and fancy, this denarion, has grown over a period, only as a spastic child!

While its elder cousin CESTAT is busy with truck loads of cases flowing in every day, this forlorn forum has not even got its minimum ration! Over years, this institution has only become a forlorn forum and has just reduced to be a park for the service extension seekers in the department!

Why this sorrow state for this Settlement Commmission? Where it went wrong? What are the bottlenecks? Does it have any future? Is there a way out so that the Commission could live upto its purpose or will it have its own burial? Whenever I appear before the Commission, seeing the inactivity surrounding, I always ponder over the above nagging questions...

First and foremost, to me, the cheapest teaser in the Act is Sec 32L of the Act (Sec 127I of the Customs Act). As per this Section, if the Commission is not admitting the application of a person, for any reason, it shall send the case back to the jurisdictional Central Excise officer, to dispose of the case. While sending back, the Commission

shall also send all the materials, evidences, results, depositions and any other information placed by the applicant before the Commission. The Central Excise officer shall use all these materials while deciding the case, as if it were submitted to him.

This is the most unbecoming provision of the Settlement Commission, where the so-called "in camera" proceedings are thrown to public eye and used against the applicant. In other words, the applicant is made to dig his own graveyard. It may be argued that, the case is sent back only because of the applicants "non-cooperation" and hence he deserves the same. Tell me, is it ethical and not a betrayal of his disclosure? The prime requirement of the Settlement Commission is " honest disclosure". It is as good as making a confession in a Church. Once a person confesses and seeks absolution, can the Church, for any reason, make the confessions public? NO LAW CAN BE SO IMMORAL OR UNETHICAL. If you don't want him, at the worst, throw him away. But using one's own confessions against him and punishing him based on such confessions, is definitely a shameful and unethical act and is highly condemnable.

Further, there is another major threat to an applicant who opts for the Settlement is in the nature of his other fiscal implications, under the Income tax, Sales Tax, etc., which

are paraphernalia implications to his accepted liability. At least, if he loses his case in an appellate forum (Tribunals, High courts or Supreme Court), and pays his liability, he can still argue with the Income Tax and Sales Tax departments that it is not his accepted liability (and hence not an accepted turnover) but has lost the case due to lack of evidence or incapacity of the counsel, whereas, in case of the Settlement Commission, it's given in a platter!

Hence it shall be codified that the proceedings of the Commission shall be proprietary to the Commission and shall not be used by any other person or agency, either if the case is settled or sent back for adjudication.

Secondly, the admissibility of applications filed by the non-registered units. Bulk of the excise cases are generated from the SSI units, who do not register with the department. Under Sec 32 B of the CE Act, 1944, one of the conditions to apply for settlement is that, the applicant should have filed returns to the department. When the case itself is made on unregistered unit, such a stipulation is illogical. In this connection, the larger bench of the Commission has held (In Re : Emerson Electric Company India (P) Limited) that the application for settlement can be accepted from an unregistered SSI unit provided a declaration has been filed as per the relevant

Notifications. In most of the cases booked against SSIs, the non payment of duty of excise was mainly due to their lack of awareness as to their excise liability. Had they been aware of their requirement to file the declaration, they would have very well paid the duty. When registered persons, being very well aware of their liability, evades duty can still seek the remedy of the Settlement Commission, why not the innocent non registrant/non declarant units? It is high time that this requirement is dispensed with.

Last but not the least, the main attraction of going to the Settlement Commission is immunity from prosecution. But this incentive has its own bottlenecks! Section 32K of the Central Excise Act and Sec 127H of the Customs Act grants immunity to an applicant from the claws of prosecution. But it grants immunity only from the Excise Act or Customs Act, as the case may be, Indian Penal Code and any other Central Act. As discussed above, the applicant may land up in paying the Sales Tax for his accepted Sales turnover, which is governed by a State Act. There is every possibility that he may be liable for a prosecution under the said Sales Tax Act, which is primarily a State Act. Either Sec 32 K of the Central Excise Act or Sec 127H of the Customs Act do not provide any immunity to the possible prosecution under any State Act, thus rendering the poor applicant, vulnerable to the

prosecution under such State Acts. Exonerated under the Central Act but imprisoned under the State Act!

Further as per the proviso to the Sec 32K (1) & Sec 127H (1) of the Customs Act, there is no immunity to an applicant, against whom the prosecution proceedings have already been initiated, before the date of his application. This makes the situation graver, as in such cases, an admission of liability would only fortify the prosecution proceedings against the applicant. Instead, it would have been practical and forthcoming, if the provisions are made in such a way, to withdraw the prosecution proceedings, at any time, if the person opts for the Settlement. That too, with the present proposed amendment to Sec 11A of the Central Excise Act, wherein compounding of an offence has been introduced and whereby immunity under Sec 9 of the Act *ibid*, (prosecution), is provided to any person who opts to pay an additional 25% of the duty liability, henceforth, there is little charm left with the Settlement Commission, on this score.

So I request the Commission to be benevolent, not by imposing reduced penalties, but by waiving off the penalties, on the cases settled!

Now to the title of this piece. **SC for ST - Settlement Commission for Service Tax!**

Service Tax is the tax of the future. Most of the Service Tax disputes are now only crawling in the corridors of higher judicial fora. The unawareness and the misinterpretations prevailing in the Service Tax, among the taxmen, tax payers as well as the tax consultants, are abundant. The inclination to settle the disputes among the service providers is very evident and profound. The response to the voluntary disclosure scheme announced by the Government is also testimony to the willingness of the trade to settle their service tax disputes. It would be timely and fruitful, if the Government extends the scope of the Settlement Commission for Service Tax too! May be in the ensuing Budget!

Before Parting...

The Settlement Commission provisions relating to the Central Excise envisions only the assessee, on whom demand of duty is cast, to file an application under Section 32 E of the Act. If that were so, on what capacity, the co-noticees, who are served with the notice for various penalties are filing the application? Though the Settlement Commission in the case of **Oriflame** has held that the co-noticees can also file an application before the Settlement Commission, but where is the statutory provision???