

(2000) 02 AHC CK 0181

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 512 of 1999 2 February 2000

BRIJ BHUSHAN LAL and SONS

APPELLANT

Vs

DESIGNATED AUTHORITY

RESPONDENT

Date of Decision : 02-02-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Finance (No. 2) Act, 1998 — Section 87, 88, 89
Income Tax Act, 1961 — Section 154, 226, 245, 54A

Citation : (2001) 165 CTR 137 : (2001) 246 ITR 353

Hon'ble Judges : S. Rafat Alam, J; M.C. Agarwal, J

Bench : Full Bench

Advocate : V.B. Upadhya and Abhinav Upadhya, for the Assessee Shambhu Chopra, for the Revenue, for the Appellant;

Final Decision : Dismissed

Judgement

M. C. Agarwal, J.

By this petition under article 226 of the Constitution of India, the petitioner challenges the orders dated 17-3-1999, passed by the Designated Authority, i.e., Commissioner (Appeals), Meerut (hereinafter referred to as the respondent No. 1), whereby the petitioner's declarations under the Kar Vivad Samadhan Scheme have been rejected for the reason that there were no arrears of tax due from the petitioner on the date of the declaration, i.e., 31-12-1998.

2. The petitioner's case is that by section 89 of the Finance (No. 2) Act, 1998, a scheme for settlement of tax disputes was introduced and the petitioner, which is a Hindu undivided family, filed declarations for the assessment years 1988-89 to 1992-93. Under the scheme only all assessee against whom tax was in arrears could approach for the settlement of the dispute in accordance with the provisions of this Act. Section 88 provides for settlement of tax payable in respect of tax arrears and there is no dispute between the parties that if in a case there is no tax arrears, then an assessee cannot make a declaration and no

settlement. can be made under the scheme. "Tax arrear" has been defined in section 87 to mean in relation to direct tax enactment, the amount of tax penalty or interest determined on or before 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.

As mentioned above, the petitioner's declarations which were five in number have been rejected by the designated Authority on the ground that when the declarations were made on 31-12-1998, there was no tax arrears, i.e., tax remaining unpaid against the petitioner.

3. The petitioner's contention is that there was a Hindu undivided family in the name and style of Seth B. D. Gupta, Hindu undivided family which was being assessed to Income Tax and wealth-tax. There was a partition in that family under which an industrial unit, viz., Modern Industries, fell to the share of Sri B. B. Bindal, a coparcener. The said Sri B. B. Bindal was the karta of the present petitioner and under the terms of the partition, Sri B. B. Bindal was liable to any tax liability or refund of the erstwhile Sri B. D. Gupta, Hindu undivided family. It is claimed that for the assessment years 1988-89, 1989-90, 1990-91, 1991-92 and 1992-93 wealth-tax assessments were made on the petitioner resulting in a demand of Rs. 1,65,85,798 out of which sums amounting to Rs. 1,16,27,689 had been paid up to 19-2-1996, and the balance amount of Rs. 49,58,109 remained due. It is further averred that the petitioner was entitled to a refund from its Income Tax assessment for the years 1988-89, 1989-90, 1990-91, 1991-92, 1992-93 and 1996-97 to the tune of Rs. 29,66,213, The petitioner was also entitled to a refund of Income Tax out of the tax deposited in the case of B. D. Gupta, Hindu undivided family, for the assessment years 1970-71, 1971-72, 1974-75, 1985-86 and 1986-87 to the tune of Rs. 20,12,407. These figures find place in paragraphs 5 and 6 of the writ petition and it is specifically mentioned that while the amount remaining due in respect of the wealth-tax was Rs. 49,58,109, the refund of income tax amounted to Rs. 49,78,620. In other words if the two amount figures were adjusted, the petitioner was entitled to a net refund of Rs. 20,411. The aforesaid amounts of refund were adjusted towards the outstanding amount of Rs. 49,58,109. It is claimed that before making these adjustments, no notice of any kind or intimation was given to the assessee by the Wealth Tax Officer.

