

UNION OF INDIA AND ORS.
v.
ONKAR S. KANWAR AND ORS.

SEPTEMBER 27, 2002

[SYED SHAH MOHAMMED QUADRI AND S.N. VARIAVA, JJ.]

TAX/TAXATION:

Kar Vivad Samadhan Scheme/Kar Vivad Samadhan Scheme (Removal of Difficulties) Order—Ss. 91 and 93/Order 2—Levy of excise duty and penalty on Company and its officers—Pursuant to Scheme declarations and payment made by the Company and its officers—Payment by officers under protest—Claim of refund on the basis of benefit of the Order—Held, officers do not get immunity u/s 91 as declaration by Company does not cover tax arrears of officers—But they were entitled to benefit of the Order as adjudication proceedings were pending in appeal—However, u/s 93 they are not entitled to refund even if paid under protest—Since the refunds were made by High Court's orders, they need not repay the amounts to Revenue.

Interpretation of Statutes—An interpretation which leads to discrimination must be avoided—If two views are possible then the one which is in favour of the assessee must be adopted.

Certain Officers of a Company and the Company were issued show cause notices by Central Excise authority as to why excise duty and penalty be not levied on them, and consequently adjudicated show-cause notices and called upon the company to pay excise duty and also imposed penalty. The Officers were also directed to pay a sum as personal penalty.

During pendency of the appeals before Customs Excise and Gold (Control) Appellate Tribunal, Kar Vivad Samadhan Scheme was announced. Thereafter Kar Vivad Samadhan Scheme (Removal of difficulties) Order was passed. Customs and Central Excise Authority by its clarificatory note clarified that the Order would not apply to cases where show cause notices had been adjudicated but only where such notices were pending. Tax arrears were settled under the Schemes. The Company and the Officers filed separate declarations and paid the

A amounts. However, the Officers made the payment under protest.

B Writ petitions were filed before High Court claiming refund of the amounts paid on the ground that they were entitled to the benefit of the Order, as the Company had settled the matter under the Scheme. High Court of Kerala ordered for refund on the ground that as the appeals were pending, the adjudication proceedings had not terminated. However, High Court of Gujarat dismissed similar writ petitions.

C In appeal to this Court, State contended that benefit of the order was not available to the officers as the same was not available where proceedings were pending adjudication, but only where the show cause notices were pending adjudication.

D Officers contended that once the Company settled under the Scheme, there was immunity in respect of the matter for which show cause notice was issued as per section 91 of the Scheme, and that since penalty was sought to be imposed on them for the same matter for which show cause notice was issued on the Company and the Company getting immunity, nothing survived even against them.

Disposing of the appeals, the Court

E HELD: 1.1. Under the Kar Vivad Samadhan Scheme there is no adjudication on the subject matter of the demand notice or show cause notice. There is a settlement of the "tax arrears". Even though the same show cause notice may call upon the Company and its Directors/Officers to show cause, there is a separate demand for "tax arrears" against the Directors/Officers. Thus each entity/person would have to file a declaration separately. The settlement is in respect of each declaration. Section 91 only gives immunity in respect of matters covered in the declaration. The matter covered in the declaration by the Company is the "tax arrears" of the Company. The declaration by the Company admittedly does not cover the tax arrears of the Directors/Officers. Thus they get no immunity under Section 91 on a settlement by the Company. [683-E-G]

H 1.2. If Kar Vivad Samadhan Scheme (Removal of Difficulties) Order is read as a whole, it is clear that a settlement by the main declarant is to operate as full and final settlement in respect of all other persons on whom show cause notice was issued in respect of the same matter. Thus the words "pending adjudication" cannot be read to exclude cases where the

proceedings are still pending in appeal. Even otherwise the order has to be read along with the Kar Vivad Samadhan Scheme. Under the Scheme a party can file a declaration so long as the proceedings are pending. Thus, even though the show cause notice may have been adjudicated upon and an appeal is pending a party could still take the benefit of the Scheme and file a declaration. The object of the Order is to give benefit of a settlement by the main party (i.e. the Company in this case) to all other co-noticees. This being the object a classification, restricting the benefit only to cases where the show cause notice is pending adjudication, would be unreasonable. If read in this manner the Order would be discriminatory. An interpretation which leads to discrimination must be avoided. An interpretation, as suggested by the Department would also be against the object of the Order. Reasoning given by the High Court of Kerala is correct and is upheld. [684-E-H; 685-A]

1.3. If two views are possible then the one which is in favour of the assessee must be adopted. On this ground also the interpretation sought to be given by the Department cannot be accepted. [685-B]

2. All the officers have paid the amounts in pursuance of the declaration made by them under Section 88 of the Scheme. Even if they have paid the amounts under protest they are not entitled to refund. The Directors/Officers in Kerala would also not have been entitled to refund by virtue of section 93 of the Scheme. However, section 93 does not seem to have been pointed out to the High Court of Kerala. As, pursuant to the Order of the High Court of Kerala, they have received refund, they are not required to repay the amount to the Revenue. [685-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6260-6265 of 2000.

