

**(2000) 02 KAR CK 0020**  
**In the Karnataka High Court**  
**Case No : Writ Appeal No. 5333 of 1999**

|                                            |            |
|--------------------------------------------|------------|
| Eyelite Optical Industries Private Limited | APPELLANT  |
| Vs                                         |            |
| The Commissioner of Customs                | RESPONDENT |

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**Date of Decision :** 22-02-2000

**Acts Referred:**

Constitution of India, 1950 — Article 14  
Customs Act, 1962 — Section 111 (d), 111 (m), 112, 124  
Finance Act, 1998 — Section 86, 95 (ii) (b)

**Citation :** (2000) 3 KCCR 1599

**Hon'ble Judges :** V.G. Sabhahit, J; Ashok Bhan, J

**Bench :** Division Bench

**Advocate :** K.G. Raghavan, for the Appellant; Aravind Kumar, Central Government Standing Counsel, for the Respondent

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## Judgement

Ashok Bhan, J.—Appellant-writ Petitioner (hereinafter referred to as "the Appellant") has filed this appeal against the order of the Single Judge in Writ Petition No. 9153 of 1999 dated 9th of June, 1999 dismissing the petition thereby confirming the order of the Commissioner of Customs (for short, "the Respondent") holding that the Kar Vivad Samadhan Scheme, 1998 (for short, "the Scheme") would not be applicable to the case of the Appellant as he had waived issuance of a show-cause notice.

2. In order to appreciate the contention raised, it is necessary to give some of the basic facts which have been spelt out by the Appellant in his writ petition.

3. Appellant is a private limited company engaged in the manufacture of spectacle frames and sun glasses since 1980. In October 1996, the Appellant imported certain goods and filed a bill of entry for the clearance of goods. The supplier's invoice indicated the description and quantity of the goods. Appellant had earlier imported identical consignments and claimed exemption and the authorities had allowed the said exemption. He was under a reasonable belief that even the import made in October 1996 would be exempted from duty.

4. However, the Customs Authorities made certain enquiries, and, despite the Appellant's objections, the Additional Commissioner (Customs) passed an order dated 14.3.1997 bearing No. 29 of 1997 confiscating the said goods u/s 111(d) and 111(m) of the Customs Act, 1963 (for short "the Act"). He levied a redemption fine of Rs. 35 lakhs and imposed a penalty of Rs. 5 lakhs u/s 112 of the Act.

5. Aggrieved by this order, the Appellant filed an appeal before the Appellate Commissioner of Customs who by his order dated 25.7.1997 reduced the fine from Rs. 35 lakhs to Rs. 30 lakhs, but otherwise confirmed the order of the Additional Commissioner of Customs. The Appellant went in further appeal before the Customs Excise and Gold (Control) Appellate Tribunal (for short, "the Tribunal"). Tribunal reduced the fine from Rs. 30 lakhs to Rs. 15 lakhs and penalty from Rs. 5 lakhs to Rs. 1.5 lakhs.

6. Appellant approached this Court by filing Writ Petition No. 13547 of 1999 challenging the said order of the Tribunal. Single Judge dismissed the writ petition against which a writ appeal bearing No. 2295 of 1998 was filed which was disposed of on 1.11.1998. During the pendency of the writ appeal, the Tribunal passed an order dated 6.10.1998 bearing Miscellaneous Order No. 585 of 1998 (Final Order No. 1925 of 1998) directing the Additional Commissioner of Customs, Bangalore to denovo determine the price of the imported goods and thereupon arrive at the redemption fine. At the time of filing the writ petition the matter was pending at that stage.