On 25-11-1998, the petitioner moved applications before the Joint Commissioner Meerut, claiming that adjustments of Income Tax refund toward the wealth-tax liability was legally not correct and it appears to have been done by mistake and this mistake should be rectified and the process of adjustments may be revised and the outstanding demand may be ascertained and intimated to the assessee. The Joint Commissioner rejected those applications by an order dated 30-12-1998, saying that the adjustments were rightly made as the assessing officer was entitled to realise the amount u/s 226 of the Income Tax Act, 1961. It is claimed that in the meantime, the petitioner made declarations u/s 89 of the

Finance (No. 2) Act of 1998. known as "Kar Vivad Samadhan Scheme, 1998" (hereinafter referred to as "KVSS") with regard to the wealth-tax liability of the petitioner-Hindu undivided family for the assessment years 1988-89 to 1992-93. These declarations were made on 31-12-1998. The petitioner filed appeals against the order dated 30-12-1998, passed by "the Joint Commissioner refusing to allow the petitioner's application u/s 154. The Commissioner (Appeals) by a consolidated order dated 28-1-1999, allowed the appeals and held that the impugned adjustment of refund under the Income Tax Act against the wealth-tax demand for different years and in some cases of different assessees, were not legally correct. The Commissioner, therefore, cancelled the adjustments and the assessing officer was directed to make fresh adjustments after following the procedure u/s 245 of the Income Tax Act. After the decision of the Commissioner (Appeals), the petitioner moved an application before the Designated Authority under the Kar Vivad Samadhan Scheme claiming that since the adjustments had been cancelled, the wealth-tax demand became outstanding on the date of the filing of the declarations and, therefore, the declarations may be proceeded with. The declarations were, however, rejected by the Designated Authority on the ground that on the date of the declaration, no amount was in arrears. The contention of the petitioner is that this view taken by the Designated Authority is wrong because the order passed by the Commissioner (Appeals) would relate back to the date on which the petitioner's application u/s 154 was rejected by the Joint Commissioner which was dated 30-12-1998, and, therefore, on 31-12-1998, when the declarations were made the demands were outstanding.

In the counter affidavit, it has been stated that refunds relating to the erstwhile Hindu undivided family B. D. Gupta were adjusted long back in the years 1992 and 1993 as under :

Refund relating to erstwhile HUF. B.D. Gupta

Demand relating to the petitioner

Date of adjustment

income tax assessment year

Assessment year

Amount (Rs.)

1970-71

1988-89 (W/T)

2,49,099

5-7-1993

1970-71

1989-90 (W/T)

62,488

5- 7-1993

1970-71

1990-91 (W/T)

9,86,170

5-7- 1995

1971-72

1989-90 (W/T)

80,545

26-7- 1993

1974-75

1989-90 (W/T)

1,57,632

14-7-1993

1985-86 and 1986-87

1988-89 (W/T)

4,83,619

3-7-1992

20,19,553

Then it is stated that a sum of Rs. 6,87,652, in respect of the assessment year 1989-90 (Es. 3,28,923), the assessment year 1988-89 (Rs. 1,80,914) and the assessment year 1987-88 (Rs. 1,77,815) was adjusted towards the wealth-tax demands against the assessee for the assessment years 1990-91 and 1991-92 on 5-1-1995. It is further stated that Income Tax refund of the assessee amounting to Rs. 3,37,909 for the assessment year 1993-94 was adjusted against the wealth-tax demand for the assessment year 1992-93 on 29-11-1995. On the same date a sum of Rs. 39,855 being Income Tax refund due to the assessee for the assessment year 1994-95 was adjusted against the wealth-tax demand for the assessment year 1992-93 on 29-11-1995. An Income Tax refund of the assessee amounting to Rs. 2,98,362 for the assessment year 1989-90 was adjusted against the wealth-tax demand for the assessment year 1989-90 on 12-4-1993. Like wise other amounts in respect of Income Tax refunds due to the assessee for the assessment years 1990-91, 1987-88, 1993-94. 1992-93,

1996-97 and 1993-94 were adjusted on various dates in the years 1995-96. Thus, according to the respondent, the adjustment of total amount of Rs. 49,73,597 was made several years ago and the petitioner never objected to the above adjustment. It is averred that the petitioner raised his objection only in November, 1998, for availing of the benefits of the Kar Vivad Samadhan Scheme which came into force on 1-9-1998, as one of the conditions was that arrears of tax should be outstanding. It is claimed that the petitioner's conduct in remaining silent for so long shows that there was deemed consent to the adjustments. It is claimed that since there were no outstanding dues, the declarations were rightly rejected. It is also averred that an intimation dated 3-7-1992. was sent to the petitioner for adjustment of the refund of Rs. 4,83,619 relating to the bigger-Hindu undivided family named B. D. Gupta. With regard to the order passed by the Commissioner of Wealth Tax (Appeals), it is claimed that the Commissioner of Wealth Tax (Appeals) was not competent to entertain the appeals and that in any case no appeal effect was given to the appellate order and, therefore, no demand can be said to be outstanding.

4. We have heard Shri V. B. Upadhyaya, learned senior advocate, assisted by Sri Abhinav Upadhyaya, learned counsel for the petitioner, and Shri Shambhu Chopra, learned counsel for the respondent.

