
(2009) 12 AHC CK 0075
In the Allahabad High Court

Injecto Plast

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-12-2009

Acts Referred:

Income Tax Act, 1961 — Section 140A, 143, 154, 156, 220

Citation : (2010) 231 CTR 142 : (2010) 323 ITR 287 : (2010) 187 TAXMAN 174

Hon'ble Judges : Subhash Chandra Nigam, J;Prakash Krishna, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—Challenge in the present writ petition is the order dated 25-2-1999 passed by the Commissioner of Income Tax and Designated Authority, under Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as KVSS) whereby a sum of Rs. 13,75,133/- has been determined as amount payable at the rate of 35% by the petitioner in view of declaration filed by it under KVSS. The said order has been passed u/s 90(1) of KVSS.

2. Facts of the case lie in a narrow compass Raising a short controversy as to whether the amount deposited by the petitioner before the date of declaration in pursuance of the assessment order, which is subject matter of appeal, is liable to be adjusted towards the tax due first or towards the accrued interest, the present petition has been filed.

3. The petitioner was a partnership firm till 30-9-1996 and it was converted into a joint stock company under part IX of the Companies Act w.e.f. 1-10-1996 and was incorporated under the Indian Companies Act. It returned the income for the assessment year 1994-95, relevant to the previous year ended on 31-3-1994 at Rs. 27,97,650/- and tax due thereon was Rs. 12,69,368/- which was paid. On 31-3-1997, the petitioner was assessed u/s 143(3) of the Income Tax Act at taxable income of Rs. 85,56,100/-. The said order was rectified u/s 154 of the Income Tax Act and the excess claims allowed under Sections 80H and 80I were

disallowed. The income was accordingly assessed at Rs. 1,24,85,050/- and the tax determined thereon was Rs. 55,93,302/-. Before passing of the rectification order dated 28-12-1998, the petitioner had deposited a sum of Rs. 43,23,360/-. The rectification order was challenged in appeal. During the pendency of appeal, the aforesaid KVSS was enacted by the Parliament and the petitioner filed declaration under the scheme. On the basis of the declaration furnished by the petitioner, the authority concerned has passed the impugned order holding that a sum of Rs. 13,75,133/- is the amount payable at the rate of 35% of the disputed income i.e. 39,28,950/-. Challenging the computation part, as contained in the impugned order, the present writ petition is at the instance of the assessee.

4. A counter affidavit has been filed stating that the return of income was filed on 12-8-1994 and not on 12-7-1994, that against total demand of Rs. 73,50,795/-, the petitioner made payment by two separate challans, one for interest amounting to Rs. 17,50,291/- and the other for tax amounting to Rs. 25,73,069/- on 28-4-1997. It has been further stated that adjustment of the aforesaid amount i.e. Rs. 17,50,291/-+Rs.25,73,069/-=Rs. 43,23,360/- was not towards "tax paid" but towards "demand paid". In other words, in the counter affidavit, the computation part of the impugned order has been sought to be justified by giving necessary details.

5. In the rejoinder affidavit, the stand, as taken in the writ petition, has been reiterated.

6. Heard Sri S.D. Singh, learned Counsel for the petitioner and Sri Shambhu Chopra, learned Standing Counsel for the department.

7. The facts of the case are not much in dispute. The only dispute which falls for consideration is whether a sum of Rs. 43,23,360/- deposited by the petitioner through two separate challans, both dated 28-4-1997, are liable to be adjusted against "tax demand" or against "accrued interest" or against "interest and tax demand" as specified in the challans themselves.

8. Before proceeding further, it may be noted that it is not disputed even by the petitioner that through two challans, both dated 28-4-1997, the petitioner deposited Rs. 25,73,069/- towards income tax and Rs. 17,50,291/- towards interest under Sections 234B and 234C of the Income Tax Act. Photostat copies of these challans are on record as Annexure-3 to the writ petition. Main thrust of the argument of the learned Counsel for the petitioner is that the aforesaid two amounts should be adjusted against the tax due. In other words, he submits that the department was not justified in adjusting the sum of Rs. 17,50,291/-, which according to the petitioner, were deposited in the interest account under Sections 234B and 234C of the Income Tax Act, but this amount should also have been adjusted against the tax due. In support of the above argument, reference was made to Explanation to Section 140A of the Income Tax Act which provides that where the amount paid by the assessee under this section falls short of the aggregate of the tax and interest as aforesaid, the amount so paid shall first be

adjusted towards the interest payable as aforesaid and the balance, if any, shall be adjusted towards the tax payable. The submission is that the said Explanation is applicable with reference to deposits made u/s 140A of the Act and not otherwise in respect of other deposits made. It necessarily follows by implication that the deposits made otherwise u/s 140A of the Act is liable to be adjusted first against the tax due and then towards the interest payable thereon, submits the learned Counsel for the petitioner.

