

Bombay High Court The Anup Engineering Limited vs The Union Of India on
29 September, 2010 Bench: V.C. Daga, R. M. Savant 1 wp-8.99.sxw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 8 OF 1999

1. The Anup Engineering Limited.

2. Shri V.R.Shah. ... Petitioners.

V/s.

1. The Union of India.

2. The Commissioner of Customs. ... Respondents.

Ms.Anjali Chandurkar with Ms.Akanksha Thakkar i/b.

Purnanand & Co. for the petitioners.

P.S.Jetly for the respondents.

CORAM : V.C.DAGA AND R.M.SAVANT, JJ.

DATED : 29th September 2010.

JUDGMENT : (Per V.C.Daga, J.)

Perused petition.

Heard learned counsel for the petitioners and learned counsel for the respondents.

2. The petitioners have filed this petition to challenge the order/communication dated 2nd December, 1998, whereby and whereunder the declaration filed by the petitioners pursuant to the notice issued under section 72 2 wp-8.99.sxw of the Customs Act, 1962 ("Act" for short) was rejected by the Commissioner of Customs (Adjudication) and Designated Authority, Kar Vivad Scheme, 1998 holding that the declaration filed travels beyond the scope of the Kar Vivad Samadhan Scheme, 1998. The Facts :

3. The petitioner- company is in the business of manufacturing chemical and pharmaceutical machineries, and in the normal course of business it sought to import hot rolled SS Plates. Specification 904-L & 2 REIO from Sweden. Accordingly, petitioners imported 4050 Kgs of such plates on 18th April, 1991 having CIF value of Rs. 6,06,984/-. At the relevant time, the said plates were eligible to concessional rate of duty under notification No.58/87 dated 1st March, 1987 (as amended from time to time). The petitioners obtained certificate from the Directorate General of Technical Development (DGTD) in June, 1991 which entitled them to claim exemption under the said notification. The Petitioners claimed concession under the said notification, however, the same was not considered and the petitioners were informed that they have to pay full amount of duty in the sum of Rs.12,50,696/- . Concessional rate of duty was not granted to them. In the meantime, the goods remained in the warehouse as per the provisions of the Customs Act. Since the warehousing period had expired, various notices were issued from time to time to the petitioners under section 72 of the Act. 3 wp-8.99.sxw The goods of the petitioners were, accordingly detained and the notice dated 28th February, 1998 was issued for auction of said goods. On 26th March, 1998, the petitioners received order passed by the Assistant Commissioner of Customs (Bond Department) confirming the demand of Rs. 12,50,696/- with interest at the rate of 20%.

4. The petitioners aggrieved by the above demand, filed appeal on 29th May, 1998 against the said order along with stay application. In the meanwhile, on 1st September, 1998, Kar Vivad Samadhan Scheme, 1998 ("KVS Scheme" for short) came into force. As such, on 14 th October, 1998, petitioners filed declaration under Scheme-89 of the said KVS Scheme. The respondent No.2 vide his order/ communication dated 2nd December, 1998, rejected the declaration filed by the petitioners holding that the declaration filed by the petitioners was not covered under the KVS Scheme. Rival Submissions :

5. The learned counsel appearing for the petitioners submits that petitioners are eligible to take advantage and file declaration under the KVS Scheme. That the petitioners complied with all the preconditions for availing the benefit of

the said Scheme. According to the petitioners, demand notice was issued prior to 31st March, 1998; the tax in respect of the said demand notice was not paid by the petitioners and were in arrears; appeal against the said demand notice has been preferred by the 4 wp-8.99.sxw petitioners and is pending before the Commissioner (Appeals) and the first petitioner is otherwise not debarred under section 95 of the KVS Scheme, as such the petitioners are entitled to take advantage of the KVS Scheme. 6. Learned counsel for the petitioners submits that the respondent No.2 found that the declaration filed by the petitioners was complete in all respect. He, however, rejected the declaration only on the ground that no dispute existed between the petitioners and the department since the notice of demand was issued under section 72 of the Act which the petitioners were bound to pay, as such declaration was not covered under the KVS Scheme. Learned counsel submits that once the petitioners have complied with all the prerequisites and filed declaration under section 90(1), which is complete in all respects, then the respondent No.2 is duty bound to determine the tax payable by the petitioners and not required to go into the merits of the case. She further submits that the impugned order passed by the respondent No.2 rejecting declaration filed by the petitioners is based on the extraneous reasons not covered under the KVS Scheme and is liable to be set aside in exercise of writ jurisdiction of this Court. Per Contra : 7. Mr.Jetly, learned counsel appearing for the respondent Revenue urged that the impugned order is passed in accordance with law and that there is no infirmity of 5 wp-8.99.sxw any nature as alleged or otherwise. It is further submitted that by allowing, the collection of duty which was attracted to the imports was postponed under section 60 of the Act. According to him, the petitioners failed to clear the goods after the bond period was over. Consequently, the petitioners were called upon to pay duty with interest as contemplated under the Act. According to him, there was no dispute which could have been raised, as such the Designated Authority was justified in rejecting the declaration made by the petitioner. 8. In rejoinder, Miss Chandurkar urged that the duty demanded and confirmed was in excess of the assessment done and that it was assessed without affording an opportunity of of hearing, as such the petitioners were well within their rights to challenge the said demand in appeal filed before the Commissioner (Appeals) on 29th May, 1998. She further submits that the amount of duty due and payable under the Customs Act was determined on 31st March, 1998 and that it remained unpaid as on the date of making declaration under section 88 of the Act as such the declaration could not have been rejected by the respondent. 9. Having heard rival parties, the KVS Scheme is contained in sections 86 to 98 of the Finance No.(2) Act, 1998. The object of the scheme as explained by the Finance Minister in his speech is:- "Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in 6 wp-8.99.sxw pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Declassing the system will not only incentivise honest taxpayers, enable Government to realise its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-

