

\$~100

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

DECIDED ON: 03.11.2016

+ W.P. (C) 4819/1999

M/S.LESAG HBB(I) LTD. & ORS Petitioners

Through: None.

versus

COMMR.OF CENTRAL EXCISE DELHI & ORS Respondents

Through: Mr. Pramod Kumar Rai, Sr. Standing
Counsel and Mr. Deepak Anand, Jr.
Standing counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.(ORAL)

1. The three individuals in this writ petition seek direction for the quashing of an order dated 07.01.1999 which imposes penalty upon them. The impugned order was made pursuant to a show cause notice issued to the Company Lesag HBB (India) Limited and the other three petitioners before the court. The show cause notice, *inter alia*, was that the petitioners are 100% Export Oriented Unit manufacturing and exporting electronic parts had indulged in mis-declaration with respect to importation of goods. The show cause notice was defended by the petitioners; culminated in an adverse order by the Commissioner who, *inter alia*, held as follows:

“(i) I order confiscation of 22,56,74,100 pcs. of Solder

Preforms imported in excess of the declared quantity vide BOI No.211144 dated 8.2.95 under Section 111 (j) and 111 (I) of the Customs Act, 1962 and confiscation of 2,25,900 pcs. of solder performs under Section 119 and 111 (m) of the Customs Act, 1962 as these had been used as concealment for the non-declared 22,56,74,100 pcs. and also for their mis-declaration with regard to their value. However, I give M/s Lesag (HBB) India Ltd., Faridabad an option to redeem the said confiscated goods on payment of a fine of Rs.4,00,000/- (Rupees four lakhs only) in lieu of confiscation under Section 125 of the Customs Act, 1962 within a period of three months from the receipt of this order.

(ii) I order that the impugned goods are to be valued at Rs. 4.92 per 1000 pcs instead of declared value at Rs.2.00 per 1000 pcs and that exemption under Notification No. 95/93- Cus dated 2.3.93 is not available to such undeclared and unauthorisedly imported goods. I further order that customs duty amounting to Rs.11,00,179.55 (Rupees eleven lakhs one hundred seventy nine and paise fifty five only) is leviable on the 22,56,74,100 pcs. of Solder Preforms imported in excess vide BOE No. 211144 dated 8.2.95 under Section 28 of the Customs Act, 1962.

(iii) I also hold that the following notices are liable for penal action under Section 112 of the Customs Act 1962 and impose the following amounts of penalty on them:-

- | | | |
|------------|---|----------------------|
| <i>(a)</i> | <i>M/s Legal (HBB) India Ltd. Faiddabad
(Rupees Five Lakhs Only)</i> | <i>Rs.5,00,000/-</i> |
| <i>(b)</i> | <i>Shri E. George Commercial Manager
(Rupees Two Lakhs Only)</i> | <i>Rs.2,00,000/-</i> |
| <i>(c)</i> | <i>Shri J.P.Gupta, Senior Manager
(Rupees One Lakh Only)</i> | <i>Rs,1,00,000/-</i> |
| <i>(d)</i> | <i>Shri Jaspal Singh Rekhi, Import Manager
(Rupees Fifty Thousand Only)</i> | <i>Rs.50,000/-</i> |

(iv) I do not impose any penalty on Shri Chattopadhyaya, the

employee of M/s Lesag HBB (India) Ltd. as well as the clearing agent, M/s Vardhman Customs Clearing and Forwarding Agents under Section 112 of the Customs Act, 1962.”

2. The company- the first petitioner in this case applied under the Kar Vivad Samadhan Scheme, 1998 and made an appropriate declaration with respect to its liability. Having regard to the totality of circumstances on 11.03.1999, the declaration of the company was accepted and an order was passed under Section 19(1) of the Finance (II) Act, 1998. The amount determined as payable under Section 88 of the Finance Act was ₹5,50,090/-. It is not in dispute that the said amount was paid.

3. In the meanwhile the other three petitioners who were working with the first petitioner company as its employees (as Import Manager, Commercial Manager and Senior Manager respectively) were sought to be proceeded in respect of the penalties imposed. They, therefore, approached this court. By way of present proceedings the petitioner was entertained long ago and remained benefited by law.

4. It is urged that in terms of the scheme once the settlement is recorded with respect to the tax liability of the principal noticee, the question of further liability on the part of others, who may not play a permanent role, does not arise. In this regard, reliance is placed upon para 2 of the clarification contained in the Commissioner of Central Excise and Customs, Trade Notice No. 35/1998 dated 30.11.1998. It is stated that as long as the liability of the company i.e. first petitioner was satisfied, it would be highly inequitable if the respondent proceed

against the present petitioners who were mere employees.

5. Mr. Rai appearing on behalf of the respondents, on the other hand, urged that unless an application is moved by all noticees, under the scheme, the settlement recorded in respect of one of them - may be even the principal person involved, would not inure any benefit to all others. To the extent of any tax liability, the revenue's rights to enforce it independently are preserved. Reliance is placed upon para 12 upon the judgment reported as *Union of India v. Onkar S. Kanwar* (2002) 145 ELT 266 (SC).

6. It is evident from the above facts that the principal noticee's liability i.e. (of the company) was the real basis for the finding of abatement recorded against the other petitioners who were employees. The order of adjudicating authority amply clarifies that not only tax but the penalty imposed against the company was to a substantially higher degree than that against the present petitioners. Customs duty to the extent of ₹11,00,179.55 and penalty to the tune of ₹5 lacs was imposed upon the company. However, as regards the other petitioners only penalty on the finding of abatement was recorded.

7. In *Onkar S. Kanwar (supra)* Supreme Court, *inter alia*, observed as under:

"12. 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 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 the a settlement by the Company.

13. Mr. Vellpally 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 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 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.

14. 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 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 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 to 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 benefits 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."

8. From a bare reading of the above extracts what emerges is that

the tax arrears of the Directors and officers of a company can be proceeded with independently, if they do not join it in making an application. This case, however, it is not tax arrears which are in dispute but the penalty which is wholly dependent upon the findings that led to the tax arrears (which has not been settled by the company) in the part of other three petitioners. Secondly, and more importantly, the Supreme Court clearly stated that object of the removal of difficulties order in respect of the scheme was to give benefit of settlement by the main parties to all other co-noticees.

9. Having regard to this object and a declaration by Supreme Court, we are of the opinion that the petition has to succeed. The respondents are hereby directed not to enforce any demand towards payment of penalty as against the three individual petitioners who were employees of the first petitioner at relevant time. The penalty order to the extent it applied to them is hereby quashed.

10. The writ petition is allowed in the above terms.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

NOVEMBER 03, 2016

mr