

(1999) 07 DEL CK 0084

In the Delhi High Court

Case No : Civil Writ Petition No's. 2165 and 1746 of 1999 23 July 1999

IRON MASTER (INDIA) (P.) LTD.

APPELLANT

Vs

UNION OF INDIA

RESPONDENT

Date of Decision : 23-07-1999

Acts Referred:

Citation : (1999) 106 TAXMAN 670

Hon'ble Judges : Sarin, J

Bench : Division Bench

Advocate : Rajesh Rawal for the Petitioner. Maninder Singh, for the Appellant;

Judgement

Sarin, J. -

An interesting question under the Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as the Scheme) arises for consideration in both these writ petitions which are, Therefore, being disposed of by this common judgment.

2. The petitioner claims that under the provisions of the Kar Vivad Samadhan Scheme, 1998, on payment of 50 per cent of the duty amount it is entitled to waiver of the complete amount of the redemption fine and penalty imposed in respect of the imported goods. The goods imported had been confiscated u/s 111 (d) of the Customs Act, 1962, but an option to pay redemption fine and penalty in lieu of confiscation had been provided to the petitioner u/s 125 of the said Act.

3. Let us briefly notice the factual matrix of the two writ petitions before dealing with the provisions of the Scheme, and the legal submissions in respect thereof.

The petitioner claims to have imported tractor spares and defective/ second hand diesel engines from Japan. The petitioner had initially claimed that the import of the goods was covered as "seconds" under para 27(1) of the Hand Book of Procedures, as amended by public notice No. 296 PN dated 12-6-1995. The customs authorities reached the conclusion that the imported goods were not "seconds" as is commonly understood in the trade as referring to the goods of

the second quality or defective material, which arise during the course of manufacture of the prime quality goods. In other words, these were not "seconds" having some manufacturing defect but, on the other hand, were second-hand used diesel engines imported for the purposes of re-conditioning and repair for giving a further lease of life. The customs authorities held these to be covered under para 29 of the Indian Export Policy, for the import of which a valid import license was required but had not been obtained. The goods were, Therefore, held to be imported in contravention of law and liable to confiscation u/s 111 (d).

4. The customs authorities in case of the import covered by CW No. 2165 of 1999, gave the option to the petitioner to redeem the goods on payment of redemption fine of Rs. 15 lakhs and payment of penalty of Rs. 3 lakhs, The amount of custom duty, ie., required to be paid in addition to the redemption fine and penalty in terms of section 125(2) worked out to Rs. 2,53,062. The petitioner filed a declaration on 31-12-1998, under the Scheme offering to pay 50 per cent of the duty amount, ie., Rs. 1,26,531 and claiming complete waiver of the redemption fine and penalty. However, the customs authorities directed the petitioner to pay the entire amount of duty, ie., Rs. 2,53,062 and 50 per cent of the penalty and redemption fine. This is sought to be assailed.

5. The subject-matter of import in CW. No. 1746 of 1999 was again tractor spares and second-hand diesel engines from Japan. In this case, the Deputy Commissioner of Customs vide his order dated 23-12-1997, held the goods to be imported in contravention of law and liable for confiscation u/s 111(d). The petitioner was given an option in lieu of confiscation to pay redemption fine of Rs. 24 lakhs and penalty of Rs. 2,50,000 u/s 125. The duty amount payable in addition u/s 125(2) worked out to Rs. 2,64,169. The petitioner had preferred an appeal before the Commissioner. The said appeal was dismissed and the redemption fine of Rs. 24 lakhs and penalty of Rs. 2,50,000 was upheld. The Commissioner also noticed that in the previous import by the same party, the subject-matter of CW. No. 2165 of 1999, redemption fine originally imposed, ie., Rs. 30 lakhs, was reduced to Rs. 15 lakhs by the CEGAT. The petitioner filed its declaration under the Scheme purporting to pay 50 per cent of the duty amount and claiming complete waiver of penalty and redemption fine. The petitioner is aggrieved by the certificate of intimation directing it to deposit 50 per cent of the redemption fine and penalty and full amount of customs duty.

