

(2002) 04 P&H CK 0139
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 14797 of 1999

Narula Traders

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 22-04-2002

Acts Referred:

Finance (No. 2) Act, 1998 — Section 87, 88, 89
Income Tax Act, 1961 — Section 154, 155, 220(2), 234C

Citation : (2003) 184 CTR 57 : (2003) 262 ITR 78

Hon'ble Judges : Nirmal Singh, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : A.K. Mittal, for the Appellant; R.P. Sawhney and Rajesh Bindal, for the Respondent

Final Decision : Dismissed

Judgement

1. This is a petition for quashing order annexure P-5 dated February 26, 1999, passed by the Commissioner of Income Tax, Patiala (respondent No. 1), treating the declaration filed by the petitioner u/s 89 of the Finance (No. 2) Act, 1998, as non est. The other prayer made in the petition is for issuance of a direction to allow the petitioner benefit under the Kar Vivad Samadhan Scheme (hereinafter described as "the KVSS") for the assessment year 1989-90.
2. The petitioner is a partnership firm engaged in the business of wholesale scrap material. It filed a return on August 30, 1989, for the assessment year 1989-90 declaring an income of Rs. 1,04,560. By an order dated January 29, 1990, the Assessing Officer assessed the income of the petitioner at Rs. 3,80,080 and created demand of Rs. 89,589. He also levied interest amounting to Rs. 6,936 u/s 220(2) of the Income Tax Act, 1961 (for short, "the Act").
3. The petitioner paid the amount of tax and interest on December 29, 1990. After eight years, it filed a declaration dated January 31, 1999, for availing of the benefit under the KVSS. Vide letter dated February 10, 1999, respondent No. 1 asked the petitioner to explain as to how its case was covered under the KVSS

and after considering its reply, he held that the declaration filed by it was non est.

4. The petitioner has averred that as on the date of declaration, a sum of Rs. 15 was payable out of the interest levied u/s 220 and a sum of Rs. 40 was payable u/s 234C of the Act and, therefore, order annexure P-5 dated February, 26, 1999, passed by respondent No. 1 rejecting its declaration should be declared as vitiated by an error of law.[

5. In his reply, respondent No. 1 has defended the impugned order by asserting that the petitioner's case was not covered by the provisions of the KVSS. The precise case of respondent No. 1 is revealed from the following extracts contained in the written statement :

"As per information available on record, the whole of the tax arrear including interest u/s 220(2) was paid by the petitioner firm by December 29, 1990. Since then neither any tax arrear was created for the assessment year 1989-90 nor it was pending against the petitioner firm. However, in the case of partners for the assessment year 1989-90, a demand of Rs. 1,07,253 was created on January 29, 1999 u/s 154/155 of the Income Tax Act, as a result of revision of their shares as per details given below :

Rs.

Sh. Ramesh Kumar

53,460

Sh. Piara Lal

53,793

The petitioner firm and its partners, as stated above, filed the declaration u/s 88 of the Finance (No. 2) Act, 1998, on January 31, 1999. As per the provisions of Section 88, any person can make a declaration to the designated authority in accordance with the provisions of Section 89 in respect of tax arrear outstanding against him. The term "tax arrear" has been defined u/s 87(m) of the Finance (No. 2) Act, 1998, as per which it means, in relation to a direct tax enactment, the amount of tax, penalty or interest determined on or before March 31, 1998, under that enactment, in respect of an assessment year, as modified in consequence of giving effect to the appellate order but remaining unpaid on the date of declaration. However, on going through the record, it was found that no arrears were outstanding as on March 31, 1998, or as on the date of the declaration in the case of the petitioner firm. Accordingly, a show cause notice was issued for February 17, 1999, on which date, the petitioner firm filed a written reply stating that interest u/s 220(2) amounting to Rs. 15, was payable by the firm. He further stated that the assessee is also liable to pay statutory interest u/s 234C, amounting to Rs. 55 was payable by the petitioner firm as on March 31, 1998, which constituted the tax arrear. The plea of the declarant was not accepted in view of the specific provisions of Clause (f) and Clause (m) of

Section 87 of the Finance (No. 2) Act, 1998, which defines disputed tax as the total tax determined and payable as on the date of making declaration u/s 88 and the tax arrear, as the tax and interest determined on or before March 31, 1998. As there was no determined and payable tax arrear as on the date of the declaration and no appeal had been filed by the petitioner firm against such deemed interest as on the date of declaration, as such, the declaration filed by the petitioner firm was not considered valid and was, accordingly, treated as non est, by treating the declaration as though it had never been made by the petitioner firm. In reply to the show cause notice, the petitioner firm and its partners had pleaded that since the partners' shares have been revised, these were required to be considered to have been revised prior to March 31, 1998, as per the clarification of the Central Board of Direct Taxes and as the partners were otherwise eligible for the Kar Vivad Samadhan Scheme, their cases would be considered for relief under the Kar Vivad Samadhan Scheme, 1998, along with the petitioner firm. Since the partners have filed separate declaration along with the petitioner firm and their cases were covered under the KVSS and the certificate of intimation u/s 90(1) of the Finance (No. 2) Act, 1998, in respect of the KVSS, 1998, was given in favour of the partners of the petitioner firm."