friendly. I, therefore, propose to introduce a new Scheme called Samadhan.”
 10. We will shortly notice the grounds of challenge. At the outset, we may set out briefly the contents of the Scheme and extract and reproduced the relevant parts of the Scheme to the extent necessary to appreciate and adjudicate upon the grounds of challenge. KVS Scheme : 11. Section 86 specifies that the Scheme may be called the Kar Vivad Samadhan, 1998. It shall come into force on the first day of September, 1998. Section 87 defines a few terms unless the context otherwise requires. The relevant ones are :- “(f)”disputed tax" means the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under section 88; 7 wp-8.99.sxw

xxxxx	xxxxx	xxxxx
xxxxx	xxxxx	xxxxx

(m) "tax arrears" means,-

(i) in relation to direct tax

(ii) in relation to indirect tax
 enactment, _

- (a) the amount of duties (including drawback of duty, credit of duty or any amount presenting duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a declaration under section 88; or
- (b) the the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show-cause notice issued on or before the 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration under section 88, but does not include any demand relating to erroneous refund and where a show- cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified. Explanation.__Where a declarant has already paid either

voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in 8 wp-8.99.sxw this sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause;

- (c) All other words and expressions used and not defined in this Scheme but defined in any direct tax enactment or indirect tax enactment shall have the meanings respectively assigned to them in those enactments."

12. Sections 89 and 90 deal with the manner in which declaration has to be made and the manner in which the payment of tax arrears is to be made. Section 91 provides that the Designated Authority shall, subject to the conditions provided in section 90, grant immunity from instituting any proceedings for prosecution for any offence under any direct tax enactment or indirect tax enactment or from the imposition of penalty under any of such enactments, in respect of matters covered in the declaration under section 86. The provisions of section 94 make explicitly clear that any benefit, concession or immunity to the declarant shall be available only for the year in which the declaration has been made. Further, section 95 specifies certain circumstances, cases, situations in which the benefit of the Scheme shall not be available. 9 wp-8.99.sxw

13. Sections 90 to 94 are of relevance and hence are extracted and reproduced as under :-

14. Time and manner of payment of tax arrears.- (1) Within sixty days from the date of receipt of the declaration under section 91, the designated authority shall by order, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the tax arrear and the sum payable after such determination towards full and final settlement of tax arrears : Provided that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived : Provided further that the designated authority may amend the certificate for reasons to be recorded in writing.

- (2) The declarant shall pay, the sum determined by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment of the designated authority along with proof thereof and the designated authority shall thereupon issue the certificate to the declarant. 10 wp-8.99.sxw (3) Every order passed under

sub-section (1), determining the sum payable under this Scheme, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force.

- (3) Where the declarant has filed an appeal or reference or a reply to the show-cause notice against any order or notice giving rise to the tax arrear before any authority or Tribunal or Court, then, notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) is passed : Provided that where the declarant has filed a writ petition or appeal or reference before any High Court or the Supreme Court against any order in respect of the tax arrear, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the Court, furnish proof of such withdrawal along with the intimation referred to in sub-section (2).
14. Section 88 provides for settlement of tax payable. Section 89 provides for particulars to be to be furnished in a declaration under Section 88. 11 wp-8.99.sxw
15. The Memorandum to Finance (No.2) Bill, 1998, thus, explains the scheme-Kar Vivad Samadhan Scheme seeks to provide a quick and voluntary settlement of tax dues outstanding as on 31.3.1998, both in various direct tax enactments as well as indirect taxes enactments by offering waiver of a part of the arrear taxes and interest and providing immunity against institution of prosecution and imposition of penalty. The assessed on his part shall seek to withdraw appeals pending before various appellate authorities and Courts. The Scheme comes into force on the first day of September, 1998 and ends on 31st day of December, 1998. It will have following salient features.
16. The scheme is applicable to tax arrears outstanding as on 31.3.1998 under various direct tax enactments and indirect tax enactments. The amount payable by the applicants termed as declarants shall be determined as under :-
- (a) Direct Taxes
 - (b) to (viii) xxxxxx xxxxxx xxxxxx
 - (c) Indirect taxes Under indirect taxes the amount payable shall be 50% of the tax arrear and including interest payable, fine or penalty levied.
17. A person desiring to avail the scheme is required to file a declaration in the prescribed form before the designated authority notified for this purpose. The 12 wp-8.99.sxw designated authority shall pass an order within sixty