9. Learned Standing Counsel, on the other hand, submits that even if Section 140A of the Act is not applicable, the general principle of law is that where part payment has been made against sum due which consists of "amount due" and the "interest", in the absence of any contrary instruction by the person making the payment, it should be adjusted first towards the interest accrued and then the remaining amount towards the principal. Even otherwise also, in the present case, there has been clear instructions in the challans filed by the petitioner specifying the heads of payment under the "tax due" and the "interest due", no such plea as the petitioner contends, on the facts of the present case, is available to it. The department has acted according to the instructions of the petitioner and it is too late for the petitioner to take a contrary stand which may now be more beneficial to it in view of the promulgation of KVSS.

10. Considered the respective submissions of the learned Counsel for the parties and perused the record.

11. Before examining the merits of the respective submissions of the learned Counsel for the parties, it is desirable to have a look to the relevant provisions of KVSS. Definitions of "disputed income" defined in Clause (e) and "disputed tax" defined in Clause (f) and "tax arrear" defined in Clause (m) of Section 87 of the said scheme were referred by the learned Counsel for the petitioner, besides Section 88 thereof which provides the settlement of tax payable. Section 88 of the scheme, besides other things, provides that a declaration to the Designated Authority in accordance with the provisions of Section 89 in respect of tax arrears is required to be filed within a specified period. It further provides that in case a declaration being by company, as the case herein, the tax arrear is payable at the rate of 35% of the disputed income. The words "disputed income" and "disputed tax" have been defined by Clauses (e) and (f) which are reproduced below:

87. In this Scheme, unless the context otherwise requires-

x x x x x x (e) "disputed income", in relation to an assessment year, means the whole or so much of the total income as is relatable to the disputed tax;

(f) "disputed tax" means the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration u/s 88.

12. "Disputed tax" referred to above, means the whole or so much of the total

income as is relatable to the disputed tax. "Disputed tax" means following two things:

(1) the total tax determined and payable;

(2) but which remains unpaid as on the date of making the declaration u/s 88.

13. It may be noticed that "disputed tax" has been given a specific meaning different from the meaning as it is understood generally. One of the ingredients of the disputed tax is the amount which remains unpaid on the date of making the declaration. A declarant is required to pay at the specified rate with reference to the disputed income. The "disputed income" has been defined with reference to the "disputed tax". "Disputed tax" has been defined as the amount which remains unpaid as on the date of making the declaration. The exercise which is required to be undertaken for the purpose of determination of the settlement of the tax payable is tax which remains unpaid.

14. Having noticed the legal provisions, we may now notice the facts of the present case. Notice of demand order u/s 156 of the Act, as rectified u/s 154, has been filed along with writ petition wherein the following have been mentioned:

Assessed income Rs. 1,24,85,050/- Tax Rs. 55,93,302/- Prepaid tax Rs. 14,24,427/- ----- Balance Rs. 41,68,875/- Add interest u/s 234B Rs. 30,01,536/- Demand adjusted for A.Y. 92-93 Rs. 4,186/- Refund vouchers issued Rs. 1,60,177/-

----- Total demand Rs. 73,50,795/- Tax paid on 28-4-97 Rs. 43,23,36/- Total demand payable Rs. 30,27,435/-

15. Disputing the total demand payable at Rs. 30,27,435/-, the petitioner submits that the department was not justified and it should have adjusted a total sum of Rs. 43,23,360/- paid on 28-4-1997 against the tax outstanding. According to it, Rs. 43,23,360/- being part payment of demand created in the rectification order dated 28-12-1998 u/s 154 of the Act was to be adjusted towards payment of tax on Rs. 55,93,302/- created there under. In other words, a sum of Rs. 43,23,360/- deposited through two challans of the same date should be adjusted towards payment of outstanding demand. Reliance has been placed on question No. 4 and its answer as given in "some frequently asked questions" of Kar Vivad Samadhan Scheme, 1998 by the Directorate of Income Tax. Question No. 4 therein reads as follows:

Q 4: Where the tax arrear comprises tax and interest, how will the part payment be first appropriated-towards tax or interest?

Ans: The part payments are appropriated first towards tax and then towards interest.

16. On the strength of the above question and its reply, the petitioner submits that Rs. 43,23,360/- should be appropriated first towards the tax

notwithstanding the contrary instruction as mentioned in the challans filed by it.

