

HIGH COURT OF MADHYA PRADESH : JABALPUR

Writ Petition No. 1231/1999

Mech & Fab IndustriesPetitioners

Versus

Union of India and anotherRespondents

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Coram:

Hon'ble Shri Justice A. M. Khanwilkar, Chief Justice
Hon'ble Shri Justice Sanjay Yadav, J.

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Shri H.K. Upadhyay, Advocate for the petitioners.

Shri S.A. Dharmadhikari, Advocate for the respondents.

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Whether approved for reporting ? Yes

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JUDGMENT
{20th NOVEMBER, 2015}

Per: A.M. Khanwilkar, Chief Justice:

This writ petition under Article 226 of the Constitution of India takes exception to the communication-cum-order conveyed to the petitioner by the Department issued under the signature of Commissioner dated 3rd March, 1999 (Annexure P-12). The same reads thus:-

**OFFICE OF THE COMMISSIONER, CUSTOMS & CENTRAL
EXCISE, COMMISSIONERATE: INDORE -II,
OPPOSITE MAIDA MILL, HOSHANGABAD ROAD,
BHOPAL - 462011**

C.O.IV(16)Decl-26/98/Samadhan/6185

Bhopal, dated 03.03.99

To

M/s Mech & Fab Industries
17-B, Sector-D, Industrial Area,
Govindpura,
BHOPAL.

Sub: Declaration No.26/98 filed by you under the Kar Vivad Samadhan Scheme, 1998.

Please refer to your Declaration dated 04.12.98 filed under the Kar Vivad Samadhan Scheme (allotted Decl. No.26/98), seeking settlement of case relating to Show Cause Notice No.V(85)15-40/96/Adj/61911 dated 10.12.96, and subsequent Order-in-Original No.12/CEX/97 dated 24.09.97 declaring tax arrears of Central Excise Duty of Rs.269944 and Penalty of Rs.364238.

From the declarations dated 04.12.98 filed by you, it is noticed that you have shown the amount of tax arrears as under:-

	AMOUNT OF TAX ARREARS AS PER SHOW CAUSE NOTICE	AMOUNT PAID ON OR BEFORE FILING OF DECLN.	BALANCE AMOUNT PAYABLE AS ON THE DATE OF DECLN.
DUTY	3,64,238/-	94,294/- Vide PLA E.No.02 dtd. 15.6.98	2,69,944/-
FINE	NIL	NIL	NIL
PENALTY	3,64,238/-	NIL	3,64,238/-
INTEREST	20% from date of liability	NIL	20% from date of liability.

On inquiry, it has been found that you, vide your letter No.MF/EXCISE/98 dated 15.06.1998 have intimated to Commissioner (Appeals), Bhopal that you have made the pre-deposit of total duty of Rs.3,64,238/- vide PLA Entry Nos.26,27,28,29,30 dated 04.10.96, PLA Entry Nos.34 dated 09.10.96, PLA Entry No.02 dated 15.06.98 & RG23A Pt.II Entry No.306 dated 16.06.98. Thus you have misdeclared the amount of pending arrears in your aforesaid declarations.

Further, you have taken recredit of Rs.1,96,500 in you RG23A Pt.II account in pursuance to the Assistant Commissioner, Central Excise, Division-I's letter CNO.IV(16)518-KVS/98/7569 dated 02.12.98, without first paying the said amount from PLA. The recredit thus taken is not proper and legal.

Since, the facts show this to be a case of willful misdeclaration, in order to avail maximum undue benefit at the cost of the exchequer, the declarations is hereby rejected.

Sd/-
(SUBHASH CHANDER)
COMMISSIONER

Copy to:-

1. The Assistant Commissioner, Central Excise, Division-I, Bhopal for information.
2. The Superintendent, Central Excise, Range-IV, Bhopal for information.

Sd/-
(SUBHASH CHANDER)
COMMISSIONER”

(emphasis supplied)

2. According to the petitioner, the Authority committed manifest error in non-suiting the petitioner at the threshold on the finding that the declaration filed by the petitioner was incorrect or a case of misdeclaration, without giving opportunity to the petitioner to pursue the declaration to its logical end. The petitioner submits that the Authority clearly glossed over the factual position stated in the declaration, which is on affidavit filed in the prescribed form. That factual position stated in the declaration alone should be reckoned for considering the claim of the Petitioner with reference to the benefits to be extended under the Scheme. It is contended that the correspondence exchanged between the petitioner-assessee and the Department and the claim of the petitioner founded on such correspondence, at best, was a matter to be considered while processing the declaration of the assessee for recording opinion as to whether the assessee was entitled for the benefit of the Kar Vivad Samadhan Scheme, 1998 as propounded.