The short question arising in this appeal is whether in the circumstances mentioned above, it could be said that any tax was in arrears. Admittedly, the demands had been squared up by adjustment of the refund's due to the assessee whether they arose from the assessment of Sri B. D. Gupta, Hindu undivided family, or of the present assessee for several years. In some instances for more than six years, the assessee raised no objection. After the scheme. i. e., Kar Vivad Samadhan Scheme was launched, the petitioner solely for acquiring eligibility to make a declaration challenged the adjustments of refunds towards the liabilities by moving separate applications for all the years. We may, for the sake of facility, reproduce below one of the applications which is for the assessment year 1988-89 as under :

"Before the Deputy Commissioner (Assessment). Meerut.

In the matter of ; Shri B. B. L. and Sons-Assessment year 1988-89.

Sub : Petition for rectification of mistake arising out of wrong adjustments of refunds.

Sir,

For the abovementioned assessment year, against the demand created vide assessment order under the Wealth Tax Act, certain adjustments have been made in respect of refunds becoming due under the Income Tax and Wealth Tax Acts of different assessees as under :

Name of the assessee

Status

Tax

Amount

Seth B.D. Gupta (HUF)

HUF (Specified)

I, tax

4,76,47.3

Seth B.D. Gupta (HUF)

HUF (Specified)

I, tax

2,49,099

7,25,572

That the adjustment so made was without jurisdiction and illegal and such adjustment constitutes an apparent mistake of facts and law requiring rectification. It will be seen from the provisions of the Income tax Act contained in section 245 of the Income Tax Act, and also the provisions of the Wealth Tax Act contained in section 34A(5) of the Wealth tax Act that adjustment is permissible only in respect of the Income Tax refund against Income Tax dues in the case of the same assessee and likewise wealth-tax refund against the wealth-tax dues of the same assessee. In other words, the necessary for adjustment are :

(i) Income Tax refund can be adjusted against Income Tax demand only ;

(ii) Wealth-tax refund can be adjusted against wealth-tax demand only ;

(iii) The adjustment of refund can be made against arrear demand in the case of" the same assessee and not in the case of different assessees.

These are apparent and obvious requirements of law and the language of the two sections cited above is plain and simple which does not lead to two opinions.

In the instant case the refund of different assessees had been adjusted against the arrear demand of the present assessee and moreover, Income Tax refund had also been adjusted against wealth-tax liability. Such adjustments, therefore, are contrary to the provisions of sections 245 and 54A(5) of the Income Tax Act and Wealth Tax Act, respectively. Such adjustments, therefore, being wrong and based on mistaken view of specific statutory provisions, deserve to be reversed and the refund so adjusted deserve to be restored back to the file of the respective assessee who was entitled to refund.

As a result of rectification, that is to say, reversal of the adjustments made whatever tax liability becomes due in the case of the present assessee may be intimated so that the same may be discharged by payment. It may also be stated that such refunds due to the respective assessee may be allowed only after the discharge of liability by the present assessee.

In view of the above prayer, it is requested that the adjustment made may be reversed and the outstanding demand may be ascertained and intimated to the present assessee, to enable to avail the Samadhan Scheme in respect of disputes pending before the appellate authority

(emphasis here italicised in print supplied)

Submitted for an early action."

We have underlined the relevant portion of the application to show that the sole purpose of moving such applications was to enable the petitioner to avail of the, benefits of the Kar Vivad Samadhan Scheme which provided that a defaulter could settle the matter by paying only 30 per cent. of the dues. A close scrutiny of the application would show that it was not the ease of the assessee that it did not know about the adjustments. It was also not averred in these applications that no intimation or notice was sent to the petitioner before making these adjustment. It was subsequently at the appellate stage before the Commissioner of Wealth Tax (Appeals) that the plea of want of notice/intimation was raised and the learned Commissioner of Wealth Tax (Appeals) disposed of the appeals with the following observations :

"4. I have considered the arguments of the learned authorised representative without going into the merits of different legal issues raised by the learned authorised representative, I agree with the contentions of the learned authorised representative on the main issue that u/s 245 of the Income Tax Act, before making any adjustment of refund due to any person against any demand due from that person, the assessing officer is obliged to issue an intimation in writing to such person of the action proposed to be taken u/s 245. Admittedly, in this case, no such intimation u/s 245 was issued to the applicant before any adjustment. Hence, the impugned adjustments of refund under the Income Tax Act against the wealth-tax demands of different assessment years and in some cases of different assessee, as mentioned earlier, were not legally correct and, hence are cancelled. The assessing officer is, however, free to make fresh adjustments after following the procedure laid down u/s 245."