6. The learned counsel for the petitioner submits that the "Scheme" had been introduced with the object of reducing the litigation and wipeout the arrears of taxes and duties which had accumulated in crores. The twin object of the Scheme was to cut down the litigation and ensure recovery of arrears of revenue, locked in litigation. The counsel for the petitioner submits that considering the provisions of the Scheme and the language used in Form No. 2-B, the requirement was the payment of 50 per cent of tax arrears irrespective of the same being in dispute or not. The counsel for the petitioner relies on the

questions and answers concerning the Scheme, published by the department of Customs and Central Excise, Government of India. Reliance is placed in particular on answer to question No. 5 :

Qn. No. 5. What are the benefits available under the Scheme ?

Ans. The declarant involved in dispute with the department in a case involving arrears of taxes including duties, fine, penalties or interest can settle the case by payment of an amount as indicated in the Scheme depending upon whether it involves one or more of duties, fines, penalties or interest which are still in arrears as on the date of filing the declaration. The settlement amount essentially is payable as per the following provisions :

Category of case

Amount payable for settlement

(a) In a case involving arrears of duty whether or not it involves arrears of fine, penalties or interest.

The applicant has to pay only 50% of the amount of duties due or payable and in arrears as on the date of application. There will be complete waiver from payment of fine, penalty and interest involved, if any, apart from waiver of the balance duty due or payable.

(b) A case which doesn't involve arrear of duty but comprises penalty, fine or interest.

The applicant will have to pay only 50 per cent of the amount of such penalty, fine or interest due or payable on the date of making declaration. The balance amount of penalty, fine or interest due or payable will be waived.

In both categories of cases, the applicant will also get immunity from institution of proceeding for prosecution for any offence under any indirect tax enactment for matters covered by the declaration for the case.

7. The counsel for the petitioner submits that the case of the petitioner falls within category (a) inasmuch as there were arrears of duty, fine, penalty, etc., and, Therefore, the petitioner was obliged to pay only 50 per cent of the duty amount and there was to be a complete waiver of penalty and redemption fine and 50 per cent of duty amount.

8. The learned counsel in support of his contention that the requirement for availing the benefit of the Scheme was only the pendency of arrears of tax, ie., duty, etc., and not a dispute in relation to the same, relies on the following :-

(i) Definition of "Disputed Tax" in section 87(f) of the Scheme in respect of Direct Tax enactment and absence of a similar definition in relation to Indirect Tax Enactment of the Scheme. It is urged that the concept of disputed arrears of tax is confined and applicable only to direct tax enactment and as far as the indirect tax enactment is concerned, the mere pendency of arrears would suffice.

Definition of "Tax Arrears" in section 87(m)(z) and (ii) of the Scheme is reproduced in 1998 ELT 101 as also in the text of the Finance Bill. The submission is that the definition of tax arrears in relation to indirect tax enactment in section 87(m)(ii)(a) does not have the word "determined" before due and payable, as is used in the definition of tax arrears in relation to direct tax enactment in section 87(m)(i). This, it is urged, shows that determination of tax arrears by adjudication or there being a dispute in relation thereto is not a requirement in the indirect tax enactment regime.

We find that the correct text of the Scheme has the word "determined" before "as due or payable" in the definition of tax arrears even in the case of indirect tax enactment. However, the controversy as to the correct text need not detain us. It is not determinative of the issue and is not of consequence in the facts of this case and in view of the interpretation being given by us to the various provisions of the Scheme.

9. The learned counsel for the respondent refuted the submissions of the petitioner. It is urged on behalf of the respondent that the provisions of the Scheme ought to be given a purposive" interpretation and are not to be interpreted in a manner so as to defeat the entire purpose and object sought to be achieved by the Scheme. It was urged that a collective reading of section 87(m)(ii) and section 88(f) of the Scheme shows that the amount of duties, cesses, fine or penalty are those which stood determined as on 31-3-1998. In other words, the tax arrears are those which had been the subject-matter of any litigation or dispute or adjudication. Reliance on questions and answers by the petitioner was said to be misconceived as the same could not govern and prevail over the provisions of the Scheme.

