(1999) 12 GUJ CK 0014

In the Gujarat High Court

Case No : Special Civil Application No''s. 1502, 1503, 1641, 1663, 1885, 2229, 5183, 5188 and 5852 of 1999

Deco Mica Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 03-12-1999

Acts Referred:
Finance Act, 1998 — Section 96(1)

Citation : (2000) 68 ECC 554 : (2001) 95 ECR 422 : (2002) 144 ELT 18

Hon'ble Judges : J.N. Bhatt, J;D.C. Srivastava, J

Bench : Division Bench

Advocate : Paresh M. Dave, M.K. Vakharia and D.V. Parikh, for the Appellant; Mukesh R. Shah, for the Respondent

Judgement

J.N. Bhatt, J.—Rule, service of which is waived by learned Additional Central Government Counsel Mr. M. R. Shah for the respondents.

2. This group of 9 petitions under Article 226 of the Constitution of India, raise identical questions and, therefore, upon joint request, they are being disposed of by this common judgment.

3. A conspectus of relevant and material facts leading to the rise of this group of petitions under Article 226 of the Constitution of India may, shortly, be articulated, at the outset. Out of 9 petitions, two petitions have been filed at the stage of show cause notice. The petitioners, inter alia, contended that the action of the respondent authority in rejecting their declarations for availing the benefit of Kar Vivad Samadhan Scheme 1998 (KVSS) in Chapter IV of the Finance (No. 2) Act, 1998 has resulted into miscarriage of justice as they have been derived of availing the statutory benefit flowing from KVSS since their cases were answering the material requirements of the provisions of KVSS.

4. Broadly speaking, the petitioners have business of manufacturing of paper based decorative laminated sheets popularly known as "laminates". According to

the case of the assessees, the said product fell under Chapter 48 of the Central Excise Tariff whereas according to the case of the Revenue, it fell under Chapter 39. The petitioner submitted that various such manufacturers, successfully, claimed the benefit of KVSS for the demands in difference in duty of excise raised against them for the period from the year 1985 to 1995 when all such manufacturers had discharged the duty liability of these goods under Chapter 48 of the Tariff and except the Ahmedabad Commissionerate, nowhere else in the country, declarations filed by other similarly situated manufacturers for the demands for the same period on the same grounds have been rejected.

5. The declarations came to be filed in all cases arising out of this group before 31st January 1999 before the Designated Authority under the KVSS. Except two matters, like that, Special Civil Application No. 2229/99 and 5188/99, all the matters were beyond the stage of adjudication, but in these cases also at the relevant point of time, appeals were pending.

6. It would be interesting to mention that the claim of the excise department was that the product was an article of plastics and hence classifiable under Chapter 39 of the Tariff which covered plastics and articles thereof. As against that the manufacturers'' version was that the product was classifiable as article of paper under Chapter 48 of the Central Excise Tariff. It would be interesting to find that the claim of the manufacturers was accepted and upheld by the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT), which had held that the product was classifiable under Chapter 48 of the Tariff. The Department did not find favour with this conclusion and did not agree with such classification, as a result of which, appeals came to be filed by the Department before the Hon''ble Supreme Court against the decisions of the CEGAT. The petitioners were paying excise duty on this product in accordance with the rates of duty prescribed under Chapter 48 of the Tariff. During the period from 1989 to 1995, the rate of duty under Chapter 39 was higher than that of under Chapter 48, and, therefore, various show cause notices were issued to the petitioners for the demand of additional excise duty. The show cause notices were in the nature of protective demands for saving the limitation in case the appeals of the Department succeeded before the Hon''ble Apex Court. The notices so issued to the petitioners during the relevant period were kept pending in view of the pendency of the appeals of the Department before the Hon''ble Supreme Court. Finally, in two cases between The Collector of Central Excise, Hyderabad, Vs. M/s. Bakelite Hylam Ltd., and Collector of Central Excise Vs. Wood Polymers Ltd., , the Hon''ble Supreme Court allowed the appeals of the Department and held that the product "laminated sheets" are articles of plastics covered under Chapter 39 of the Tariff.

7. Thus, the Hon''ble Apex Court allowed the appeals of the Department and reversed the decision of the CEGAT in so far as the question of classification of the product was concerned and it was held that the products in question was plastics or articles of plastics covered under Chapter 39 of the Tariff. After the decision of the Hon''ble Apex Court, the Assistant Commissioner of Central

Excise, respondent No. 4, adjudicated the show cause notices.