3. The respondents, on the other hand, submit that the figures stated by the petitioner in the communication sent by the

petitioner dated 15th June, 1998 are not matching with the figures mentioned in the declaration dated 04.12.1998. In that, on 04.12.1998, the petitioner had already paid the amount of duty, therefore, could not have made contrary statement in the declaration on 04.12.1998; nor entitled to any benefit under the Scheme on that count. This is the broad plea taken by the Department.

4. Having considered the rival submissions, we deem it apposite to reproduce the declaration filed by the petitioner under Section 89 of the Finance (No.2) Act, 1988 in respect of Kar Vivad Samadhan Scheme, 1998 (Annexure P-11), which reads thus:-

“Form of Declaration under section 89 of the Finance (No.2) Act, 1988 in respect of Kar Vivad Samadhan Scheme, 1998

Kar Vivad Samadhan Scheme Rules, 1998

FORM – 1B

{See rule 3(1)(b)}

To

The Designated Authority
Central Excise & Customs,
BHOPAL.

Sir/Madam,

I hereby make a declaration under section 88 of the Finance (No.2) Act, 1998.

- | | |
|---|--|
| 1. Name of the declarant
(in block letters) | M/S MECH & FAB INDUSTRIES
17-B, Sector-D, Industrial Area,
Govindpura, Bhopal.
Tel. No. Office/factory 587404
586273
Fax 527693 |
| 2. Address: Office
Factory address
(if dispute relates to excisable goods) | ----do----- |
| 3. Status of the declarant
(State whether Manufacturer, Dealer, Importer, Exporter, Individual company etc.) | Manufacturer |

4. (a) If a manufacturing Unit, If Importer or Exporter Others
Indicate Central Excise indicate Importer or
Registration No. Exporter Code No.

R-VI/MFI/92/BPL/86 --N.A.--- --N.A.—

- (b) Name of Range/Division/Commissionerate/Custom House where assessed or from where a show cause/demand notice issued in relation to the case for which tax arrears are proposed to be settled.

Range :- IV
Division :- I
Commissionerate:- Indore II, at Bhopal

5. Details of the case and tax arrears proposed for settlement under the scheme:

	Particulars													
1.)	Commissionerate of Central Excise/Customs where Assessed or from where a show cause/demand notice issued in relation to the case for which tax arrears are proposed to be settled.	The Commissioner, Collector, Custom & Central Excise, Indore												
2.)	Reference Number of show cause/demand notice and date of issue	V(85)15-40/96Adj.61911 dt.10/12/96 & Adjudicated by Dy. Comm. CEX BHOPAL Vide O-I-O 12/CEX/97 Dt. 24/09/97												
3.)	Pendency Status of the case (as on the date of declaration) (See Instruction 4)	Appeal Rejected by The Commissioner (Appeals), Custom & Central Excise, Bhopal vide his order-in-Appeal No.583-ce/BPL/98 dt.31/8/98 against which appeal to CEGAT New Delhi vide Appeal No.E/3016/98A												
4.)	Amount of Tax Arrear as per show cause/demand Notice or as already determined (due or payable) as per last order (as on the date of declaration) (In Rs. (See Instructions 5) 4(a) Duty 4(b) Fine 4(c) Penalty 4(d) Interest	 Rs. 3,64,238.00 Rs. Nil Rs. 3,64,238.00 Rs. 20% from the date of liability												
5.)	Amount of Tax arrear paid on or before the date of Declaration (along with Date of payment and payment particulars) (in Rs.) (See Instruction 6)	<table border="1"> <thead> <tr> <th>PLA No.</th> <th>RG23P(II)</th> <th>Date</th> <th>Amount</th> </tr> </thead> <tbody> <tr> <td>02</td> <td>-</td> <td>15/06/98</td> <td>94294</td> </tr> <tr> <td colspan="3"></td> <td>94294</td> </tr> </tbody> </table>	PLA No.	RG23P(II)	Date	Amount	02	-	15/06/98	94294				94294
PLA No.	RG23P(II)	Date	Amount											
02	-	15/06/98	94294											
			94294											

6. Balance amount payable as on the date of declaration (Col.4 – 5)

Duty/Cess Rs. 2,69,944.00
Fine Rs. Nil
Penalty Rs.3,64,238.00

Interest	Rs. 20% from the date of liability
7. Settlement amount Claimed as payable for the case under Section 88(f) (In Rs.)	50% of the above i.e. Rs.1,34,972.00
8. Is there any seizure of goods involved in the Case, if so, give details of seizure.	NIL
9. Is it a case where Department has filed an appeal against any of the orders passed at any stage in respect of this case, if so, give details.	
10. Remarks	

VERIFICATION

I, MAHESH AGRAWAL (name in block letters) son of Shri Bansidhar Agrawal solemnly declare that to the best of my knowledge and belief.