From the Judgment and Order dated 7.3.2000 of the Kerala High Court in O.P. Nos. 13806, 16406, 16407, 16408, 16409, and 16334, of 1999.

WITH

C.A. Nos. 633, 634, 635, 636, 637, 638, 639, 640, 641, and 642/2002

S. Ganesh, Joseph Vellapally, K. Swami, Mrs. Nisha Bagchi, K.C. Kaushik, B.K. Prasad, M.P. Vinod, P.K. Ram, A.K. Jain, Deepak Prakash, Bobby Lal and Tarun Gulati, for the appearing parties.

A The Judgment of the Court was delivered by

S.N. VARIAVA, J. Civil Appeal Nos. 6260-6265 of 2000 are against a Judgment dated 7th March, 2000 passed by the High Court of Kerala. All the other Appeals are against a Judgment dated 14th November, 2000 passed by the High Court of Gujarat. In all these Appeals a common question arises.

B Therefore all these Appeals are being disposed of by this common Judgment.

Briefly stated the facts are as follows:

The Respondents in Civil Appeal Nos. 6260-6265 of 2000 and the Appellants in all the other Appeals are Directors/Officers of M/s Apollo Tyres Limited.

C M/s Appollo Tyres has a factory in Kerala and another in Gujarat. M/s Appollo Tyres Ltd. were clearing certain tyres on the basis that the tyres were for use on trailers. It was found that these tyres were then being fitted to Light Commercial Vehicles. The Commissioners of Central Excise at Kerala and in Gujarat issued show cause notices to the Company as to why excise

D duty and penalty be not levied. In the same Show Cause Notice the Directors/Officers were also called upon to show cause as to why penalty be not imposed on them. The Company and its Directors/Officers replied to the show cause notice. Thereafter the Commissioners of Central Excise in Kerala and Gujarat adjudicated the show cause notices and called upon the Company to pay excise and also imposed penalty. The Commissioners of Central Excise

E also required each Director/Officer of the Company to pay a sum of Rs. 2,00,000 as personal penalty.

The Company as well as the Officers filed Appeals before the Customs Excise and Gold (Control) Appellate Tribunal. While the Appeals were pending the Kar Vivad Samadhan Scheme was announced. The relevant provisions of this Scheme read as follows :

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87. In this Scheme, unless the context otherwise requires. -

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(i) "indirect tax enactment" means the Customs Act, 1962 (52 of 1962) or the Central Excise, 1944 (1 of 1944) or the Customs Tariff Act, 1975 (51 of 1975) or the Central Excise Tariff Act, 1985 (5 of 1986) or the relevant Act and includes the rules or regulations made under such enactment ;

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(m) "tax arrear" means -

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(ii) in relation to indirect tax enactment -

(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 85; or

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(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-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.

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

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A 88. Subject to the provisions of this Scheme, where any person makes, on or after the 1st day of September, 1998 but on or before the 31st day of December, 1998, a declaration to the designated authority in accordance with the provisions of section 89 in respect of tax arrear, then, notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under this Scheme by the declarant shall be determined at the rates specified hereunder, namely:-

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C (f) where the tax arrear is payable under the indirect tax enactment-

(i) in a case where the tax arrear comprises fine, penalty or interest but does not include duties (including drawback of duty, credit of duty or any amount representing duty) or cesses, at the rate of fifty per cent, of the amount of such fine, penalty or interest, *due or interest*, due or payable as on the date of making a declaration under section 88,

(ii) in any other case, at the rate of fifty per cent, of the amount of duties (including drawback of duty, credit of duty or any amount representing duty) or cess due or payable on the date of making a declaration under section 88.

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F 91. The designated authority shall, subject to the conditions provided in section 90, grant immunity from instituting any proceeding 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 88."

G On 8th December, 1998 the Government passed the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order. This Order reads as follows:

"1. (1) This order may be called the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order, 1998.

H (2) It shall be deemed to have come into force on the 1st day of

September, 1998.

