(2004) 12 KL CK 0020

In the High Court Of Kerala

Case No : OP No. 7661 of 1999 21 December 2004

Dr. R.P. Patel APPELLANT

Vs

Asstt. DIT (Investigation) and Others RESPONDENT

Date of Decision : 21-12-2004

Acts Referred:

Finance (No. 2) Act, 1998 — Section 90
Income Tax Act, 1961 — Section 132, 132B, 140A, 143, 147

Citation : (2005) 144 TAXMAN 79

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : M. Pathrose Mathai, Ramesh John and V. Giri, for the Assessee P.K.R. Menon and George K. George, for the Revenue, for the Appellant;

Judgement

C.N. Ramachandran, J.

Petitioner is a reputed homoeo doctor with a homoeo clinic at Kottayam and is an assessee under the Income Tax Act being assessed by the second respondent. A search conducted by the first respondent in the residence and clinic of the petitioner at Kottayam on 30-12-1994 led to seizure of cash around Rs. 6 lakhs, Indira Vikas Patras hereinafter referred to as the (IVP) for Rs. 6 lakhs and promissory note for the value of Rs. 3 lakhs. Consequent on certain data collected during search in the petitioner''s premises, the first respondent arranged search through his counterparts in Baroda in the residence of two sons of the petitioner, namely, Indravadan R. Patel, and Jawaharlal Patel on 4-1-1995, which led to seizure of IVP''s of the value of Rs. 66.7 lakhs and Rs. 2.46 lakhs, respectively. However, in view of admission by the petitioner and his sons in the course of search, the IVPs seized from the petitioner''s sons were, also treated as undeclared income of the petitioner and proceeded with. In fact, in the course of search, petitioner made a total disclosure of Rs. 1,46,78,980 for the financial years 1989-90 to 1994-95 u/s 132(4) of the Income Tax Act. After conclusion of search, the first respondent issued Ext. P1 proceedings on 28-4-1995 under the then existing section 132(5) of the Income Tax Act estimating the Income Tax thereon, interest and penalty for the purpose of retaining the seized assets for appropriation after determination of liability. Since after search, there was still time to remit the last instalment of advance tax for the assessment year 1995-96, the petitioner after referring to his statement furnished u/s 132(4) on 4-1-1995, declared an income of Rs. 66,86,800 for the said assessment year and requested the second respondent to appropriate from the seized cash and IVPs, Rs. 26,74,720 towards advance tax vide Ext. R3(A), letter dated 13-3-1995. Petitioner maintained that the entire seizures are income relevant for the assessment year 1995-96 and based on the same he filed a return on 13-7-1995 declaring a net income of Rs. 68,86,800 which is consistent with his earlier letter Ext. R3(A). Thereafter, the petitioner filed a revised return for the very same assessment year, that is, 1995-96 stated to be on 15-12-1995 declaring an income of Rs. 75 lakhs as against Rs. 68,86,800 earlier returned. After adjusting the seized cash retained by the department, respondents 1 and 2 encashed the IVPs as and when those deposits matured and adjusted the said amount also towards petitioner''s tax liability for the assessment year 1995-96 and credited some amount towards tax for the assessment year 1994-95. While, according to the petitioner, the encashment of IVPs and adjustment towards tax liability by the department is unauthorised, the position canvassed by the second respondent is that encashment of IVPs and adjustment towards tax liability are strictly in terms of specific authorisation given by the petitioner vide Ext. R3(A) and subsequent communications. The Income Tax assessment of the petitioner for all the relevant assessment years, namely, 1990-91 to 1995-96, were completed vide Ext. P4 series of orders. While the assessments for the years 1990-91 to 1994-95 were completed on 23-12-1997 as income escaping assessments u/s 147, the regular assessment for the year 1995-96 was completed on 17-11-1997. It is seen from the assessment orders, namely, Ext. P4 series issued that the retained cash and value of IVPs encashed until then were credited and adjusted towards tax liability for the assessment years 1994-95 and 1995-96. The petitioner has stated in this court that assessments are contested and appeals are pending. However, this OP is filed by the petitioner challenging Ext. P5 whereunder the CIT has granted limited benefit for 1990-91 to 1993-94 and completely denied benefit for the assessment years 1994-95 and 1995-96 on petitioner''s applications filed under the Kar Vivad Samadhan Scheme, 1998. It is seen from Ext. P5 that the CIT allowed the claim for the years 1990-91 to 1993-94 on the outstanding demand, but declined relief for the years 1994-95 and 1995-96 on the ground that there was no demand subsisting as on the date of making the applications, which is the condition for granting the benefit under the scheme prescribed u/s 90(1) of the Finance (No. 2) Act, 1998. It is the denial of benefit of KVSS to the petitioner for the assessment years 1994-95 and 1995-96 and partial denial of the claim for the other years under Ext. P5 that is the challenge raised in this OP.