6. Shri A. K. Mittal referred to the provisions of the KVSS and Section 220(2) of the Act and argued that the petitioner's case should be deemed to be covered because it along with its partners had filed a common declaration for availing of the benefit under the KVSS. He then argued that for determining the tax arrears in the petitioner's case, the arrears due from the partners were also required to be taken into consideration. Learned counsel then referred to Circular No. 149/145 of 1998 issued by the Central Board of Direct taxes (for short, "the Board"), and argued that the departmental authorities are bound to act as per the decision taken by the Board and grant relief to the petitioner under the KVSS. In support of this argument, Shri Mittal relied on Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, ; Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, and K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, . He further argued that the expression "tax arrears" appearing in Section 87(m) of the Finance (No. 2) Act, 1998, means the arrears payable under the statute and even in the absence of determination by the competent authority, the amount of interest payable by the petitioner must be treated as tax arrears for the purpose of giving benefit under the KVSS.

7. Shri R. P. Sawhney argued that no tax arrears were due from the petitioner as on the appointed day and, therefore, it was not entitled to avail of the benefit under the KVSS. He pointed out that interest was determined on January 29, 1990 and was paid by the petitioner on December 29, 1990, and therefore, nothing was payable by it on the appointed day. Shri Sawhney controverted the argument of Shri Mittal that the firm and its partners filed a joint declaration and asserted that two separate declarations were filed by them. In support of his argument that the petitioner is not entitled to the benefit under the KVSS, Shri

Sawheny relied on the decision of this court in *Biru Mal Gauri Shankar Jain and Co. Vs. Commissioner of Income Tax and Others* (Jain Rice Mills V. Commissioner of Income Tax and Others), and of the Delhi High Court in *Jyotsna Holdings Pvt. Ltd. Vs. Designated Authority under the Kar Vivad Samadhan Scheme*, .

8. We have given serious thought to the respective arguments. Sections 87(f) and (m) and 88 of the Finance (No. 2) Act, 1998, which constitute the core of the KVSS read as under :

"(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;... (m) "tax arrear" means,--

(i) in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before the 31st day of March, 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;

(ii) in relation to indirect tax enactment,--

(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998, but remaining unpaid as on the date of making a declaration u/s 88; or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject-matter of a demand notice or a show cause notice issued on or before the 31st day of March, 1998, under that enactment but remaining unpaid on the date of making a declaration u/s 88,

but does not include any demand relating to erroneous refund and where a show cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified.

Explanation.--Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him u/s 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause ;

88. Settlement of tax payable.-- Subject to the provisions of this Scheme, where any person makes, on or after the 1st day of September, 1998, but on or before the 31st day of December, 1998, a declaration to the designated authority in accordance with the provisions of Section 89 in respect of tax arrear, then, notwithstanding anything contained in any direct tax enactment or indirect tax

enactment or any other provision of any law for the time being in force, the amount payable under this Scheme by the declarant shall be determined at the rates specified hereunder, namely : --

(a) where the tax arrear is payable under the Income Tax Act, 1961 (43 of 1961),-

(i) in the case of a declarant, being a company or a firm, at the rate of thirty-five per cent. of the disputed income ;

(ii) in the case of a declarant, being a person other than a company or a firm, at the rate of thirty per cent. of the disputed income ;

(iii) in the case where tax arrear includes Income Tax, interest payable or penalty levied, at the rate of thirty-five per cent. of the disputed income for the persons referred to in Clause (i) or thirty per cent. of the disputed income for the persons referred to in Clause (ii) ;

(iv) in the case where tax arrear comprises only interest payable or penalty levied, at the rate of fifty per cent. of the tax arrear ;

(v) where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search and seizure proceedings u/s 132 or Section 132A of the Income Tax Act,--

(A) in the case of a declarant, being a company or a firm, at the rate of forty-five per cent. of the disputed income ;

(B) in the case of a declarant, being a person other than a company or a firm, at the rate of forty per cent. of the disputed income;

(b) where the tax arrear is payable under the Wealth-tax Act, 1957 (27 of 1957),--

(i) at the rate of one per cent. of the disputed wealth ;

(ii) in the case where tax arrear includes wealth-tax, interest or penalty levied, at the rate of one per cent. of the disputed wealth ;