17. When the matter was taken up earlier, two judgments, one of Orissa High Court and another of Karnataka High Court, taking divergent views on the interpretation of question No. 4 and its answer, were placed. This Court directed CBDT who is the best authority to elucidate its clarification; directed it to file an affidavit of a responsible senior officer from CBDT, giving the meaning of the clarification by way of question No. 4, its purpose and reasons, and if necessary supported by extracts of relevant notings which led to the issue of the clarification in the form of question No. 4. In pursuance thereof, a supplementary affidavit of Sri Arun Kumar Gurjar, under Secretary (ITJ) in the Central Board of Direct Taxes has been filed. In the said affidavit, the deponent, has reproduced the notings in the relevant file No. 149/145/98-TPL, containing a set of clarification relating to question No. 4 on FAQs and stated that clarification at question No. 4 has been issued in line with the existing instruction No. 1936 issued by the Board dated 31-3-1996. It has been stated in paragraph 3(c) that for the sake of uniformity, the CBDT decided that part payment received from the assessee should first be adjusted towards the tax due and not the interest calculated u/s 220(2) of the Income Tax Act. Clauses (c) and (d) of paragraph-3 of the said affidavit are reproduced below:

(c) The said instruction was issued in consultation with Ministry of Law. The issue to be decided was whether "if the tax paid by the assessee was not sufficient to cover the total demand then should it first be adjusted against the interest". The M/o Law in its opinion observed that both the views are possible, i.e., the payment can be adjusted against the tax or against interest. Therefore, for the sake of uniformity, the CBDT decided that part payment received from the assessee should first be adjusted towards the tax due and not the interest calculated u/s 220(2) of the Income Tax Act.

(d) The above principle was followed in drafting clarification to question No. 4 of the FAQs.

18. Undoubtedly, the clarification, as given in the above affidavit, corroborates and supports the legal submission of the petitioner. The said clarification in no uncertain terms provides that Central Board of Direct Taxes, as a policy, for the sake of uniformity, has taken a conscious decision that payment received from the assessee should first be adjusted towards the tax due and not the interest. In view of the above clarification, we see no difficulty in accepting the petitioner's contention on the legal plane so far as KVSS is concerned. Unfortunately, for the petitioner, the factual position in the case on hand is otherwise. Evidently, question No. 4 and its reply and subsequent clarification given through the affidavit, referred to above, contemplate a situation where a part payment has been made to the assessee or received by the department from the assessee without specifying anything, should be adjusted first towards tax due and not the interest. But what would be the position, if the assessee unequivocally specifies or gives instruction that the payment should be adjusted

towards part payment of tax due or towards the interest first. In the case on hand, as noted hereinabove, the petitioner by means of two separate payments, both dated 28-4-1997, made the deposits of Rs. 25,73,069/- under the head "Income Tax" and Rs. 17,50,291/- "towards interest" under Sections 234B and 234C . To wriggle out from this scenario, the learned Counsel for the petitioner invited our attention to the demand notice wherein it has been stated that total demand of Rs. 30,27,435/- is payable. He submits that even if the petitioner made the payments under specified heads, the same could not be treated so by the department by raising a composite demand of Rs. 30,27,434/-. We find that the said argument of the learned Counsel for the petitioner has no merit in as much as the said demand is a composite demand which comprises tax and the interest due thereon. It is well settled that a debtor should seek the creditor.

19. In Venkatadri Appa Row v. Parthasarathi Appa Row AIR 1922 PC 233 it has been held that ordinary rule with regard payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of the interest. The said principle was reiterated by the Apex Court in Meghraj and Others Vs. Mst. Bayabai and Others, wherein it was held that normal rule in the case of a debt due with interest is that any payment made by the debtor was in the first instance to be applied towards satisfaction of interest and thereafter to the principal. It is for the debtor to plead and prove the agreement, if any, that the amounts paid or deposited in the Court by him were accepted by the creditor/deeree-holder subject to the condition imposed by him.

20. The aforesaid two decisions have been referred and relied upon in Anand S. Biji Vs. State of Kerala and Others, Relevant paragraph-7 from the report is reproduced below:

7. Order 21 Rule 1 of CPC provides the mode of paying money under the decree. Payments made to the decree-holder out of court are required to be certified for adjustment in terms of Rule 2 of Order 21 CPC. Where any money payable under a decree is paid out of court or is otherwise adjusted in whole or in part to the satisfaction of the decree, the decree-holder is to certify such payment and adjustment towards the court whose duty is to execute the decree. The judgment-debtor has also a right to inform the court of such payment or adjustment applying to the court for the issuance of a notice to the decree-holder to show cause as to why such payment or adjustment be not recorded as certified and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court is obliged to record the same accordingly. No payment or adjustment can be recorded at the instance of the judgment-debtor unless it is made in the manner provided under Rule 1 or the payment or adjustment is proved by documentary evidence or the payment or adjustment is admitted by, or on behalf of the decree-holder in a reply to the notice given to him under Sub-rule (2) of Rule 1 Order 21 of CPC. In the absence of payment having been made in accordance with the mode prescribed or the satisfaction recorded under Rule 2, the

judgment-debtor cannot claim the benefit of adjustment in the manner insisted upon by him.