2. The main issue raised by the petitioner is that respondents 1 and 2 were not

entitled to encash IVPs and adjust the proceeds towards Income Tax liability and so much so, their actions have to be declared as unauthorised and illegal. Consequently, the petitioner prays for a direction from this court to third respondent to treat the entire tax and interest liability for the assessment years 1990-91 to 1995-96 as outstanding as on the date of making applications under the KVSS and to grant the benefit of the scheme on the entire tax and interest dues. Respondents, on the other hand, contended that encashment of IVPs and adjustments were done strictly in accordance with the provisions of the Act and particularly based on specific request by the petitioner vide Ext. R3(A) and subsequent letters and, therefore, the petitioner cannot demand, and is estopped from requesting for reversal of the position to enable him to get the benefit of KVSS 1998.

3. I have heard counsel for the petitioner and senior standing counsel appearing for the respondents, and I have also perused the documents and the affidavits filed by both the parties.

4. The main question to be considered is whether encashment of IVPs and 12 adjustment of the same towards tax liability are unauthorised or illegal as claimed by the petitioner. Eventhough the petitioner raised a contention that the encashment of IVPs and recovery towards tax was made by the first respondent which was not permissible u/s 132(9A) of the Act, and only the second respondent has the authority u/s 132B (ii) and (iii) to appropriate the retained assets towards tax liability, the allegation is factually incorrect because, it is seen from Exts. P2 and P3 series of correspondence and challan copies annexed thereto that after encashment, the amounts were credited only by the second respondent in petitioner''s account. The challans were issued by the assessing officer, the second respondent, and the first respondent has only co-ordinated in the collection and encashment of IVPs because the certificates were stated to have been held in bank lockers operated jointly by respondents 1 and 2. Therefore, the petitioner''s allegation that the first respondent illegally encashed IVPs and adjusted recovered amounts towards tax is not tenable as the second respondent himself has sent the entire receipted challans to the petitioner after remittance of tax in petitioner''s account towards proof of recovery of tax. Moreover, it is specifically provided in section 292B of the Act that any assessment, notice, summons or other proceeding issued under the Act, does not get invalidated on account of any mistake, defect or omission, if there is substantial conformity with or is done in accordance with intent and purpose of the Act. The very object of proceeding for retention of seized assets u/s 132(5) of the Act is for appropriation towards tax liability as provided u/s 132B after determination of liability. The scheme of the Act provides for the officer retaining seized cash and assets u/s 132(5) to transfer the same to the assessing officer for effecting recovery after determination of liability. There is nothing in the Act prohibiting the officer seizing the cash and assets from co-ordinating with the assessing officer to effectively achieve the object of the Act, that is to recover tax from the seized assets. Therefore, the continued involvement of the first

respondent in encashment of IVPs and recovery of tax was not illegal or inconsistent with any of the provisions of the Act. This contention of the petitioner is, therefore, rejected.

5. The next aspect of the question is whether encashment of IVPs and adjustment of proceeds towards tax liability is unauthorised. Even though petitioner has denied having given any such authorisation to the department, the correspondence produced in court and admitted by the petitioner proves to the contrary. Petitioner vide Ext. R3(A), dated 13-3-1995 wrote to the second respondent requesting for adjustment of cash and IVPs towards advance tax for 1995-96 as follows:

"By virtue of section 132(5), if it is not possible to ascertain to which previous year the investment relates to, the option given is to take the entire income as the income of the year in which the assets have been seized. So, taking this provision into consideration and also the impossibility of allocating this income for any particular year, it is submitted that the entire amount of Rs. 66,86,800 be taken as the income for assessment year 1995-96. The tax on this will work out to Rs. 26,74,720. This may kindly be appropriated and realised from the cash seized of Rs. 6 lakhs and also from the IVPs. I do not have other sources to pay the demand, since the entire assets have been seized.

The final quantum of income is yet to be ascertained. Based on the figures furnished above, I am requesting for the appropriation of the above said amount, after which if any amount is due on final assessment, the same may also be appropriated from the assets seized, namely, the IVPs, which alone is the source for the said payment. So, I should be deemed to have paid such amount also as advance tax from the assets seized in case for any reason the figure is enhanced.

I shall render all assistance for collecting the amounts from the IVPs after hearing from you to comply with the advance tax provisions. "

Followed by Ext. R3(A), the petitioner filed revised return with Ext. R2(A) covering letter before the second respondent requesting for adjustment of tax wherein he has stated as follows :

"As stated in my letter dated 13-3-1995 regarding advance tax, I have made specific request to appropriate the seized amount towards the advance tax for the above year.