7. In the meantime Section 86 of the Finance (No. 2) Act, 1998 introduced the scheme called Kar Vivad Samadhan Scheme. The Scheme is an offer by the Government for settling tax arrears at a substantial discount. In respect of arrears of Customs duty, the amount payable is 50% of the tax arrears including interest, fine or penalty levied. Although the Appellant was contesting the legality of the fine etc., imposed, but in order to buy peace, the Appellant decided to approach the Respondent for suitable relief under the Scheme. In terms of the said scheme the Appellant filed a declaration in Form 1B on 29th of December, 1998. By its letter No. C. No. VIII/10/97/98/KVSS"98, dated 3rd of February 1999, the Respondent informed the Appellant as follows:

The issue of show-cause notice/demand notice is a pre- condition for applicability of the scheme and cases wherein the party has waived the issue of show-cause notice/demand notice are out of the purview of the Kar Vivad Samadhan Scheme. In the instant case, since you had requested for waiver of the issue of show-cause notice as is mentioned in the Order in Original 29 of 1997, dated 17.3.1997, no show-cause notice was issued to you. Hence your declaration does not satisfy the condition for KVSS"98.

The declaration No. 62 of 1998 is not eligible for the scheme and is hereby rejected.

8. Being aggrieved by this decision the Appellant filed the writ petition on the

ground that u/s 124 of the Act a notice can either be in writing or oral at the option of the affected person; that the provision had been enacted essentially to meet the requirement of the principles of natural justice. Having regard to the practical aspects of cases coming under Customs Act, the Parliament, in its wisdom, provided for oral notice in the place of written show-cause notice. Oral notice coupled with the requirement of Clause (c) of Section 124, is no lesser than the written show-cause notice, in its efficacy and its objective of meeting the requirement of natural justice. That the Respondent was wrong in presuming that the show-cause notice means only a written show-cause notice, that even Section 95 of the Finance Act (No. 2), 1998 does not restrict the applicability to the scheme, not covered by a written show-cause notice. That the scheme is applicable to all cases in which notice u/s 124, either written or oral, is issued. In the alternative it was pleaded that in case oral notice is not taken as show-cause notice, then it will lead to an absurd situation where fine or penalty is imposed without show-cause notice and therefore violative of the principles of natural justice and Article 14 of the Constitution. Once an adjudication order is passed, the person against whom such an order is passed is bound to pay under the said order and no separate demand notice is issued under the Customs Act. The adjudication order itself would constitute a demand notice and satisfies the requirement of Clause 95 of the scheme.

9. Notice was issued to the Respondents and the writ petition was disposed of at the motion stage without awaiting filing of the written statement by the Respondents. Learned Single Judge agreed that the reasonings adopted by the authorities below that the waiver of the show-cause notice and personal hearing of the Appellant would debar him from invoking the provisions of the scheme.

10. Counsel for the parties have been heard.

11. Scheme is made applicable to direct as well as indirect taxes. Indirect taxes are defined in Section 87(j) as:

Indirect tax enactment" means the Customs Act, 1962 (52 of 1962) or the Central Excise Act, 1944 (1 of 1944) or the Customs Tariff Act, 1975 (51 of 1995) or the Central Excise Tariff Act, 1985 (5 of 1986) or the relevant Act and includes the rules or regulations made under such enactment.

12. Tax arrears have been defined u/s 87(m) as under:

Tax arrear" means:

(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 the enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a 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 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 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 purpose of determining tax arrear under this sub-clause.

13. Section 88 deals with the settlement of tax payable and the relevant portion of the same relating to indirect taxes reads:

88. Subject to the provision of this scheme, there 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 of 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:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ....

(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 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 cess due or payable on the date of making a declaration u/s 88

14. Section 95 provides that scheme would not apply in certain cases and the same reads:

95. The provisions of this Scheme shall not apply.-

(i) ...

(a) ...

(b) ...

(c) ....

(ii) in respect of tax arrear under any indirect tax enactment:

(a) in a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration u/s 88, in respect of any tax arrear in respect of such case under such indirect tax enactment;

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

(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.

15. Applicability of the scheme has been denied to the Appellant as the Appellant did not satisfy the condition laid down u/s 95(ii)(b) inasmuch as that no show-cause notice had been issued to him as it had waived the notice. Issuance of notice was a pre-condition for applicability of the scheme. Because of the waiver of the notice the scheme could not be made applicable to the Appellant.

