

A

M/S. NRC LIMITED

v.

UNION OF INDIA & ORS.

Civil Appeal No. 2820 of 2007

B

OCTOBER 08, 2015

[A.K. SIKRI AND ROHINTON FALI NARIMAN, JJ.]

C

Kar Vivad Samadhan Scheme (KVSS) (As introduced by Finance Bill, 1998) – ss.87(m)(ii)(b) and 95(ii)(b) – Applicability of – On the assessee in question – Assessee declared value of goods on which import duty was payable, by filing Bill of Entry – Customs authorities, by making endorsement on the Bill of Entry, demanded additional duty under Customs Tariffs Act ad valorem on CIF price and also on the basic and auxiliary custom duty and landing charges on goods imported by the assessee – During pendency of the case, which was initiated by the assessee challenging levy of additional duty on basic and auxiliary custom duty and landing charges, KVSS introduced – Assessee applied under the scheme to settle tax arrears and withdrew the pending case – Benefit of the Scheme denied by the authorities, on the ground that his case was not covered u/s.87(m)(ii)(b) and the scheme was not applicable to the assessee as he was covered u/s.95(ii)(b). – Writ petition challenging the order, dismissed by High Court – On appeal, held: Declarant is entitled to claim benefit of the scheme where show cause notice and notice of demand had been issued – In the present case, the endorsement on the Bill of Entries would constitute demand – Therefore, the assessee in question was entitled to benefit of the Scheme – Customs Tariffs Act, 1975.

D

E

F

G

H

Allowing the appeal, the Court

HELD: 1. A plain reading of ss.87(m)(ii)(b) and 95(ii)(b) of Kar Vivad Samadhan Scheme (KVSS) would indicate that in those cases where show cause notice had been issued or where the notice of demand for payment of indirect tax had been issued, it was permissible for the declarant to claim the benefit of the Scheme. In the absence of such show cause notice or demand for payment, the benefit of the scheme was not available as per clear stipulation in Section 95(ii)(b). [Para 8] [989-E]

2. The Customs Authority had not only asserted the additional duty @ 15% on aggregate value of CIF price but even the additional duty on basic and auxiliary custom duty and landing charges was assessed. There were clear endorsements in respect of demand of this additional duty made on the Bills of Entries by the Assessing Officer. This, would clearly constitute a "demand" which was issued. The case of the appellant was covered by Section 87(m)(ii)(b) and did not get excluded by virtue of Section 95(ii)(b) and, therefore, the appellant was entitled to the benefit of the KVSS. [Paras 9 and 10] [989-G-H; 990-B-C; 991-E]

Swastika Enterprises vs. Commissioner of Customs, Kolkata 2015 (322) ELT 423 (SC) – relied on.

Case Law Reference

2015 (322) ELT 423 (SC) relied on Para 9

CIVILAPPELLATE JURISDICTION: Civil Appeal No. 2820 of 2015.

From the Judgment and Order dated 31.03.2006 of the Division Bench of the High Court of Judicature at Bombay in Writ Petition No. 2135 of 2001.

A Shyam Divan, Sr. Adv., U. A. Rana, Mrinal Elkar Mazumdar, V. Mohan, M/s Gagrat & Co., Advs., With him, for the Appellants.

A. K. Panda, Sr. Adv., Arijit Prasad, R. S. Jena, B. Krishna Prasad, Advs., with him, for the Respondents.

The Judgment of the Court was delivered by

C A.K.SIKRI, J. 1. The appellant herein had imported Caprolactum for use in manufacture of Nylon Tyre Cord sometime in May, 1986. The appellant filed the Bill of Entry declaring the value of goods on which the import duty was payable. The Customs Authorities, however, took the view that in addition to normal duty, additional duty under the Customs D Tariffs Act, 1975 @ of 15% *ad valorem* on CIF price and also on the basic and auxiliary custom duty and landing charges on goods imported by the appellant was also payable. The appellant, on the other hand, took the position that the additional duty was payable only on CIF value of goods.