Since now a revised return is being filed, the seized amount may kindly be treated as discharge of the tax liabilities as per this return for assessment year 1995-96 and discharge of tax liabilities for earlier years. We are also enclosing herewith the copy of the letter dated 16-1-1996 with the relative annexures. "

Again after receipt of section 143(1)(a) intimation for the assessment year 1995-96, dated 20-11-1995, based on return filed by the petitioner, petitioner filed a rectification application before the second respondent u/s 154 wherein petitioner has blamed the second respondent for non-adjustment by encashment of IVPs and consequent demand of interest under sections 234B and 234C of the Act and requested for revocation of interest by rectifying the order. The relevasnt extract of the letter dated 27-11-1995 produced by the petitioner himself as Ext. P9 is as follows:

"Please refer to my letter dated 13-3-1995 in the matter of advance tax payment for 1995-96.

As can be seen from the last para of the above said letter, I have promised all assistance for collecting the amounts of IVPs after hearing from you for complying with the advance tax payment.

After retaining the IVPs with you, you have encashed only Rs. 7,50,000. As explained in the said letter, that was my only source to pay the advance tax. So you should have assisted me in raising the funds based on the said IVPs for the payment of the advance tax.

The demand now raised is without taking into consideration the assets which I have already surrendered to you. So there is mistake in arriving at the balance demand and in levying the interest referred to above.

I, therefore, request you to kindly rectify the order and delete the interest levied under sections 234B and 234C and also to delete the additional demand of Rs. 13,01,029.

I further agree to assist you in collecting the IVPs for settlement of the tax liabilities. "

6. Even though counsel for the petitioner with particular reference to Ext. R2(A) vehemently argued that the petitioner only requested adjustment of seized cash towards tax liability and that he did not authorise encashment of IVPs, it is clear from Exts. R3(A) and P9 that the petitioner specifically authorised the department to encash IVPs and adjust the proceeds towards tax liability, and offered all assistance to do it. After making request in Ext. R2(A) in petitioner''s own words "the seized amount may kindly be treated as discharge of the tax liabilities as per this return for assessment year 1995-96 and discharge tax liabilities for earlier years", the petitioner cannot contend that "amount" referred to in his letter means only seized cash and does not take in encashment and adjustment of value of IVPs for more than one reason. In the first place, the seized cash was thoroughly inadequate even to cover the tax liability admitted by the petitioner in the return and revised return filed for the assessment year 1995-96 itself, not to talk about liability for earlier years. Secondly, the petitioner never mentioned the amount to be adjusted but requested for "discharge" of his "tax liabilities" which obviously means that the adjustment authorised was to the extent of amount required to wipe out tax liability which was not possible without the encashed value of IVPs. Further, it is to be noted that IVPs are not like any other asset which can be disposed of after following the procedure prescribed under the Third Schedule to the Act. On the other hand, IVPs are virtual cash

after maturity as it can be encashed by surrendering it to the concerned post office. Therefore, the allegation of procedural violation u/s 132B(1)(iii) read with Third Schedule to the Act in the encashment of seized assets, namely, IVPs also, does not arise. It is seen from Ext. P9 that petitioner opposed the demand of huge interest liability under sections 234B and 234C of the Act consequent upon second respondent''s failure to comply with his request to adjust cash recovered on maturity of IVPs towards his tax liability. Therefore, I find, contrary to the contention raised by the petitioner, petitioner has, in fact, vide Exts. R3(A), R2(A) and P9 specifically authorised second respondent to encash IVPs and adjust the recovered amount towards tax liability.

7. The next issue is whether the encashment of IVPs and recovery towards tax ''for the year 1995-96 and earlier years, pursuant to petitioner''s request or authorisation as found above, are permissible under the Act or illegal to be treated as no recoveries of tax at all as claimed by the petitioner. The petitioner has contended that adjustment of tax u/s 132B of the Act arises only after completion of assessment and after service of notice of demand and after petitioner is declared as an "assessee in default" in terms of section 220(4) of the Act. Petitioner has referred to the assessment orders for the years 1994-95 and 1995-96 showing credit of tax before assessment and refund of excess tax for those years while huge interest under sections 234B and 234C of the Act is demanded for the assessment years 1990-91 to 1993-94 on account of non-adjustment of any amount after encashment of IVPs towards tax liability for those years. According to the petitioner, recoveries, particularly excess tax for 1994-95 and 1995-96, are unauthorised and against section 132B(1)(i) of the Act. On the face of it, section 132B(1)(i) authorises appropriation of seized assets towards liability only after detetmination of liability through adjudication. However, it is to be seen that on 13-3-1995 petitioner vide Ext. R3(A) declared income and requested for adjustment of specified amount from seized cash and IVPs towards advance tax for the assessment year 1995-96. Later, the petitioner reconfirmed it by filing return and revised return for the assessment year 1995-96 declaring an income of Rs. 75 lakhs and filed rectification application vide Ext. P9. In view of the request by the petitioner and the statutory requirement for payment of advance tax be ore t e end of the financial year and admitted tax along with return u/s 140A of the Act, the second respondent rightly adjusted advance tax and the tax due under the return and revised return filed by the petitioner for the assessment year 1995-96 from out of encashed value of IVPs. Moreover, it is seen from the assessment order for the assessment year 1995-96 that the petitioner is the beneficiary of adjustment of advance tax and admitted tax inasmuch as interest is charged under sections 234B and 234C after taking into account the adjustments as payment of tax by the petitioner. Petitioner after blaming the department vide Ext. P9 for not encashing IVPs and crediting the amounts towards tax, to avoid interest under sections 234B and 234C of the Act and after enjoying the benefits of such adjustments, cannot turn round and contend that recoveries are illegal. Incidentally, it is pointed out on