10. Let us examine the object of the Scheme and some of the provisions relevant for the case:

The Scheme is contained in sections 86 to 98 of the Finance Act, 1998. The aim and object of the Scheme, as explained by the Finance Minister in his speech, was:

"95. Litigation has been the bane of both direct and indirect taxes. A lot of energy of the revenue department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked-up in such disputes. Deluging the system will not only incentivise honest taxpayers, enable government to realise its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-friendly Therefore, propose to introduce a new Scheme called "Samadhan .

The relevant provisions of sections 87 and 88 of the Act are reproduced hereunder:

Section 87:

(m) "tax arrears" means-

(i) in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before the 31-3-1998 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:

(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 31-3-1998 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 31-3-1998 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 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;

All other words and expressions used and not defined in this Scheme but defined in any direct tax enactment or indirect tax enactment shall have the meanings respectively assigned to them in those enactments."

88. Settlement of tax payable - Subject to the provisions of this Scheme, where any person makes, on or after the 1-9-1998 but on or before the 31-12-1998, 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:

(a) to (e) **

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

Sections 89 and 90 deal with the manner in which declaration has to be made and the manner in which the payment of tax arrears is to be made.

Section 91 provides that the designated authority shall, subject to the conditions provided in section 90, grant immunity from instituting any proceedings 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 u/s 86. The provisions of section 94 make it explicitly clear that any benefit, concession or immunity to the declarant shall be available only for the year in which the declaration has been made. Further, section 95 specifies certain circumstances, cases, situations in which the benefit of the Scheme shall not be available. As far as tax arrears under the indirect tax enactment are concerned, section 95(ii)(a)(b) and (c) of the Scheme provides that:

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

(i) * *

(it) in respect of tax arrears 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 the 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; [Emphasis here italicized in print supplied]

It would be seen from the foregoing that Kar Vivad Samadhan Scheme seeks to provide a quick and voluntary settlement of tax dues outstanding and in dispute as on 31-3-1998, both in various direct tax enactments as well as indirect tax enactments by offering waiver of a part of the arrear taxes and interest and providing immunity against institution of prosecution and imposition of penalty. The assessed on his part shall seek to withdraw appeals pending before various

appellate authorities and courts. The Scheme came into force on 1-9-1998 and ended on 31-12-1998,

The Scheme is applicable to tax arrears outstanding as on 31-3-1998. A person desiring to avail the Scheme is required to file a declaration in the prescribed form before the designated authority notified for this purpose. The designated authority shall pass an order within sixty days of the declaration determining the amount payable in accordance with the provisions of the Scheme and grant a certificate indicating the particulars of tax arrears and the sum payable and intimate the same to the declarant. The declarant will pay the sum payable as determined by the designated authority within thirty days of the passing of such order. The order passed by the designated authority shall be conclusive and shall not be reopened in any other proceedings or under any law for the time being in force. Where the declarant has filed an appeal or reference before any authority, Tribunal or Court, notwithstanding anything contained in any other provision of law for the time being in force, such appeal, reference or reply shall be deemed to have been withdrawn. Where writ petitions have been filed before the High Court or Supreme Court, the declarant shall move an application for withdrawing such petitions and furnish the proof of the same along with the intimation. Any amount paid in pursuance of declaration made under the Scheme shall not be refundable under any circumstances.