E 2. The decision of the Customs Authority was challenged by the appellant by filing writ petition No. 1174 of 1986 in the High Court of Bombay seeking order restraining Customs Department from levying and/or recovering the additional duty F on basic and auxiliary custom duty and landing charges. In this writ petition, interim order dated 02.05.1986 was passed by the Bombay High Court restraining the respondent from recovering and/or levying additional duty under the Customs G Tariff Act, 1975 and the import of Caprolactum in future was permitted to be cleared on payment of additional duty on CIF price of goods only. A condition was, however, put directing the appellant to furnish a bank guarantee of nationalized bank in favour of the respondent for 100% of the differential duty. Such a guarantee was furnished by the appellant to comply H with the condition contained in the interim order passed by

the High Court. On that basis, between May, 1986 to July, 1991, the appellant imported several consignments and furnished bank guarantees from time to time and the amount of these bank guarantees in all came to Rs. 6,34,87,079/-. The respondents also determined, quantified and endorsed on Bill of Entry the additional duty @ of 15% on aggregate value of CIF price, basic and auxiliary custom duty and landing charges. However, since the matter was pending in the High Court, separate endorsements were also made on the Bills of Entry specifying the differential duty and the goods were allowed to be cleared on receiving the bank guarantee for differential duty. Ultimately, the writ petition was dismissed by the Bombay High Court on 28.06.1994. Insofar as the stay order which was operating during the pendency of the writ petition is concerned, it was extended for a period of ten week.

3. On 28.07.1994, respondent no. 3 issued demand notice in respect of Bill of Entry No. 1175/164 dated 28.05.1986 calling upon the appellant herein to pay a sum of Rs. 5,08,300/- along with interest @ of 12% i.e. Rs. 5,03,008/-. A copy of this notice was sent to the Bank of Baroda which has furnished bank guarantee for encashing the bank guarantee for the aforesaid amount. The period of ten weeks which was granted by the High Court has also expired in August, 1994 and because of this reason the respondents wrote another communication dated 12.08.1994 to the bank for encashment of the said bank guarantee to recover the outstanding differential duty. In the meantime, order of Bombay High Court was challenged by the appellant by filing special leave petition in this Court. In the said special leave petition interim order dated 14.11.1994 was passed by this Court permitting the respondent to encash the bank guarantees to the extent of half the duty due, i.e. up to Rs. 3.25 crores. It was also directed that the remaining bank guarantees would be kept alive till the disposal of the said matter in this Court. In this special leave

A

B

C

D

E

F

G

H

A petition leave was granted by this Court. While the said appeal was still pending the Government came out with Kar Vivadh Samadhan Scheme (KVSS) which was introduced by Finance Bill, 1998 and came into effect from 1st March, 1998. Under this Scheme the Government invited the tax payers to settle tax arrears by availing substantial discount and immunity from prosecution. As per Section 88(f) of the Finance Act, 1988, an amount of 50% of the tax dues was payable by the declarant for availing the benefit of the Scheme. The appellant herein with a view to take the benefit of this KVSS, filed its declaration thereunder on 29.12.1998. In this declaration it was stated that the total demand of differential duty was in the sum of Rs. 6,34,87,079/-. As against this the Government had already realized Rs. 3,25,40,000/- by invoking the bank guarantees as directed by this Court vide order dated 14.11.1994. It was thus stated that the balance amount of arrears which was payable by the appellant was Rs.3,09,47,079/- and the appellant was ready to pay 50% thereof in terms of the KVSS i.e. Rs. 1,54,73,540/-.

E 4. This application of the appellant was, however, rejected by the respondents on 01.03.1999 on the ground that it was not covered by the KVSS and the case of the appellant fell under the exclusion clause of Section 95(ii)(b) of KVSS inasmuch as there was neither any show cause notice nor a demand notice issued prior to 31.03.1998. This order of rejection was challenged by the appellant by filing writ petition No. 2528 of 1999 in the Bombay High Court. Insofar as the appeal which was filed by the appellant challenging the earlier decision of the Bombay High Court dated 28.06.1994 is concerned (Civil Appeal No. 5974/1994) the appellant withdrew the same on 29.09.1999.

H 5. The writ petition of the appellant filed in the Bombay High Court was disposed of by the High Court on 03.03.2000

whereby the matter was remanded back to the Designated Authority directing it to decide the application of the appellant de novo after considering the two questions viz.:

i) Whether the endorsement on the bills of entries could be considered to be demand notice under KVSS? and

ii) Whether the notice dated 28th July, 1994 was the demand notice within the meaning of Section 95(ii)(b) of KVSS?

6. On remand the Designated Authority passed an order dated 14th June, 2001 and rejected the application of the appellant once again giving the reason that there were no tax arrears as contemplated by Section 87(m)(ii)(b) of the KVSS and also that the case of the appellant was covered by Section 95(ii)(b) of the said Scheme and, therefore, the appellant was not entitled to the benefit under the Scheme. Against this order, the appellant approached the High Court again and filed writ petition under Article 226 of the Constitution. This writ petition has been dismissed by the High Court vide impugned judgment dated 31st March, 2006.