16. Section 95(ii)(b) has to be read conjointly with and in the context of Section 88 and Section 87(m)(ii) (a) and (b). Section 88 provides that where a person makes a declaration before the designated authority in accordance with the provisions of Section 89 on or after 1.9.1998 but on or before 31st of December, 1998 in respect of all 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, the amount payable under the scheme shall be determined at the rates specified in the section. In the case of indirect tax the same section in Sub-clause (f) provides where the tax arrears comprises fine, penalty or interest but does not include duties (including drawback of duty, credit or duty or any amount representing duty) or cesses at the rate of 50% of such fine, penalty or interest, due or payable as on the date of making a declaration u/s 88. In any other case at the rate of 50% 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 u/s 88.

17. u/s 87(m) tax arrears in relation to indirect tax have been divided into two

categories, namely (a) and (b). Clause (a) deals with the amount of duties, cess, interest fine or penalty already determined as due or payable under that enactment as on 31st March, 1998 but remain unpaid as on the date of making a declaration u/s 88 and in Sub-clause (b) the amounts of duties, interest, cess, 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 the enactment but remaining unpaid on the date of making a declaration u/s 88. Clause (a) deals with the duties etc., which are already determined as due and payable whereas Clause (b) deals with the duties or penalties which constitutes the subject matter of demand notice or a show-cause notice and not the duties already determined or payable. Sub-clause (a) of Section 95(ii) refers to the notices issued u/s 87(m)(ii)(b) and not the cases where tax or penalty has already been determined. The adjudication order itself amounts to be a demand notice under the Customs Act. There is no separate provision for issuance of separate demand notice under the Act. When an adjudication order is passed, a person against whom such order is passed is bound to obey the order and no separate demand notice can be issued under the Act.

18. Section 95(ii)(b) refers to the issuance of a demand or a show-cause notice where the amounts of duties or penalties have not been determined as on 31st of March, 1998 but constitutes the subject matter of demand notice or a show-cause notice issued on or before 31st March, 1998 as provided u/s 87(m)(ii)(b). It does not relate to cases where the amount of duties and penalties etc., have already been determined as due or demanded under the enactment as on 31st March, 1998 provided u/s 87(m)(ii)(a). Case of Appellant falls under Clause (a) of Section 87(m)(ii) as in his case the amounts due already stood determined by an adjudication. The amount was still in dispute and the proceedings were still pending at the time when the Appellant filed a declaration u/s 88 in this Court i.e., Writ Appeal No. 2295 of 1998 as well as before the Tribunal.

19. This apart Section 124 of the Customs Act contemplates both a written show-cause notice and an oral show-cause notice. Section 124 reads:

124. Issue of show-cause notice before confiscation of goods etc.-No order confiscating any goods or imposing any penalty on any person shall be made under this chapter unless the owner of the goods or such person:

- a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
- b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
- c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred in Clause (a) and the representation referred to in Clause (b) may at the request of the person concerned, be oral

20. It is apparent that Section 124 contemplates both a notice in writing and at the option of affected person, oral notice. It is an admitted fact that the order of the Additional Commissioner dated 14.3.1997 was passed only after hearing the parties which means a reasonable opportunity of hearing was accorded thus satisfying the requirement of Section 124. Assumption of the authorities that Section 95(ii)(b) contemplates only a written show-cause notice is incorrect. They have failed to notice the fact that Section 124 covers an oral notice also. In case it is accepted that oral notice is not a show-cause notice, then it will lead to absurd situation where fine or penalty is imposed without show-cause notice and therefore violative of principles of natural justice and Article 14 of the Constitution. A demand made in the form of fine or penalty raised after following the procedure laid down in proviso to Section 124 should be treated as show-cause notice for the purpose of Section 95(ii)(b) of the Scheme. Such an interpretation would not only be in accordance with the rules of interpretation but also be in harmony with the objectives of the Scheme.

21. For the reasons stated above, we accept this appeal, set aside the order of the Single Judge and that of the Respondent-authority. Respondent- authority is directed to proceed in accordance with law and the observations made herein.