* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : 12.02.2009
Judgment pronounced on : 31.03.2009

WP(C) No.17467/2006

Special Director of Enforcement ..... Petitioner

Thru : Mr. Bishwajit Bhattacharya Sr. Advocate with
Mr. Debashish Mukherjee and Mr. Ajay Singh, Advocates

Vs.

Anil Agarwal & Anr. ..... Respondents

Thru : Mr. Dushyant Dave, Sr. Advocate with Mr. P.C. Sen,
Advocate for Respondent No.1.

WP(C) No.17479/2006

Special Director of Enforcement ..... Petitioner

Thru : Mr. Bishwajit Bhattacharya Sr. Advocate with
Mr. Debashish Mukherjee and Mr. Ajay Singh, Advocates

Vs.

Sterlite Industries Private Limited ..... Respondent

Thru : Mr. Dushyant Dave, Sr. Advocate with Mr. P.C. Sen,
Advocate for the respondent

WP(C) No.17483/2006

Special Director of Enforcement ..... Petitioner

Thru : Mr. Bishwajit Bhattacharya Sr. Advocate with
Mr. Debashish Mukherjee and Mr. Ajay Singh, Advocates

Vs.

D.P. Agarwal & Anr. ..... Respondents

Thru : Mr. Dushyant Dave, Sr. Advocate with Mr. P.C. Sen,
Advocate for Respondent No.1.

WP(C) No.17509/2006

Special Director of Enforcement ..... Petitioner

Thru : Mr. Bishwajit Bhattacharya Sr. Advocate with
Mr. Debashish Mukherjee and Mr. Ajay Singh, Advocates

Vs.

Navin Agarwal & Anr. ..... Respondents

Thru : Mr. Dushyant Dave, Sr. Advocate with Mr. P.C. Sen,
Advocate for Respondent No.1.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported in the Digest?

S.RAVINDRA BHAT, J.

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1. In these writ proceedings, under Article 226 of the Constitution of India, The Special Director of Enforcement questions an order of the Appellate Tribunal for Foreign Exchange (hereafter called "the Tribunal") unconditionally dispensing with the statutory requirement of pre-deposit of the penalty amount, before the respondents' appeal to it could be heard and decided on the merits.

2. The essential facts for deciding these writ petitions are that by Show Cause Notices, Issued on 26th of May 2002, it was alleged that M/s Sterilite Industries Ltd (hereafter "the company") had contravened Section 8 (1) of the Foreign Exchange Regulation Act, 1973

(hereafter FERA") for acquiring and transferring foreign exchange equivalent to Rs. 208 crores, without any previous general or special permission from the Reserve Bank of India; the directors of the company were also charged with violation of FERA, particularly Section 68.

3. According to the show cause notices, investigations by the income tax department revealed that the company was engaged in business of copper, telephone cables, aluminium and nonferrous items. It was alleged that out of the total equity of 4.25 crores, shares of face value of Rs. 10/- each, worth Rs. 12.5 crores were held by promoter directors and that one Twinstar Holding Ltd, an offshore company registered in Mauritius, held about 30 lakh shares. It was alleged that the three promoter directors were engaged in the business of investments and Twinstar Holding held hundred percent capital investment in three other companies to the extent of Rs 73 crores; Twinstar Holding was incorporated in Mauritius, on 12-01-1993, with issued capital and paid up capital of US $ 100, as a subsidiary of M/s Volkon Investments Ltd; the latter was incorporated in Bahamas on 25-11-1992. M/s Volcan Investments had a share capital of US$ 2. It was alleged that Shri D.P. Agarwal, the respondent in WP 17483/2006, was a director of Twinstar Holding Ltd. During the search and seizure operations, it was discovered that Twinstar Holdings was actually operating from Middlesex, UK; the documents indicated remittance of Rs.34,50,25,280/- to the company, M/s Sterilite for subscribing to certain debentures, immediately after incorporation of the company on 12-01-1993.

