

SETTLEMENT COMMISSION – A FORLORN FORUM

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The hype was matching the arrival of Mr. Bill Clinton to India! The expectation was matching the arrival of Sachin Tendulkar to the crease, on the final of the Sharjah Cup! The objective was matching the treaty between the Israelis and the Palestines! But the result...!

The Hon'ble Settlement Commission was constituted with the above ingredients during 1998, with a noble intention of settling the disputes, thus buying peace for the applicants and earning revenue to the Exchequer. But after seven years of its birth, it is highly unfortunate that it still remains to be a spastic infant, without any nourishment. Though conceived to be an alternate Ombudsman to the Hon'ble Tribunal, the Settlement Commission has not evoked the intended response either in quantum or in repute, till date. As the statistics goes, the ratio between the number of cases filed in the Settlement Commission vis-à-vis the Hon'ble Tribunals, is around 1:50. Even though the age difference between the Tribunal and the Settlement Commission is a definite factor, the incentives and privileges of the Settlement Commission should have made it more populist, in these seven years of existence. But, where it really went wrong as it is still limping? Let us analyze some possible shackles that have prevented the Settlement Commission from its progress.

First and foremost, the 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. Normally, if a person evades excise duty, he should have suppressed the corresponding sales turnover also. For example, if an applicant accepts a duty liability of, say, Rs.50 Lakhs, (@16% duty) on his suppressed sales without payment of Excise duty, his accepted additional turnover would be around Rs.3 crores. This suppressed turnover may cost him an additional Income Tax liability of around Rs.1 Crore (@ 30%) and Rs. 30 Lakhs on Sales tax liability (@10%). As he would not have maintained purchase documents and evidence for other expenditures for this unaccounted transactions, he may land up in paying the above said IT and ST, without much abatements. This shall result in ultimately paying up Rs.1.80 Crores, for an accepted excise liability of Rs. 50 Lakhs. Around 60% for 16%! This equation makes every prudent applicant to think twice before opting for the Settlement!

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! Even though the IT and ST may not accept the same, still they have to independently investigate and frame their charges, whereas, in case of the Settlement Commission, it's given in a platter!

Secondly, 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.

The other major advantage of going to the Settlement Commission is waiver of fine, penalty and interest, either wholly or partly. After the Supreme Court interpreting that the penalties are discretionary and to be imposed based on the gravity of offence, all judicial fora are either imposing reasonable penalties or waiving them completely, thus rendering compassionate justice. With the Larger Bench of the Hon'ble Tribunal holding that there shall be no penalty or interest in cases where the duty is paid before the issuance of show cause notice in the case of *Machino Montell* and with the amended Sec 11 A itself providing for waiver of show cause notice and penalty if the duty is paid with the interest, there is no more charm in going to the Settlement Commission for waiver of penalty or fine, thus leaving the waiver of interest as the lone josh of Settlement Commission.

Even though Sec 32K of the Central Excise Act (Sec 127H of the Customs Act), provides for waiver of interest in full, it has been an uniform practice for all the Benches of the Settlement Commission, across the nation, to impose an interest @10% on the cases settled, save the entire duty is paid before the issuance of the show cause notice (following the *Machino Montell* case, *supra*). The rationale behind imposing interest @ 10% flat, irrespective of the merits of the case, is highly questionable and not well founded. It had remained to be so static and monotonous, that it remains to be the same 10%, irrespective of the fact that the statutory rate of interest imposable under the Sec 11AB of the Central Excise Act was @ 24% earlier or @ 13%, at present. The purpose and aim of constituting the Settlement Commission is to settle disputes with compassion. When the requirement of getting into the Settlement Commission is based on a virtue called " honest disclosure", we feel it would be a reasonable bargain, if the Settlement Commission also reciprocates back with a gesture of granting full waiver of interest. At least, instead of imposing interest @10% right, left and center, it would be more reasonable and appropriate, if the Commission imposes interest at reasonable rates, based on the gravity of the case. The national lending rates having already been down to single digit percentage, the interest rates under Sec 11 AB of the Central Excise Act is also being periodically revised. Unless the Commission revisits the interest rates but glues to this 10%,

someday, the rate of interest imposed by the Commission would be much higher than the rate of interest imposable in the normal course.

Another teaser in the provisions relating to the Settlement commission 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. But is it ethical and not a betrayal of his disclosure? 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.

Now let us cruise through some of the land mark decisions of the Commission, which have a lasting impression, on the Commission itself. In the larger bench decision of the Commission (In Re Crest Communications 2003 (152) ELT 452) it has been held that the Settlement Commission can travel beyond the scope of the Show cause notice, while settling the dispute.

When the Supreme Court itself has time and again held that there is no provision under law to travel beyond the scope of the notice, the decision of the Commission to travel beyond the notice is highly debatable and the wisdom of the decision requires a definite judicial scrutiny. This whimsical decision leaves the entire trade in aghast that everyone is gasping in awe and despair, as to whether to "honestly disclose" the mischief, if any, done by their fore fathers too, and accept the same. This quizzical proposition shall topple the well settled legal principles including limitation!

Next comes the admissibility of applications filed by 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. We have already addressed this issue asking as to whether the Commission is a haven only for "registered evaders?" Recently 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, kind reference is drawn to the decision of the Hon'ble High court of Calcutta, in the case of CC Vs Settlement Commission - 2005 (179) ELT

386, wherein it has been held that the Settlement Commission has got no powers to grant immunity from interest liability arising out of a contractual obligation. The Hon'ble High Court has not appreciated the fact that the contract (bond) in question is not any independent contract, but is executed only in pursuance of the Notification issued under the Customs Act. The said decision is religiously being followed by various benches of the Settlement Commission, thus rendering its remnant charm to descend to an abysmal depth.

Before parting...

No doubt, Service Tax is going to be the tax of the future. Most of the Service Tax disputes are yet to travel to the higher judicial fora. The unawareness and the misinterpretations prevailing in the Service Tax is Oceanic. 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, last November, is a 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!