21. The Commissioner of Income Tax has found in the impugned order, that it is amply evident that the assessee has paid the amount of tax and interest separately on the same day by two separate challans specifically bifurcating the amount of interest under Sections 434B and 434C, the answer to question No. 4 does not apply to the case. The said finding is perfectly justified. In the impugned order, it has been found that the department made adjustment in the record as per the instruction given by the petitioner/declarant while making the payment by two challans. We are of the view that the petitioner/declarant cannot now take a different stand after adjustment in the record has been made as per instruction of the petitioner.

22. At this stage, it was submitted by the learned Counsel for the petitioner that the instructions given by the petitioner are not relevant as in case the appeal or revision succeeds, the demand comprising the tax and interest has to be recalculated to give effect to the appellate order. We do not think it proper to address the said issue for the simple reason that it does not fall for our consideration in the present writ petition. After declaration having been filed under KVSS, the appeal preferred by the petitioner loses its efficacy and it shall be treated to have been decided in terms of KVSS. The other aspect of the case is that KVSS is a special scheme. It talks about the disputed tax which means the tax unpaid as on the date of making the declaration u/s 88. It thus contemplates an accomplished fact and does not contemplate a situation which may take place in future. The tax which remains unpaid on the date of making of declaration u/s 88 is an accomplished fact which has to be taken into consideration for the purposes of the said scheme and not any other figure which might or ought to have remained unpaid. There being no dispute that the adjustments in the record were made as per the instructions given by the petitioner through two challans, it is no longer open to contend otherwise for the purposes of the said scheme.

23. We could find out that Andhra Pradesh High Court in CIL Securities Ltd., Hyd. Vs. Commissioner of Income Tax, A.P. and another, had occasion to consider the provisions of KVSS vis-a-vis the tax arrears. In this case it was held that on the date of filing of the declaration under KVSS, if there was no tax arrears remaining unpaid on that date, the assessee cannot take advantage of the said scheme. The scheme came into force w.e.f. 1-9-1988 and will apply only to such persons, besides other things, who were in tax arrears on the date of filing of the declaration under the scheme. It has been held that on a plain reading of the scheme it is clear that if the tax arrear is not existing on the relevant date, the scheme has no application. There is no provision in the scheme empowering the designated authority to go into the legality of the adjustment made or sit in judgment over the intimation order made u/s 143(1)(a) of the Act.

24. In (2003) 79 TTJ 517 the Karnataka High Court interpreted the words

"notwithstanding" used in Section 88 of KVSS and has held that a matter which has already been settled cannot be reopened under the scheme and the benefit under the scheme should not be extended to an assessee even with regard to the admitted income. If the tax has been paid or adjusted, no re-adjustment has to be done in terms of the provisions of Section 88 of the scheme. In other words, it means that past is past. An accomplished fact cannot be reopened or reconsidered after commencement of the KVSS.

25. Applying the said principle to the facts of the present case, it is no longer open to the petitioner to urge that the adjustment made by the department by making credit entry towards tax due and interest is incorrect, in a proceeding under KVSS.

26. It is not necessary for us, in view of the affidavit filed by CBDT, to consider the judgments of Orissa High Court in *Smt. Epari Amaravati Vs. Commissioner of Income Tax and Others*, and of Karnataka High Court in *Mangilal S. Jain Vs. Commissioner of Income Tax and Another*, Reference was also made to the decision of Apex Court in *Union of India (UOI) and Others Vs. Onkar S. Kanwar and Others*, wherein the Apex Court, while considering similar scheme under the Excise Act, has observed that where two views are possible, one in favour of the assessee must be adopted. There cannot possibly be any quarrel to the said proposition. Learned Counsel for the petitioner has also referred the following cases, but we find theirs no application to the issue involved herein.

1. *Union of India and Another Vs. Azadi Bachao Andolan and Another*,
2. *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*,
3. *Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others*,
4. *P.M. Parameswaran Nambudiripad Vs. Expenditure-Tax Officer, A-Ward, Palghat*,
5. *Commissioner of Income Tax, Amritsar Vs. Straw Board Manufacturing Co. Ltd.*,
6. *Commissioner of Income Tax Vs. Indian Molasses Co. (P.) Ltd.*,

27. Viewed as above, we find that on the facts of the present case, the impugned order does not suffer from any illegality or legal infirmity. There is no merit in the writ petition.

28. At the end, the learned Counsel for the petitioner prayed that some reasonable time may be granted to the petitioner to make the deposit as was required under the impugned order. It is provided that if the petitioner makes the deposit as per the impugned order within a period of one month, the same shall be accepted by the authority concerned in accordance with law.

29. In the result, the writ petition fails and is, therefore, dismissed, but no order

as to costs.