- (a) The information given in this declaration and statements and annexures accompanying it is correct and complete and amount of tax arrears and other particulars shown therein are truly stated.
- (b) I am not disqualified in any manner from making a declaration under the Scheme with reference to the provisions of Section 95 of Finance (No.2) Act, 1998.

I further declare that I am making this declaration in my capacity as Managing Partner (designation) M/s Mech & Fab Industries, Govindpura, Bhopal and that I am competent to make this declaration and verify it.

For MECH & FAB INDUSTRIES

PLACE: BHOPAL
DATE: 04/12/98

(MAHESH AGRAWAL)
MANAGING PARTNER”

5. Notably, it is not the argument of the respondents that the factual position stated against column Nos.4 to 7 of the declaration in particular, is incorrect as such. What has been held against the petitioner, is that, the petitioner in the communication sent on 15.06.1998 had mentioned different factual position. For that, we may usefully refer to said communication (Annexure P-5) which reads thus:-

“MF/Excise/98
June 15, 1998

The Commissioner (Appeals),
 Customs & Central Excise,
 Opp. Maida Mill,
 Hoshangabad Road,
 Bhopal.

Subject: Our application for stay/against Appeal No.12/98.

Ref: Your letter C. No.12-CE/BPL/APPL/98 (No.172- CE/BPL/98) 1450
 dated 18/05/98.

Dear Sir,

We wish to draw your kind attention towards your above mentioned letter vide which you have instructed us to deposit the duty adjudged. In this connection, we wish to inform you that we have pre-deposited the duty adjudged vide the following details.

S.No.	PLA	RG 23 A Part II	Amount
1.	26, 27, 28, 29, 30 dated 04.10.96	---	70917.00
2.	34 dated 09.10.96	---	2527.00
3.	02 dated 15.06.98	---	94294.00
4.	----	306 dated 15.06.98	196500.00
		Total =	364238.00

The photocopies of the relevant pages of PLA and RG 23 A Part II are being enclosed herewith. This is for your further necessary action.

Thanking you
 Yours faithfully
 For MECH & FAB INDUSTRIES
 Sd/-
 Mahesh Agrawal
 Managing Director.”

6. It may be mentioned at this stage that after this communication, the petitioner received communication from the Assistant Commissioner, Central Excise, Division-I on 02.12.1998, Annexure P-6, which reads thus:-

**“OFFICE OF THE ASSISTANT COMMISSIONER
 CENTRAL EXCISE, DIVISION, BHOPAL**

C.No.IV(16)818-KVs/98/7567

Bhopal dt. 2.12.98

To,
 M/s Mech & Fab Industries
 17-B, Sector-D, Industrial Area,
 Govindapura, Bhopal.

Gentleman,

Sub: Payment of Arrears through RG23A Part II-C/R.

On scrutiny of RI 12 for the month of June, 98, it was observed by Range Supdt. That you have paid the arrears against order – in original No.12/CEN/Dc/97 dt. 24.9.97 vide RG23-A Pt. II E.No.306, dt.15.6.98, for

Rs.1,96,500/- without maintaining sufficient balance in RG23-A Pt.II account during the intervening period.

You are directed to pay the Arrears of Rs.1,96,500/- in cash or through RA. However, you can take revenue entry of the amount debited vide RG23-A Pt.II E.No.306 dt.15.6.98 as per law.

Yours faithfully,
Sd/- 2.12.98
Assistant Commissioner
Central Excise Dv.I, Bhopal.

Copy to: The Supdt. Central Excise,
Range-IV for information and necessary action.”

7. In response to the said communication the petitioner on 03.12.1998 (Annexure P-7) wrote back to the Commissioner as follows:-

“MF/EXCISE/98
December 3, 1998

The Assistant Commissioner
Central Excise
Division – I.
Bhopal

Sub :- Intimation
Ref :- Your Letter No. C.No.IV(16) 518-KVS/98 Dated 02.12.98.

Dear Sir,

We refer to your above mentioned letter, accordingly we wish to inform you that we have reversed the amount of Rs.1,96,500/- in RG-23 A Part II vide Entry No.1154 dated 02/12/98 against previously debited in RG-23 A Part II entry No. 306 dt. 15/06/98.

This is for your kind information and record.

Thanks

Yours Faithfully,
for Mech & Fab Industries

Mahesh Agrawal
Managing Partner

CC: Superintendent,
Central Excise
Division-I
BHOPAL”

8. As aforesaid, the core issue, as is rightly contended by the petitioner, is: whether the factual position stated by the

petitioner in the declaration, which is required to be filed in the prescribed Form No.1-B, is incorrect in any manner?