4. The Enforcement Directorate alleged that the total investments of the DP Agarwal group, who are individual respondents, apart from the company, much exceeded the funds invested by the Mauritian company, Twinstar; a large proportion of shares were partly paid up

so that a large number of shares could be acquired with lesser funds. In the process of voluntary liquidation of the investment companies of Sterilite, alleged the petitioners, the overseas corporate body i.e. Twinstar became the holding company with controlling interest in Indian companies. In this process the promoters of Sterilite effected book adjustments which amounted to write off of Rs. 23 crores. The book adjustments by Sterilite and its group companies effectuate it a gift of Rs.33.82 crores to Twinstar this was besides family members of the promoters of Sterilite gifting shares worth Rs. 7.22 crores to the Mauritius company.

5. The company, Sterilite, and the directors who were issued with individual notices, resisted the proceedings and made submissions before the Special Director. By a common order dated 03-08-2004, the Special Director held Sterilite as well as the directors guilty of contravention of provisions of, FERA, and imposed the penalty of Rs. 20 crores upon the company, Sterilite, and Rs. 5 crores each upon its directors, i.e. Shri Anil Agrawal; Shri Naveen Agrawal; and Shri DP Agarwal all of whom are respondents in these writ proceedings. The said company and directors preferred appeals to the, being Appeal Nos. 957-960/2004. During the pendency of the appeals, they sought for dispensation of the requirement of pre-deposit of the penalty amounts, required in terms of Section 19, of the Foreign Exchange Management Act, 1999.

6. The Tribunal passed a common order accepting the respondents application and dispensing with the requirement of the depositing the penalty amounts. It reasoned as follows:

> *"5. We have carefully considered the arguments from both sides. However, it is an admitted position that these proceedings are conducted under FER Act and appeal before this tribunal is filed as a newly*

created/substituted forum after abolition of FERA Board by Section 49(1) FEM Act, 1999. As an appeal is continuation of original proceedings so FER Act, 1973, is the proper law for the disposal of this appeal, and not FEM Act, 1999. Therefore, the arguments based on Section 19(1) need not be discussed further.

6. It is settled on a catena of judgments that the phrase " undue hardship" conveys two factors, namely (1) prima facie case with a strong possibility of setting aside of the adjudication order; or (2) financial disability creating serious hurdles in pursuing the remedy of appeal the appellant herein are on the grounds of prima facie strong case. The second proviso of Section 52 (2) permits this tribunal to dispense with the pre-deposit of penalty if such pre-deposit causes undue hardship and the dispensation can either be unconditional or with certain conditions deemed fit.

7. At this preliminary stage, prima facie case is to be considered without going into merits of these appeals. Those shares were purchased by Twinstar of the appellant-company but assumption of providing money for the purchase against appellant-company and not against the individual appellants, or either of them is difficult to understand, particularly when there is permission of RBI for the said purchase of shares. This tribunal has not been lead to any other material by Enforcement Directorate which can support the contention of circumstantial evidence. It is repeatedly contended that appellant DP Agarwal had not come forward to explain the source of money of Twinstar, may yet been working as Director of both in appellant-company and THL and other two Directors in appellant-company are his sons of the but it will not lead to a different result because of his mere nonappearance for making statement when prosecution is not launched for his absence. Also, this cannot prove the guilt beyond reasonable doubt which is the standard of proof in these proceedings. In this regard reference can be made to Shankar Lal Gyarsilal Dixit –vs- State of Maharastra AIR 1981 SC 765 where Apex Court observed that falsity of defence cannot lead to conclusion of guilt.

8. From the above discussion, this becomes clear that the appellants have a prima facie good case which entitles them for dispensation of the pre-deposit of penalty. An order is passed accordingly."

7. The writ petitioner, Special Director argues that the respondents were unable to establish any prima facie case in their appeal. It is contended that non-disclosure of source of funds amounting to over Rs.208 crores and evading the due process of law by ignoring

summons, in the background of a huge investment originating from a company with a capital of only U.S. $ 100, negatived any such prima facie case. It is contended that the tribunal clearly and palpably exceeded its jurisdiction in granting complete waiver of pre-deposit. Leonard senior counsel for the special director emphasised the mandatory character of Section 19, stating that pre-deposit is the rule for the hearing of an appeal, and waiver of such mandatory requirement, is only a rare exception.