8. Needless to highlight and elaborate the fundamental design and deciderátum of the KVSS 1998. It is more participative, liberal and distributive. The objectives of the Scheme, as such, are very well known by now. In reality, it is one of the statutory recognizable methodologies of Alternative Dispute Resolution (ADR) in respect of the old pending disputes involving astronomical stakes. The very expression "samadhan" is indicative of settlement and samadhan scheme which means settlement scheme is aimed at achieving the twin objectives of effective settlement of outstanding disputes on one hand and raising resources on the other. From the point of view of revenue department, huge funds are locked in and blocked up in various litigations in various courts which, if realised, could be, successfully, used and ploughed back in the developing economic country, like ours. Sometimes tax payers are put to prolonged and meaningless litigations for several years. Needless to reiterate that even an end of fraction or part of pending litigations will turn out to be a boon and welcome breather and more redeeming hope culminating into clearing huge backlogs. It is also, rightly, said that one who wants to remove the mountain has to start with pebbles or the stones. It is officially declared time and again by the Department concerned that the amount of recoveries generated out of KVSS could not be said to be disappointing. Such a scheme came to be introduced by the Financial (No. 2) Act, 1998 and there could, hardly, be any question that such a scheme has been laudably and widely accepted and has received tremendous success.

9. Again the ADR is inevitable in one or the other form in view of the global unquestionable phenomena because of the fact that the court of law sometimes becomes suit for the life. In other words, litigation in the present set up and mechanism has become expensive, time-consuming and the system under which justice delivery or dispensation of justice has become in slow motion. It is reported that out of 192 countries which are the members of the United Nations, 133 countries have successfully implemented ADR in one or the other form and with encouraging and rewarding success. The traditional law system which has been in vogue in our country has, unfortunately, failed to respond to the preambular promise and constitutional mandates of easy, speedy and cheap justice to the common man. Be that as it may. The KVSS which is popularly known as Samadhan Scheme appears to have made successful start though in a very encraddle (sic) stage. The principles and parameters, the chronicles and contours of ADRs highlighted hereinabove in nutshell are very important and significant for the purpose of applying, interpreting and executing the benign provisions under KVSS 1998.

10. In so far as following 7 petitions are concerned, the following points have remained unquestionable.

1. Special Civil Application No. 1502 of 1999

2. Special Civil Application No. 1503 of 1999

3. Special Civil Application No. 1641 of 1999

4. Special Civil Application No. 1663 of 1999

5. Special Civil Application No. 1885 of 1999

6. Special Civil Application No. 5183 of 1999

7. Special Civil Application No. 5852 of 1999

(1) The show cause notice in each matter came to be issued on or before 31st March, 1998.

(2) The statutory appeals were pending on the date of filing of declaration before the Designated Authority under the Scheme.

(3) The amount remained unpaid at the relevant time.

11. In the remaining two petitions being, Special Civil Application Nos. 2229 of 1999 and 5188 of 1999, the only difference, while other factors being the same, was referable to the pendency of show cause notice prior to March 31, 1998 and the same has remained unadjudicated.

3.12.1999

12. Let us have a look, at this juncture, at the statutory provisions. In so far as indirect tax is concerned, the relevant provisions is section 87(m)(ii) which reads as under :

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

xx xxxxxxxxxxx xx xxxxxxxxxxx (m) (i) ....

(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 of declaration u/s 88; or

(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 u/s 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 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 this sub-clause, on or before the date of making a declaration by him u/s 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;"

13. It could, very well, be visualised that in so far as indirect tax enactment is concerned, clause (ii) is relevant and again there are two categories under clause (ii) and sub-clause (a) is referable to a case of indirect tax which has been determined as due or payable under the enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making declaration u/s 88, whereas, sub-clause (b) refers to the amount of duty etc. which has not been determined, but in respect of which demand notice or show cause notice had been issued on or before 31st day of March, 1998 and, obviously, therefore, under the enactment the remaining amount must have remained unpaid on the day of making a declaration u/s 88. Since we are not concerned with the explanation attached to clause (ii), we need not dilute upon it.

14. Section 88 of the KVSS provides for settlement of tax payable. Clause (f) of section 88 is referable where the tax arrear is payable under the indirect tax enactment, which is relevant and material for our purpose. Section 88(f) reads as under :

"87(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 payable as on the date of making a declaration u/s 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 cesses due or payable on the date of making a declaration u/s 88."

15. It is quite apparent from the aforesaid statutory provisions incorporated in sub-clause (ii) of clause (f) of section 88 that it shall be at the rate of 50 per cent of amount of duty including drawback of duty, credit of duty or any amount representing duty or cesses due or payable on the date of making a declaration u/s 88. Let it be noted, at this stage, that the date prescribed or the cut-off date for filing a declaration under KVSS was initially 31st December, 1998 which came to be extended till 31st January, 1999. The declarant means a person making a declaration u/s 88 and he has to make the declaration before the Designated Authority and the expression "Designated Authority" is also statutorily defined.