9. The counsel for the respondents is not in a position to point out as to how the facts or figures stated in clauses 4 to 7 of the declaration are incorrect. The argument of the respondents, however, proceeds that since the petitioner had already paid the amount of Rs.2,69,944/- towards duty/cess before 4.12.1998, that amount could not have been shown as the balance amount payable by the petitioner in the declaration. Per contra, the petitioner points out that the petitioner had made necessary book entries in the books of accounts, as was expected to be done in terms of communication received from the Assistant Commissioner, Central Excise, Division-I dated 02.12.1998 and which was duly communicated to the Department by letter dated 03.12.1998 Annexure P-7. As a consequence thereof, on the date of submitting declaration on 04.12.1998, the amount mentioned in clause 6 of the declaration against item Duty/cess was payable by the petitioner.

10. Assuming that the Department is right in pointing out that the duty/cess was already paid by the petitioner and was not due on 04.12.1998 when the declaration was filed, we fail to understand as to how that would result in causing willful loss to the public exchequer, as such. It would be a different matter, if the

petitioner was to incorrectly claim that the amount was not outstanding on the day of filing declaration. Only then it would be a case of wrong or incorrect disclosure made to cause loss to public exchequer. Further, we hold that the correctness of the declaration submitted in the prescribed form for settlement of the dispute under the Scheme, cannot be judged on the basis of the stand taken by the assessee in the correspondence exchanged with the Department, prior to submission of such declaration. That approach will be counterproductive to the purpose and intent for which the Scheme has been launched – for resolution of the disputes. In other words, the declaration cannot be jettisoned at the threshold as has been done in the present case, by referring to the stand taken by petitioner in its previous correspondence exchanged with the Department. Instead, the Department ought to have treated the disclosures made in the declaration by the petitioner as relevant facts; and the correctness thereof could be judged on its own merits. For, the term “declaration”, as expounded by the Supreme Court in **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others**¹, has a definite connotation. It is a statement of material facts announced solemnly or officially. It may constitute a formal announcement or deliberate statement. Thus, it is an act of declaring; something which is declared, or a statement made. In

¹ (2006) 11 SCC 548 (Para 40)

para 40 of the above decision, the Supreme Court held thus:

“40. The expression “declaration” has a definite connotation. It is a statement of material facts. It may constitute a formal announcement or a deliberate statement. A declaration must be announced solemnly or officially. It must be made with a view “to make known” or “to announce”. (See *Prativa Pal v. Janhavi Charan Chatterjee*.) When a person is placed in the category of a declared defaulter, it must precede (sic be preceded by) a decision. The expression “declared” is wider than the words “found” or “made”. Declared defaulter should be an actual defaulter and not an alleged defaulter.”

11. We have no manner of doubt that in the facts of the present case, it was not open to the Department to non-suit the petitioner from participating in the said Scheme at the threshold on the ground that the factual position stated in the declaration dated 04.12.1998, submitted in the prescribed Form 1-B, Annexure P-11, was incorrect as it was not consistent with the previous communication sent by the petitioner dated 15.06.1998 – much less is of such a nature that it would cause loss to public exchequer either directly or indirectly. If the petitioner has already paid the amount towards Duty/cess, there can be no loss to the public exchequer as such. The petitioner, at best, would be entitled for adjustment as per the Scheme propounded, which is a matter to be considered by the Appropriate Authority. It is also open to the Appropriate Authority to consider as to whether the assessee, who has already paid the amount towards Duty/cess is eligible to participate in the Scheme.

12. In our opinion, the communication dated 03.03.1998,

Annexure P-12, is founded on incorrect understanding of the requirement of declaration to be filed in the prescribed format and disclosures made by the assessee in respect of the respective items to be declared therein. In the fact situation of the present case, it is not possible to hold that the petitioner had misdeclared the relevant information, as noted in the impugned communication.

13. Accordingly, this petition **succeeds**. The impugned communication, Annexure P-12, is quashed and set aside. Instead, the Appropriate Authority is directed to process the proposal/declaration of the petitioner under the Scheme as per law.

14. We make it clear that we are not expressing any opinion on the merits of the issues to be considered by the Appropriate Authority including the question of applicability of the Scheme to the petitioner-assessee on other counts, which are not dealt with nor have arisen for consideration in the present petition.

15. The amount already deposited by the petitioner with the Department during the concerned assessment period either directly or in terms of order passed by the Court, be given due adjustments in the final decision to be taken by the Appropriate Authority.

16. Petition disposed of on the above terms with no order as to costs.

(A. M. Khanwilkar)
Chief Justice

(Sanjay Yadav)
Judge

psm