8. It was argued that the Special Director's adjudicatory order had relied upon statements and documents obtained during the search and seizure, which clearly disclosed that Sterilite and its directors had tried to pull wool over the revenue's eyes and manipulated foreign exchange, even while holding out that the Mauritius company had acquired shares in Sterilite. It was contended that none of the directors cared to disclose the source of wealth and foreign exchange by which control of those foreign companies had been obtained. In these circumstances the tribunal fell into complete error in granting exemption, as it did. The special director argued that the tribunal overlooked the settled position in law that the revenue or department is not required to prove its case with mathematical precision and that the standard of absolute proof is unattainable. In these circumstances the law accepts probability as a working substitute and does not require the prosecution to prove the impossible. Counsel contended that what is necessary is establishment of such a degree of probability that a prudent man can believe legal proof is not necessarily perfect proof. To this end, reliance was placed on the decision reported as *Collector of Customs –vs- D. Bhoormall 1974 (2) SCC 544.* Counsel also relied on Section 71 of FERA and submitted that in such instances the burden of proof shifts on the party asked to answer the show cause notice. Since the concerned directors,

despite opportunity, chose to stay away and not answer when called upon and summoned, in the proceedings it was legitimately concluded that they had no explanation to offer; the penalty amount was therefore perfectly justified.

9. It was argued that judicial pronouncements in such context, invariably pointed to the appellants' obligation to show how it was prejudiced financially. Reliance was placed on the decision reported as *MP State Board Corporation –vs- Collector of Central Excise, Indore 1997 (10) SCC 367.* It was also contended that the respondents had not ever argued about financial hardship; the company as well as individual directors were solvent and in a sound financial condition, which was sufficient ground to deny the application for waiver of pre deposit, under Section 19.

10. The respondents argue that Sterilite is one of the largest taxpayers in the country; it is the largest manufacturer of copper, aluminium and zinc and has operations throughout the world. It claims to employ 50,000 people throughout the world, and contributes more than Rs. 10,000 crores every year by way of income tax, sales tax, VAT excise duty, customs duty etc. It is contended that the special director has been unable to establish why this court should exercise its extraordinary judicial review powers to interfere with the tribunal's order, which was justified in law and made within the bounds of its jurisdiction. It is argued that the source of funding of Twinstar could not have been disclosed by Sterilite or its directors, since Twinstar was not subject to the jurisdiction and the laws of India, being incorporated overseas.

11. It is argued that the adjudicatory order was based entirely on conjectures. Learned senior counsel on behalf of the respondents submitted that there was no proof of the directors

or Sterilite having generated Rs. 208 crores, transferred it to Twinstar so that the investments could be complete. It is contended that the documents relied upon by the Enforcement Directorate mainly pertained to Twinstar's investments and three private investment companies, to which neither Sterilite nor its directors were privy, purchase of mines in Australia, Canada and Tasmania all of which were acquired by Twinstar; management agreements entered into by Sterilite and companies in UK and Canada and expansion of its copper smelter, which was done after gaining requisite approvals. It was contended that once the replies substantiated that necessary permissions were obtained from RBI, to enable investments in India, unless there was proof that the regulatory body had been kept in the dark with respect to the source of funds and the nature of transactions, the finding with regard to contravention of law could not have been arrived at. It is submitted most crucially that there is no provision of law which contemplates disclosure of source of funds by a foreign company which invests in India, nor the nature of transactions it is involved in, while making such investments.

12. It was argued that the burden of proving contravention of law, particularly Sections 8 and 68 of FERA was upon the authorities who alleged it; they had to first establish, *prima facie,* that the money obtained by foreign companies, who invested in Sterilite, were illegal. In the absence of such proof of foundational facts, there could not have been any finding of contravention of provisions of FERA, or FEMA. Reliance was placed on the decisions reported as *Hindustan Steel Ltd –vs- State of Orissa* 1969 (2) SCC 627 and *Akbar Badruddin Giwani –vs- Collector of Customs, Bombay* 1990 (2) SCC 203. It was also argued that without disturbing the order of the Tribunal, the appropriate course would be to direct the disposal of the pending

appeals, on their merits, peremptorily, within one month; learned senior counsel commended the approach indicated by the Supreme Court in *Union of India –vs- Adani Exports Ltd.* 2007(13) SCC 207.