5. Section 245 of the Income Tax Act, merely requires that the adjustments or set off will be made after giving an intimation in writing to such person of the action to be taken under this section. Therefore, what is required is merely an intimation so that the person concerned may choose to raise any objection and may not make unnecessary payments. The intimation is certainly not a jurisdictional requirement and absence thereof is merely an irregularity which, if a person objects to, can be pointed out to the concerned officer and if need be,

suitable amendments may be made. In case no intimation has been given and the person concerned has any objection, he can approach the officer concerned. Therefore, want of intimation does not vitiate the adjustment and it is merely an irregularity which can be ignored if no prejudice has been caused to the party concerned. In this case, no prejudice is even alleged to have resulted to the petitioner whose own money due as the refund was adjusted towards its own liabilities. The adjustments did not cause any prejudice to the petitioner and that it knew fully well of the adjustments is evident from the fact that no such averments were made in the applications purporting to be moved u/s 154 and no other action was ever taken by the petitioner. As is averred in paragraph 5 of the writ petition, the last payment was made on 19-2-1996, and according to the figures given in paragraphs 5 and 6 by those payments and adjustments made, there was an over payment of Rs. 20,000 and odd. Why did the petitioner stop making payment after 19-2-1996. The reason simply was that the entire demands stood wiped out by the adjustments. No other reason has been given in the writ petition or before us at the hearing. The fact that after 19-2-1996. the petitioner made no payment, unequivocally indicates that the adjustments were made to the knowledge of the petitioner and even if there was no prior consent, he consented to the same by not raising any objection and by not making any payment thereafter on the assumption that the demands stood wiped out. Therefore, in our view, the adjustments were legally made and were final as between the parties. The petitioner's application u/s 154 was an ingenious attempt to treat the law as an ass which partly succeeded in the Commissioner of Wealth Tax (Appeals) cancelling the adjustments through a patently illegal order and without looking into the facts of the case. He did not even look into the question as to whether an appeal was maintainable against an order u/s 154 which neither enhanced the assessment nor reduced the refunds or whether the applications u/s 154 were within limitation.

Learned counsel for the petitioner placed reliance on a Single Judge, judgment of the Calcutta High Court in bank of Bank of Tokyo Mitsubishi Ltd. Vs. Commissioner of Income Tax and Others, , in which it was held that adjustment of refund against tax arrears without prior intimation to the assessee was not valid. The learned Single Judge held that a prior intimation in that regard must generate from the revenue and only thereafter the revenue has jurisdiction to make the set off. With great respect to the learned Single Judge, we are unable to agree with the reasoning given in this judgment. Reliance is also placed on a judgment of the learned Single Judge of the Madras High Court in K.T. Kunjumon Vs. Commissioner of Income Tax and Others, , in which cash seized during a search was adjusted against the existing liability. That was a case in which the court held that the cash seized had to be applied first towards the liability arising out of a block assessment u/s 158BC and, therefore, the adjustment was invalid. In the present case before us, there is no lack of jurisdiction. The refunds were due to the assessee and were adjusted towards the assessee's own liabilities and without any objection by the assessee. Therefore, the want of an intimation

if at all it was there. was a mere irregularity that could not invalidate the adjustments made long back and consented to by the petitioner.

It was contended that in any case the adjustments having been cancelled by the Commissioner of Wealth Tax (Appeals), the same no longer stand and, therefore, the demand would relate back to the date when the applications u/s 154 were rejected. This may be the consequence in a general manner but the provisions of the scheme require that the tax should actually be in arrears on the date of the declaration. The declarations were made on 31-12-1998 and on that date, the appellate order was not even in existence. The scheme contains a special legislation granting substantial benefit to tax defaulters and, therefore, its provisions have to be strictly complied with, if a person wants to avail of the benefit of the scheme. The tax should have remained unpaid on the date of declaration and the tax that was not in arrears on the date of the declaration, cannot be treated to be in arrears on the relevant date by a sheer fraudulent device like the one adopted by the petitioner. Jurisdiction under article 226 of the Constitution of India is a special jurisdiction conferred on the High Court to do justice and it cannot be allowed to be a tool for encouraging a fraud on public revenue. In the present case, the round about turn taken by the petitioner without any genuine grievance was solely to harm the public revenue and to gain an undeserved advantage. and the High Court cannot extend a helping hand to such attempt.

For the above reasons. we find no force in this petition and the same is hereby dismissed with costs to the respondent that we assess at Rs. 2,500.