2. Where a declaration to the designated authority has been made in respect of tax arrear in relation to indirect tax enactment for 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 but remaining unpaid and pending determination on the date of making a declaration and, where, in respect of the same matter stated in the said declaration, a show cause notice has also been issued to any other person and is pending adjudication on the date of making the declaration, then, no civil proceeding for imposing of fine or penalty shall be proceeded with against such other person and in such cases the settlement in favour of the declarant under sub-section (1) of section 90 shall be deemed to be full and final in respect of such other person also on whom a show cause notice was issued on the same matter covered under the declaration."

The Commissioner of Customs and Central Excise issued a clarificatory note dated 16th December, 1998 wherein it was clarified that the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order only applied to cases where the show cause notices had been issued on or before 31st March, 1998 and where such notices were pending adjudication. It was clarified that the said Order would not apply to cases where the show cause notices had been adjudicated by the competent authority and fines/penalties had already been imposed on the date of making the declaration.

The company as well as all its Directors/Officers filed separate declarations before the Designated Authority. The Commissioner determined the settlement amounts and the Company and the Directors/Officers paid the amounts. It is claimed that the Directors/Officers paid under protest.

All the Directors/Officers then filed Writ Petitions. The Officers who were posted in the Kerala factory filed Writ Petitions in the High Court of Kerala. The Officers who were posted in the Gujarat factory filed Writ Petitions in the High Court of Gujarat. All the Petitioners claimed a refund of the amounts paid by them. It was claimed that as the Company had settled under the Kar Vivad Samadhan Scheme they were entitled to the benefit of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order. It was claimed

A that as they had paid the amounts under protest they were, therefore, entitled to refund of the amounts paid by them.

B The High Court of Kerala, by the impugned Order dated 7th March, 2000, allowed the Writ Petition and directed refund of the amounts. Pursuant to the Order dated 7th March, 2000 the Officers in Kerala got a refund. The High Court of Gujarat dismissed the Writ Petition. Therefore, in their case, no refund has taken place. The Judgment of the High Court of Kerala is assailed by the Union of India. The Judgment of the High Court of Gujarat is assailed by the Directors/Officers working in Gujarat to whom relief has been refused.

C Mr. Ganesh pointed out that the admitted facts are (a) that show cause notices had been issued not only to the Company but also to the various Directors/Officers of the Company, (b) that the show cause notices had been adjudicated upon and on the Company excise duty as well as penalty had been imposed, whereas on each of the Directors/officers a penalty of Rs. 2,00,000/- had been imposed, (c) that the Company as well as its Officers had filed Appeals which were pending, (d) that not only the Company but each of the Directors/Officers filed a declaration under the Kar Vivad Samadhan Scheme, (e) that those declarations were also adjudicated upon and the settlement amounts determined and paid not only by the Company but also by each of the Officers.

F Relying upon the provisions of the Kar Vivad Samadhan Scheme, Mr. Ganesh submitted that the Scheme was very clear. He submitted that declarations had to be filed, not only by the Company but by each of the Directors/Officers on whom show cause notice had been issued. He submitted that each declaration had to be separately dealt with and a settlement amount arrived at for each declaration. He submitted that each declarant would then have to pay the amount settled. He submitted that a plain reading of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order showed that the benefit was to be given only in those cases where the show cause notices were still pending adjudication. He submitted that once the show cause notice had been adjudicated upon, as admittedly they were in this case, the Directors/Officers were not entitled to the benefit of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order. He submitted that this position had been made clear by the clarificatory note dated 16th December, 1998 which had been issued by the Commissioner. He submitted that the Judgment of the High Court of Gujarat is the correct Judgment. He submitted that the High

Court of Kerala misdirected itself and proceeded on an erroneous basis. He submitted that the High Court of Kerala has proceeded on the basis that as the Appeals were still pending, the adjudication proceedings had not terminated. He submitted that the reasoning of the High Court of Kerala cannot be sustained as the benefit of Kar Vivad Samadhan Scheme (Removal of Difficulties) Order was not to be given where the proceedings were pending adjudication but only where the show cause notices were pending adjudication.

Mr. Vellapally, on the other hand, submitted that only one show cause notice had been issued. He submitted that in the same show cause notice the Company was called upon to show cause why excise duty and penalty be not levied and the Directors/Officers were also called upon to show cause why penalty be not levied on them. He submitted that Section 91 of the Kar Vivad Samadhan Scheme makes it clear that on payment being made and a certificate being granted, immunity is granted against prosecution for any offence and from imposition of penalty. He submitted that once the Company settled under the said Scheme, there was immunity in respect of the matter for which the show cause notice was issued. He submitted that penalty was sought to be imposed on the Directors/Officers for the same matter in respect of which the Show Cause Notice had been issued on the Company. He submitted that once the Company got immunity in respect of that matter, nothing survived even against the Directors/Officers.