13. Before a discussion on the merits of the rival submissions, it would be necessary to extract Section 19, (of FEMA) which is in the following terms:

> *"19(1). Save as provided in Sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in Sub-section (1) of Section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal:*
>
> *Provided that any person, appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government:*
>
> *Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty."*

14. The question which this court has to decide, in these petitions is the correctness and propriety of the Tribunal's impugned order, granting complete exemption from the requirement of pre-deposit, which is otherwise mandatory. The respondents are strictly correct, when they contend that the tribunal exercises its discretion, in determining whether the pre-deposit requirement should be waived, and if so, to what extent, in the given circumstances of a case. Naturally, when it does so, the intricacies of the appeals should not be examined in great detail. It is also correct to say that such interim determinations should ordinarily be left alone, and not subject to judicial review, particularly when appeals are

confined to questions of law, under Section 35, of FEMA. Nevertheless, there is a narrow band of jurisdiction, available with this court, to scrutinize whether such orders, even while making interim determinations, are proper; judicial review is available if the order is plainly unsupportable in law; if it was made by following an irregular procedure, or discloses *ex-facie* an unreasonable approach.

15. The tribunal was persuaded here, to grant complete exemption, by firstly concluding that the Special Director arrived at wrong findings, since there was no proof beyond reasonable doubt. The second ground was that RBI permission was available, and that mere non-cooperation of the company and or its directors, could not have led to adverse findings.

16. In the decision reported as *Director of Enforcement v. M.C.T. M. Corpn. (P) Ltd.,* (1996) 2 SCC 471, the Supreme Court, relying on a previous Constitution Bench ruling in *Maqbool Hussein –vs- State of Bombay* AIR 1953 SC 325, to negative the contention that penal provisions under fiscal statutes require, as a precondition, proof of facts beyond reasonable doubt, said that:

> *"In Corpus Juris Secundum, Vol. 85, at p. 580, para 1023, it is stated thus:*
>
> > *"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."*
> >
> > ***13.*** *We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" equally holds good for the 'blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section*

> *10(1)(a) is established. The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence", overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention. Our answer to the first question formulated by us above is, therefore in the negative."*

The court, while concluding in the above manner, took the aid of the Preamble to FERA, holding that its purpose was to provision for effective conservation of foreign exchange, and to that end, prescribe penalties for its breach. In view of the decision, the tribunal's understanding that the Special Director had to see that facts were proved beyond reasonable doubt, cannot be sustained.

16. As far as the other aspect, involving merits of the adjudicatory findings, it is apparent that the respondent Sterilite's director, when called upon to depose in the proceedings under the Act, refused to do so; he now claims that Twinstar's activities and source of funds are beyond the pale of Indian laws. There is no refutation that such company had little funds; its capital was US $ 100; it was the holding company of M/s Volkon Investments Ltd which was incorporated in Bahamas on 25-11-1992. M/s Volcan Investments had a share capital of US$ 2. In the light of these facts, and documents recovered from the premises of Sterilite, which are discussed in the adjudicatory order, the question as to how Twinstar came by the amounts to invest in Sterilite was logical; it, as well as its directors had to afford some explanation. They did not do so. Their claim is that the necessary RBI approvals were furnished. The adjudicatory order, however, concluded that provisions of FERA were violated, and directed payment of penalties.

17. The mandatory nature of pre-deposit provisions in fiscal and economic legislation was underlined in *Benara Valves Ltd. v. CCE*,(2006) 13 SCC 347, in these terms :

> *"…on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a licence to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given."*

More recently, in *Monotosh Saha -Vs- Special Director, Enforcement Directorate and Anr.* 2008 (11) SCALE 603, the Supreme Court held, while interpreting Section 19(1) FEMA, that:

> *"…there are two important expressions in Section 19(1). One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors.* AIR 1994 SC 923 *that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.*
>
> *13. For a hardship to be `undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.*
>
> *14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.*

15. The other aspect relates to imposition of condition to safeguard the realization of penalty. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the realization of penalty. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the realization of penalty.

16. The above position was highlighted in Benara Valves Ltd. and Ors. v. Commissioner of Central Excise and Anr. 2006 (13) SCC 347. The decision was rendered in relation to Section 35F of the Central Excise Act, 1944 where also identical stipulations exist."