(iii) in the case where tax arrear includes only interest payable or penalty levied, at the rate of fifty per cent. of the tax arrear ;

(iv) where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search and seizure proceedings u/s 37A or Section 376 of the Wealth-tax Act, at the rate of two per cent. of the disputed wealth ;

(c) where the tax arrear is payable under the Gift-tax Act, 1958 (18 of 1958),-

(i) at the rate of thirty per cent. of the disputed value of the gift;

(ii) in the case where the tax arrear includes gift-tax, interest payable thereon or penalty levied, at the rate of thirty per cent. of the disputed value of the gift;

(iii) where the tax arrear includes only the interest payable or the penalty levied, at the rate of fifty per cent. of the tax arrear ;[

(d) where the tax arrear is payable under the Expenditure-tax Act, 1987 (35 of 1987), --

(i) at the rate of ten per cent. of the disputed chargeable expenditure;

(ii) in the case where the tax arrear includes the disputed expenditure-tax, interest payable thereon and penalty levied, at the rate of ten per cent. of the disputed chargeable expenditure ;

(iii) in the case where the tax arrear comprises only the interest payable or penalty levied, at the rate of fifty per cent. of the tax arrear;

(e) where the tax arrear is payable under the Interest-tax Act, 1974 (45 of 1974),-

(i) at the rate of two per cent. of the disputed chargeable interest;

(ii) in the case where the tax arrear includes the interest payable thereon or penalty levied, at the rate of two per cent. of the tax arrear;

(iii) in the case where the tax arrear comprises only the interest or penalty levied, at the rate of fifty per cent. of the tax arrear ;

(f) where the tax arrear is payable under the indirect tax enactment--(i) in a case where the tax arrear comprises fine, penalty or interest but does not include duties (including drawback of duty, credit of duty or any amount representing duty) or cesses, at the rate of fifty per cent. of the amount of such fine, penalty or interest, due or payable as on the date of making a declaration u/s 88 ;

(ii) in any other case, at the rate of fifty per cent. of the amount of duties (including drawback of duty, credit of duty or any amount representing duty) or cesses due or payable on the date of making a declaration u/s 88."

9. Before proceeding further, we may mention that by an amendment made in 1999, the cut off date specified in Section 88 was changed from December 31, 1998, to January 31, 1999.

10. An analysis of the provisions quoted above shows that for the purpose of availing of the benefit under the KVSS, an assessee is required to file a declaration in accordance with Section 89 in respect of tax arrears. The expression "tax arrears" which has been defined in relation to direct tax enactments, is the amount of tax, penalty or interest determined on or before March 31, 1998, which remains unpaid on the date of declaration. This necessarily means that for availing of the benefit under the KVSS, the assessee must prove that the tax arrears which were determined prior to March 31, 1998, had remained unpaid on the date of declaration. In *Biru Mal Gauri Shankar Jain and Co. Vs. Commissioner of Income Tax and Others* (Jain Rice Mills V. Commissioner of Income Tax and Others), a Division Bench of this court

interpreted the KVSS introduced by the Finance (No. 2) Act, 1998, and held as under (headnote) :

"A person who does not fulfill the basic pre-requisites of the Kar Vivad Samadhan Scheme, 1998, cannot claim its benefit merely on the ground that the designated authority has passed an order determining the sum payable in full and final settlement u/s 90(1) of the Finance (No. 2) Act, 1998. Further, once a declaration is held to be not covered by the Kar Vivad Samadhan Scheme any tax paid thereunder would automatically become refundable. In that event, even the provisions of Section 93 of the Act would also not applicable."

11. We may now advert to the impugned order. A perusal thereof reveals that the petitioner and its partners had filed separate declarations. Respondent No. 1 extended the benefit of the KVSS to the partners because in their case, the demand was created on January 29, 1999, u/s 154/155 of the Act. However, the petitioner's plea was rejected on the ground that there were no determined and payable tax arrears on the date of declaration. In our opinion, the impugned order does not suffer from any legal infirmity which may justify interference by this court because the petitioner has failed to produce any material before the court to show that the amount of interest which was determined by the competent authority vide order dated January 29, 1990, had remained unpaid on the date of declaration. During the course of hearing, Shri R. P. Sawhney produced the record of the Department to show that the amount of tax and interest had been paid by the petitioner on December 29, 1990. Therefore, it cannot be said that the petitioner was in arrears of tax as on the date of declaration. Thus, we do not find any merit in the argument of Shri Mittal that respondent No. 1 had erred in refusing to accept the declaration filed by the petitioner.

12. The circular of the Board on which reliance has been placed by Shri Mittal, is of no help to the cause of the petitioner because the factual matrix of this case is that no amount was payable by it in the form of arrears of tax on the date of declaration.

13. For the reasons mentioned above, the writ petition is dismissed.