11. Having noticed the object and intention of the Scheme as well as its salient provisions, it is manifest that the aim is to clear the arrears of revenue, locked in litigation. The Scheme is not intended to cover cases of mere non-payment or where there is no dispute about the tax arrears. The very nomenclature, ie., Kar Vivad Samadhan Scheme, is a pointer towards it. The word "Vivad" means existence of a difference or a dispute. The definition of various expressions given u/s 87 further reinforces that sine qua non is the existence of a dispute in respect of the tax arrears e.g., "definition of disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed tax, disputed wealth, disputed value of gift". Again in the definition of tax arrears, the amount of duties, interest, fine or penalty, which constitute the subject-matter of a demand notice, all tend to show the existence of a lis. Moreover, section 95 provides for the non-applicability of the Scheme to cases of indirect tax enactment, wherein a show-cause notice or a notice of demand has not been issued and to cases where no appeal or reference or litigation has been admitted and pending, which amply demonstrates that the sine qua non is the existence of a dispute in respect of the subject-matter of tax arrears.

12. In the light of the foregoing, let us recapitulate the facts of the present writ petitions:

The goods in question had been imported in contravention of law and Therefore, were liable to be confiscated u/s 111 (d). The proceedings for confiscation of the goods were initiated in accordance with the statute, i.e., section 125(2). The petitioner was given an option of payment of redemption fine and penalty in lieu

of confiscation. The petitioner had challenged the quantum of redemption fine and penalty at various levels culminating in dismissal of appeal by the CEGAT and confirmation of the redemption fine and penalty as imposed. It is significant that the goods stand confiscated and it is only when the petitioner exercises its option, by payment of redemption fine and penalty, that the question of release of goods would arise. The petitioner hitherto before, neither challenged nor could challenge the payment of customs duty, which being a statutory obligation on import of goods is payable. The petitioner wishes to avail of the benefit of redemption of confiscated goods. Neither the classification of the goods nor the rate of duty applicable or the amount thereof has been in dispute. In fact, there has been no dispute or controversy, whatsoever, in respect of the amount of customs duty payable. Accordingly, the present case would clearly fall within section 88(f)(i) of the Scheme, wherein tax arrears are those of redemption fine and penalty. The obligation for payment of customs duty arises on exercise of option to redeem the goods. It is de hors and independent of the dispute or arrears of tax comprising the redemption fine and penalty.

13. The designated authority, Therefore, was fully justified in issuing the certificate of intimation, wherein the petitioner was required to pay the full amount of duty and 50 per cent of the redemption fine and penalty. The requirement for payment of full amount of customs duty in respect of which there is no lis is in consonance with the provisions of section 125 and other provisions of the Scheme.

14. We find considerable merit in the submission of the respondent that the Scheme has to be given a purposive interpretation and the Scheme cannot be interpreted in a manner so as to defeat the very object and intention of the Scheme. The petitioner cannot claim to pay simply 50 percent of the duty amount especially when there has been no lis in respect of the same or dispute with regard to it. The petitioner's case is not advanced by the published questions and answers, in particular question No. 5. Questions and answers issued are by way of illustration and to guide the assessee. Questions and answers or any inference drawn there from cannot negate or make otiose any provision of the Scheme. Answer to question No. 5 cannot be interpreted in a manner so as to negate the essential features of the Scheme. Question Nos. 1-3 clearly bring out that the Scheme is for settlement of certain disputes involving arrears of taxes, dues, etc. The scheme is to provide legal framework for settlement of tax dues in various categories of pending cases in dispute. These answers, Therefore, demonstrate the existence of a dispute or lis being a sine qua non for the applicability of the Scheme. The learned counsel for the petitioner has cited a number of authorities to urge that if two interpretations were possible, the one favouring the subject/assessee should be preferred. Further, there is no equity in respect of a fiscal statute, and the benefit even of a legal lacunae must flow to the assessee. These authorities and principles do not apply or arise for consideration in the present set of facts and there being no ambiguity with regard to the provisions of the Scheme. There is also no merit in

the petitioner's contention that as regards indirect tax enactments, the requirement of arrears in dispute is not there.

We, Therefore, find no merit in any of the contentions raised by the petitioner. The writ petitions are dismissed with no order as to costs.