16. There is another interesting and very relevant provision to be noted is section 95 which in terms prescribes as to when the scheme not to apply in certain cases. It would be profitable to refer to the relevant clause of section

95(ii)(c) at this juncture :

"95. Scheme not to apply in certain cases - The provisions of this Scheme shall not apply -

xxxxxxxxxxxxx xxxxxxxxxxxxx

(ii) (a) & (b) ....

(c) in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made u/s 88;"

17. A mere perusal of section 95(ii)(c) makes it very clear that in respect of tax arrears under indirect tax enactment on the date of filing of declaration, an appeal or a reference or a writ petition had been admitted and was pending before any appellate authority or High Court or the Supreme Court or any application for revision was pending before the Central Government on the date of declaration made u/s 88.

18. In order to appreciate one contention with regard to adjudication of the issue of classification by the Hon''ble Apex Court in some cases, and whether it is an impediment in subsequent matters where classification issue may be there and for that purpose, our attention was invited to the provisions of section 96 of KVSS. It prescribes powers of the Central Government to issue directions in certain circumstances, which reads as under :

"96. Power of Central Government to issue directions :- (1) The Central Government may, from time to time, issue such orders, instructions and directions to the authorities, as it may deem fit, for the proper administration of this Scheme, and such authorities, and all other persons employed in the execution of this Scheme shall observe and follow such orders, instructions and directions of the Central Government;

Provided that no such orders, instructions or directions shall be issued so as to require any designated authority to dispose of a particular case in a particular manner.

(2) Without prejudice to the generality of the foregoing power, the Central Government may, if it considers necessary or expedient so to do, for the purpose of proper and efficient administration of the Scheme and collection of revenue, issue, from time to time general or special orders in respect of any class of cases, setting forth directions or instructions as to the guidelines, principles or procedures to be followed by the authorities in the work relating to administration of the Scheme and collection of revenue and any such order may, if the Central Government is of opinion that it is necessary in the public interest so to do, be published in the prescribed manner."

19. It becomes crystal clear that by virtue of the statutory authority, the Central

Government is empowered to issue directions. In all the cases, in this group of matters, show cause notices came to be issued prior to the cut-off date, like that, 31st March, 1998 whereas the adjudication came to be made in some of the cases thereafter and the amount had not been paid and the appeals were pending. Obviously, therefore, any direction, order or for that purpose instruction issued by the Central Government in relation to the scheme, statutorily, will be binding on the authorities. In this connection, our attention is drawn to the clarification/instruction issued u/s 96(1) of the Finance (No. 2) Act, 1998 issued by the Commissioner of Central Excise and Customs, Ahmedabad-1, Trade Notice No. 108/98, dated 2.11.1998 based on BE & C letter F. No. 275/33/98-CX.8A (Pt.) dated 28.10.1998, whereby it has been categorically clarified at serial No. 5 that KVSS could be availed in a case where show cause notice/demand notice has been issued prior to 31.3.1998 and (a) adjudication is pending on the date of making a declaration and (b) adjudication has been made after 31.3.1998, which reads as under :

5. "Can the KVS Scheme be availed of in a case where a show cause notice/ demand notice has been issued prior to 31.3.1998 and :

(a) adjudication is pending on the (a) Yes, the scheme can be availed date of making a declaration ? of in such cases. (b) adjudication has been made (b) Only, where party is in after 31.3.1998. dispute i.e. it has filed an appeal against the order and the appeal is admitted and pending on the date of declaration, the benefit under the Scheme can be claimed."

20. It could, therefore, well, be seen from the above that the contingency incorporated is sought to be clarified in item No. 5 and is falling within the parameters of KVS Scheme.

21. After having taken into consideration the overall factual scenario coupled with the relevant proposition of law and the submissions raised before us, we are of the clear opinion that the entire group of these petitions fall within the parameters entitling the petitioners to claim the benefits of KVS scheme. The Designated Authority has, in our opinion, committed serious error in refusing and rejecting the declarations of the petitioners. Obviously, therefore, the impugned orders of rejections of declarations made by the Designated Authority in all these petitions are required to be quashed and set aside. Accordingly, they are quashed and set aside. Obviously and undoubtedly, the impugned orders of rejection of declarations are unjust, improper and unreasonable and, therefore, time as mentioned in Section 90(i) shall begin to run from the date of receipt of order of this Court. The entire group of these petitions, accordingly, shall stand allowed leaving the parties to bear their own costs, in the circumstances of the case. Needless to mention that any amount paid after the filing of the declarations, obviously, will be subject to adjustment on determining the quantum of amount u/s 90(i). Rules is made absolute accordingly.