18. In *Adani Exports* (supra, relied on by the respondents), the Supreme Court, commenting on the propriety of the Gujarat High Court's judgment, setting aside the Tribunal's order, mandating pre-deposit, of the penalty amount, said that:

"5. *The Tribunal was of the view that neither any prima facie case was made out nor the financial stringency established to warrant dispensation of pre-deposit. A writ petition was filed before the Gujarat High Court primarily questioning the said order and also incidentally questioning legality of the proceedings. The High Court not only dealt with the impugned order before it relating to pre-deposit aspect but also the merits of adjudication. It elaborately discussed the merits of the adjudication proceedings, though it itself noted that the special civil applications were filed questioning correctness of the order relating to pre-deposit. Not only the High Court held that the order directing deposit was unsustainable but also held that the order of adjudication was unsustainable, overlooking the fact that the appeals were pending before the Tribunal. The High Court set aside the order passed by the adjudicating authority and remitted the matter to the adjudicating authority i.e. the Additional Director General.*

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8. *It is not in dispute that the respondents have filed appeals before the Tribunal. As noted by the High Court, primary challenge in the writ petitions was to the order relating to pre-deposit. While dealing with that the High Court was not justified in going into the merits and expressing its views and thereafter remitting the matter to the Tribunal (sic adjudicating authority). Such a course was not available to be adopted.*

> ***9.*** *The Tribunal has highlighted the relevant aspects while rejecting the prayer for dispensation of pre-deposit. The three aspects to be focussed while dealing with such applications are: (a) prima facie case, (b) balance of convenience, and (c) irreparable loss. The Tribunal categorically found that these factors were established by the respondents. Even when the Tribunal decides to grant full or partial stay it has to impose such conditions as may be necessary to safeguard the interest of revenue. This is an imperative requirement under Section 129-E of the Act. Normally, therefore, we would have asked the respondent assessee to comply with the orders of the Tribunal, by setting aside the impugned order. But considering the fact that the Tribunal already passed consequential order on the basis of the High Court's order, on 18-8-2006, we dispose of the appeal with following directions…"*

19. The above decisions of the Supreme Court have repeatedly underscored the importance of respecting the legislative mandate of pre-deposit, of assessed, or penal amounts, wherever prescribed, as preconditions for appellate remedies. The structure of several statutes granting discretion to the tribunal or appellate bodies, in such instances appears to be driven by the logic of existence of "undue hardship". While to some extent, the merits of the case, ("prima facie" strength) may be scrutinized, the tribunal or appellate forum has to be alive to the situation that such scrutiny, to decide interim applications, suspending the statutory requirement, have to be careful, and in rare cases. *Sans* the element of "hardship" which is necessarily subjective to each case, *prima facie* determinations should not become the normative rule, to grant exemptions. This was ruled, by the Supreme Court, in *Collector of Central Excise –vs- Dunlop India Ltd.,* (1985) 1 SCC 260. The court said that:

> *"All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due*

regard to the public interest, a court must be circumspect in granting interim orders of far-reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to

the court alleging prejudice, inconvenience or harm and that a prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration."

20. This court is of the opinion that the tribunal, while deciding the exemption from pre-deposit applications of the respondents in these writ proceedings, did not approach the matter in its proper perspective. As noticed earlier, the tribunal fell into error in holding that the burden of proving a fact, in proceedings under FERA is "beyond reasonable" doubt. No doubt, the consequences of adverse findings can have grave financial repercussions; yet that does not, as observed by the Supreme Court, make it a penal offence. As far as the findings are concerned, the tribunal no doubt did see whether they are sustainable; it did exercise its discretion. Though such discretionary orders are nor ordinarily interfered with, this court notices that curiously, the binding decisions in *Dunlop,* and *Adani,* which stipulate discussion of individual facts to establish "undue hardship" was not followed by the tribunal, in these cases. The impugned order, is thus not sustainable.

21. This court concludes, on the basis of the preceding discussion, that these writ petitions are entitled to succeed. The respondents' applications for waiver of pre-

deposit requirements shall be heard and dealt with afresh, in accordance with law, after affording them due opportunity. The writ petitions and all pending applications are allowed, in such terms, without any order on costs.

S. RAVINDRA BHAT
JUDGE

MARCH 31, 2009