7. From the aforesaid it is clear that the question that is to be determined by this Court is as to whether the case of the appellant is covered by KVSS and more particularly by Section 87(m)(ii)(b) of the KVSS or it is excluded by the provisions of Section 95(ii)(b) of the said Scheme. The aforesaid clauses of the two Sections are re-produced as under:

"Section 87:

xxxxxx

xxxxxx

(m) "tax arrear" means,-

(i) in relation to direct tax enactment, the amount of tax,

A penalty or interest determined on or before the 31st day of March, 1998 under that enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration;

B

(ii) in relation to indirect tax enactment,-

C

(a) The amount of duties (including drawback of duty, credit of duty or any amount representing 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

D

(b) 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-case 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.

F

Explanation.- Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in 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

G

H

unpaid for the purposes of determining tax arrear under this sub-clause;" A

Section 95. Scheme not to apply in certain cases.- the provisions of this Scheme shall not apply-

xxxxxx B

xxxxxx

(ii) In respect of tax arrear under any indirect tax enactment,- C

xxxx

(b) In a case where show cause notice or a notice of demand under any indirect tax enactment has not been issued;" D

8. A plain reading of the aforesaid two provisions would indicate that in those cases where show cause notice had been issued or where the notice of demand for payment of indirect tax had been issued, it was permissible for the declarant to claim the benefit of the Scheme. In the absence of such show cause notice or demand for payment, the benefit of the scheme was not available as per clear stipulation in Section 95(ii)(b). E

9. We have already pointed out above that when the writ petition No. 1174 of 1986 was pending in the Bombay High Court and interim order dated 14.11.1994 was passed, on the basis of such interim arrangements not only for payment of differential duty as on that date was made, the appellant also cleared subsequently imported goods in future as well on the said basis. The Customs Authority, acting on the order, not only asserted the additional duty @ 15% on aggregate value of CIF price but even this additional duty on basic and auxiliary custom duty and landing charges was assessed. It is a different H

A matter that for the sake of convenience and in order to comply with the interim directions of the High Court, insofar as the additional duty on basic and auxiliary custom duty and landing charges is concerned, the same was not actually recovered but was secured by means of bank guarantee. In any case, there were clear endorsements in respect of demand of this additional duty made on the Bills of Entries by the Assessing Officer. This, according to us, would clearly constitute a “demand” which was issued. The issue is no longer res integra and has already been decided in Swastika Enterprises Vs. Commissioner of Customs, Kolkata [2015(322) ELT 423 (SC)] wherein the said issues were discussed in the following manner:

D “16. In *Renuka Datla (Dr.) v. Commissioner of Income Tax, Karnataka*[2], this Court widely interpreted the term ‘total tax determined and payable’ appearing in Section 87(f) of the Scheme holding that no particular process of determination is contemplated. It has to be held that on principle, same meaning is to be accorded to the term ‘determined as due or payable’ in Section 87(m)(ii)(a) of the Scheme.

F 17. There is another manner of looking into the matter. Immediately after receiving the Bill of Entry with the endorsement to pay the amount of Rs.52,20,000, the appellants filed the writ petition in the High Court disputing the same with the contention that it was not payable. Obviously, it was a demand raised by way of endorsement on the Bill of Entry that prompted the appellants to challenge the same by filing the writ petition. The Revenue never took the plea that the case was premature in the sense that no demand had been crystallized in the absence of show-cause notice or adjudication order and, therefore, such a writ petition was

not competent. Thus, both the parties understood that endorsement on Bill of Entry and service thereof upon the appellants was a notice of demand. A

18. Even, with reference to the provisions of the Scheme, this endorsement shall have to be treated as notice of demand. We have already reproduced the provisions of Section 87(m) of the 1998 Act which defines 'tax arrears'. It, inter alia, includes the amount of dues remaining unpaid as on the date of making a declaration under Section 88 of the 1998 Act. Indubitably, there was an amount of duty payable, which had remained unpaid on the date of making declaration by the appellants under Section 88. It would be absurd to hold that though there is a tax arrear, as the appellants were liable to pay the tax/duty demanded, and still the Scheme is inapplicable." B C D

10. We, thus, hold that the case of the appellant was covered by Section 87(m)(ii)(b) and did not get excluded by virtue of Section 95(ii)(b) and, therefore, the appellant was entitled to the benefit of the KVSS. We, thus, set aside the impugned judgment of the Bombay High Court and allow this appeal holding that the appellant should be given the benefit of the said Scheme. E

11. We are informed that in the meantime, the appellant had already deposited the entire amount of tax arrears. Once the benefit of KVSS is extended, the amount of tax arrears payable under the said Scheme shall be worked out and the balance amount shall be returned to the appellant within a period of two months from today. In the peculiar facts of this case, however, we direct that no interest shall be paid on this amount, in the event, amount is paid within two months. F G