days of the declaration determining the amount payable in accordance with the provisions of the Scheme and grant a certificate indicating the particulars of tax arrears and the sum payable and intimate the same to the declarant. The declarant will pay the sum payable as determined by designated authority within thirty days of the passing of such order. The order passed by the designated authority shall be conclusive and shall not be reopened in any other proceedings or under any law for the time being in force. Where the declarant has filed an appeal or reference before any Authority, Tribunal or Court, notwithstanding anything contained in any other provision of law for the time being in force, such appeal, reference or reply shall be deemed to have been withdrawn. Where writ petitions have been filed before the High Court or Supreme Court the declarant shall move an application for withdrawing such petitions and furnish the proof of the same Along with the intimation. Any amount paid in pursuance of declaration made under the Scheme shall not be refundable under any circumstances.

18. The designated authority shall subject to the conditions provided in the Scheme grant immunity from prosecution or penalty under the relevant Acts in respect of matters covered in the declaration.
19. The Scheme shall not be applicable in respect of tax arrears in following cases : 13 wp-8.99.sxw

(a) In respect of direct taxes, _

(i) to (iii) xxxxx xxxxx xxxxx

- (b) In respect of indirect tax enactments-
- (c) in a case where prosecution has been launched under any indirect tax enactment;
- (ii) in a case where show-cause notice or notice of demand under Customs Act or the Central Excise Act has not been issued.
- (iii) In respect of a person against whom prosecution for any offence punishable under Ch.IX and Ch.XVII of the Indian Penal Code, Narcotics Drugs and Psychotropic Act, 1985 the Terrorist and Disruptive Activities Prevention Act, 1987 or Prevention of Corruption Act, 1988 has been instituted.
- (iv) In respect of a person against whom an order of detention has been made under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

(e) In respect of a person notified under sub-section(2) of Section 3 of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

20. Where the declarant has filed an appeal or reference or reply to the show-cause notice against any order or notice giving rise to tax arrear before any authority or Tribunal, such appeal or reference or reply shall be deemed to have been withdrawn. No appellate authority or court shall try in a suit or issue relating to arrear tax specified in the declaration. 14 wp-8.99.sxw
Consideration :

21. The case of the petitioners is that the declaration was valid since the petitioners have filed appeal before the Commissioner (Appeals) on 29th May, 1998 against the demand made by the Assistant Commissioner of Customs under section 72(1)(b) of the Act. During the pendency of this appeal, declaration was filed, which came to be rejected on the ground that the demand notice was issued to the importer under section 72, consequent to the expiry of warehousing period as permitted under section 61 of the Act as such declaration filed was not covered under the KVS Scheme. In support of the contention of the petitioners that the demand raised against them would fall well within the definition of tax arrears in relation to the indirect tax enactment, the petitioners have placed reliance on section 72 of the Act which provides that in any of the cases falling under clauses (a) to (d) of sub- section (1) thereof, the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods. Thus, section 72(1) contemplates payment of full amount of duty along with penalty and interest and other charges which are well within the sweep of the definition of tax arrears in relation to indirect tax enactment. In the circumstances, in our considered view, no sub-classification can be made in respect of the class of litigating assessee in arrears with reference to 15 wp-8.99.sxw the assessment of duty arising out goods warehoused. Once the liability to pay duty is incurred and determined on or before 31st March, 1998, the assessee would be treated to be in tax arrears irrespective of the nature of the duty demanded. All the litigating assessee who are in tax arrears belong to one class. Any attempt to carve out further classification with reference to the nature of duty demanded in the pending litigation is not permissible. It will be in tune with KVS Scheme to keep all the litigants in one class to achieve twin objectives of the legislation,

(i) the reduction of litigation, and (ii) the realisation of revenue. In the circumstances, the impugned order rejecting declaration filed by the petitioners is unsustainable and liable to be quashed and set aside.

22. In the result, impugned order of the Designating Authority rejecting declaration is quashed and set aside. Rule is made absolute in terms of prayer

clause (b) with direction to the petitioners to make payment in terms of KVS Scheme within the period prescribed and, in turn, Revenue is directed to accept the same and treat the declaration filed by the petitioners as legal and valid, subject to the compliance of the terms of deposit. No order as to costs. (R.M.SAVANT, J.) (V.C.DAGA J.)