behalf of respondents that respondents 1 and 2 were Willing to encash and credit IVPs towards petitioner''s tax liability even before the date of maturity of IVPs in terms of the petitioner''s request, but could not do so as the post offices declined premature encashment of IVPS. Therefore, I find the encashment of IVPs on maturity and adjustment of recovered cash towards petitioner''s liability for advance tax and admitted tax for the assessment year 1995-96 based on petitioner''s request were done by the second respondent for petitioner''s benefit and are consistent with statutory provisions.

8. So far as assessment year 1994-95 is concerned, I find the second respondent has credited tax after encashment of IVPs before completion of assessment vide Ext. P4(d) on 23-12-1997. Petitioner has relied on various decisions of the Supreme Court in Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, , Manmohanlal and Others Vs. Income Tax Officer, Ward-E, City Circle, Cuttack, , Homely Industries v. STO 37 STC 483, Indian Banks'' Association, Bombay and Others Vs. Devkala Consultancy Service and Others, and Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, and contended that no amount towards tax or any other demand could be recovered by adjustment from retained amounts unless after service of notice of demand u/s 156 and after the assessee becomes a defaulter. Further, relying on the decisions in K. Vs. KRISHNASWAMY NAIDU and CO. v. COMMISSIONER OF INCOME TAX AND OTHERS., , Commissioner of Income Tax and Others Vs. K.V. Krishnaswamy Naidu and Co., and Dr. C. Balakrishnan Nair and Another Vs. Commissioner of Income Tax and Another, , petitioner has contended that encashment of IVPs and adjustment of the same by the second respondent is also in violation of section 132(9A) of the Act read with rule 112 of the Income Tax Rules. According to the petitioner, the seized assets remain that of the petitioner until adjustment after default and in support of this contention, petitioner has also relied on the decision in P.P. Kanniah Vs. Income Tax Officer, Central Circle I, Madras and Another, . Relying on the decision in Rajiv Kumar Adukta Vs. Designated Authority, Commissioner of Income Tax and Others, , petitioner contended that recoveries from seized assets towards tax liability should be limited to demands due under assessments completed after seizure. On going through section 132B before its amendment by Finance Act, 2002, with effect from 1-6-2002, I find there is some substance in the contention raised by the petitioner in so far as adjustment of cash recovered on encashment of IVPs for the year 1994-95 is concerned where adjustments are seen made even before completion of assessment on 23-12-1997. Section 132B(1), as it then stood at the relevant time, was as follows :

132B. Application of retained assets.(1) The assets retained under sub-section (5) of section 132 may be dealt with in the following manner, namely :

(i) The amount of the existing liability referred to in clause (iii) of the said subsection and the amount of the liability determined on completion of the regular assessment or reassessment for all the assessment years relevant to the previous years to which the income referred to in clause (i) of that sub-section relates (including any penalty levied or interest payable in connection with such assessment or reassessment) and in respect of which he is in default or is deemed to be in default may be recovered out of such assets.

(ii) If the assets consist solely of money, or partly of money and partly of other assets, the assessing officer may apply such money in the discharge of the liabilities referred to in clause (i) and the assessee shall be discharged of such liability to the extent of the money so applied.

(iii) The assets other than money may also be applied for the discharge of any such liability referred to in clause (i) as remains un-discharged and for this purpose such assets shall be deemed to be under distraint as if such distraint was effected by the assessing officer or, as the case may be, TRO under authorisation from the Chief CIT or CIT under sub-section (5) of section 226 and the assessing officer or, as the case may be, TRO may recover the amount of such liabilities by the sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule.

(2) Nothing contained in sub-section (1) shall preclude the recovery of the amount of liabilities aforesaid by any other mode laid down in this Act.

(3) Any assets or proceeds thereof which remain after the liabilities referred to in clause (1) of sub-section (1) are discharged shall be forthwith made over or paid to the persons from whose custody the assets were seized.