We are unable to accept this submission. Under the Kar Vivad Samadhan Scheme there is no adjudication on the subject matter of the demand notice or show cause notice. There is a settlement of the "tax arrears". Even though the same show cause notice may call upon the Company and its Directors/Officers to show cause, there is a separate demand for "tax arrears" against the Company and a separate demand for "tax arrears" against the Directors/Officers. Thus each entity/person would have to file a declaration separately. The settlement is in respect of each declaration. Section 91 only gives immunity in respect of matters covered in the declaration. The matter covered in the declaration by the Company is the "tax arrears" of the Company. The declaration by the Company admittedly does not cover the tax arrears of the Directors/Officers. Thus they get no immunity under Section 91 on a settlement by the Company.

Mr. Vellapally next submitted that the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order, if read as a whole, makes it clear that the benefit of the declaration made by the Company was to accrue even to the

- A Officers of the Company so long as the adjudication proceedings were pending. He submitted that the interpretation sought to be given by the Department would render nugatory the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order. He submitted that such an interpretation would lead to uncertainty. He submitted that the applicability of the Order could not depend upon whether or not an Officer has been proceeded with adjudication
- B expeditiously or not. He submitted that the object was to give benefit to all Directors/Officers of the Company. He submitted that the restricted interpretation would defeat the object.

- We have heard the parties. In our view, a reading of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order shows that where a declaration had been made in respect of a tax arrear and where in respect of the same matter a show cause notice had also been issued to any other person, then the settlement in favour of the declarant has to be deemed to be full and final in respect of other persons on whom show cause notices had been issued. It is settled law that when an Appeal is pending there is no finality to the proceedings. The proceedings are then deemed to be continuing. Undoubtedly, at one place the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order seems does state that the show cause notice should be pending adjudication. However, the same order also talks of the show cause notice being in respect of same matter on which the show cause notice has been issued to the main declarant. Then the Order provides that a settlement in favour of the declarant will be deemed to be full and final in respect of other persons also. This Order has to be read as a whole. If read as a whole, it is dear that a settlement by the main declarant is to operate as full and final settlement in respect of all other persons on whom show cause notice was issued in respect of the same matter. Thus read as a whole the words "pending adjudication" cannot be read to exclude cases where the proceedings are still pending in Appeal. Even otherwise the order has to be read along with the Kar Vivad Samadhan Scheme. Under the Kar Vivad Samadhan Scheme a party can file a declaration so long as the proceedings are pending. Thus, even though the show cause notice may have been adjudicated upon and an Appeal is pending a party could still take the benefit of the Kar Vivad Samadhan Scheme and file a declaration. The object of the Kar Vivad Samadhan scheme (Removal of Difficulties) Order is to give benefit of a settlement by the main party (i.e. the Company in this case) to all other co-noticees. This being the object a classification, restricting the benefit only to cases where the show cause notice is pending adjudication, would be unreasonable. If read in this manner the Order would be discriminatory. An

interpretation which leads to discrimination must be avoided. An interpretation, as suggested by Mr. Ganesh, would also be against the object of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order. It is therefore not possible to accept the submissions of Mr. Ganesh. In our view the reasoning given by the High Court of Kerala is correct and needs to be upheld. A

In any event this would clearly be a case where two views are possible. It is settled law that if two views are possible then the one which is in favour of the assessee must be adopted. On this ground also the interpretation sought to be given by Mr. Ganesh cannot be accepted. B

In this view of the matter. Civil Appeal Nos. 6260-6265 of 2000 are dismissed. Civil Appeal Nos. 633 to 642 of 2002 are accordingly allowed and the Judgment of the High Court of Gujarat is set aside. C

The question now arises whether the Directors/Officers are entitled to a refund. Section 93 of the Kar Vivad Samadhan Scheme reads as follows:

“93. Any amount paid in pursuance of a declaration made under section 88 shall not be refundable under any circumstances.” D

Admittedly, in this case, all the Officers have paid the amounts in pursuance of the declaration made by them under Section 88. Even if they have paid the amounts under protest they are not entitled to refund. The Directors/Officers in Kerala would also not have been entitled to refund by virtue of Section 93. However, Section 93 does not seem to have been pointed out to the High Court of Kerala. As, pursuant to the Order of the High Court of Kerala, they have received refund we do not direct that they should repay the amounts to the Revenue. E

The Appeals stand disposed of accordingly. There will be no order as to costs. F

K.K.T.

Appeals disposed of.