
(2006) 04 MP CK 0060

In the Madhya Pradesh High Court

Case No : IT Appeal No"s. 138, 139 and 140 of 2003

Nishit Construction Company (P) Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 19-04-2006

Acts Referred:

Constitution of India, 1950 — Article 14
Finance Act, 1998 — Section 86 , 87, 88, 89, 90
Income Tax Act, 1961 — Section 260A, 69

Citation : (2006) 204 CTR 310 : (2008) 303 ITR 419

Hon'ble Judges : S.K. Kulshrestha, J;Ashok Kumar Tiwari, J

Bench : Division Bench

Advocate : G.M. Chaphekar and D.S. Kale, for the Appellant; R.L. Jain and Veena Mandlik, for the Respondent

Final Decision : Allowed

Judgement

S.K. Kulshrestha, J.—All these appeals u/s 260A of the IT Act raise a common question against the order cit. 28th June, 2003 of the Tribunal, Indore Bench, Indore in CO. No. 43 to 45/Ind/1997, by which the learned Members of the said Tribunal have rejected the preliminary objection regarding the maintainability of the Department"s appeals, in view of the declaration granted to the petitioner u/ s 90 of the Finance (No. 2) Act, 1998.

2. All the appeals have been admitted on the following common questions of law:

(1) Whether Tribunal was justified in holding that appeal filed by the Revenue would survive for hearing notwithstanding the issuance and eventually acceptance of a declaration submitted by the assessee (appellant herein) under the KVS Scheme in full and final satisfaction of the demands for the year in question in an appeal filed by assessee ?

(2) Whether Tribunal was right in holding that a separate declaration under the KVS Scheme was required to be filed in the case of an appeal filed by the

Department and in the absence of not filing such a declaration by the assessee, appeal filed by the Revenue will have to be heard on its own merit ?

(3) Whether Tribunal acted contrary to the law, when it refused to follow its earlier decisions taking the view in favour of the assessee on the identically situated facts ?

3. The appellant-assessee is engaged in the business of construction and in the years 1991-92, 1992-93 and 1993-94, the assessee had, inter alia, undertaken construction of the building known as "Dawa Bazar" in which in the above assessment years, the assessee had indicated certain investments. Not satisfied with the investment shown by the assessee, the ITO had got the valuation done and come to the conclusion that the investment in the building was much more than shown by the assessee and the difference was added to the income of the assessee in accordance with Section 69 of the IT Act. Accordingly, the AO treated the deemed income of the assessee in the asst. yr. 1992-92 a sum of Rs. 1,09,52,620, in 1992-93 a sum of Rs. 1,32,61,661 and in 1993-94 a sum of Rs. 1,55,27,774. The assessment orders passed on the same day have been annexed by the appellant as Annexs. A/1, A/2 and A/3. Separate appeals were filed by the assessee before the CIT(A). The CIT(A) by his order dt. 10th Jan., 1997 (Annex. R) reduced the addition for the year 1991-92 by a sum of Rs. 86,16,995 and, thus, maintained the addition of only a sum of Rs. 23,36,625, for the asst. yr. 1992-93 reduced the addition by Rs. 1,01,57,307 and maintained addition only to the extent: of Rs. 31,04,353 and for the year 1993-94, reduced the addition by Rs. 1,18,55,372 and maintained the addition only in the sum of Rs. 37,72,402.

4. Aggrieved by the additions maintained by the CIT(A), the appellant/assessee preferred 3 separate appeals being Appeal Nos. 209/Ind/1997, 210/Ind/1997 and 211/Ind/1997 before the Tribunal. The Department also preferred appeals against the part of the deletion of the addition being Appeal Nos. 273, 274 and 275 of 1997. However, during pendency of these appeals Kar Vivad Samadhan Scheme, 1998 was introduced. The objects of this Scheme were duly spelt out in the Budget Speech of the Finance Minister 1998-99. It was stated, thus:

95. Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Declogging the system will not only incentivise honest taxpayers, enable Government to realize its reasonable dues much earlier but coupled with administrative measures, would make the system more user-friendly. I, therefore, propose to introduce a new Scheme called "SAMADHAN". The Scheme would apply to both direct taxes and indirect taxes and after waiver of interest, penalty and immunity from prosecution on payment of arrears of direct tax at the current rates.

5. Prompted by the assurance given and the provisions of the Scheme, the

appellant duly made a declaration to the designated authority in accordance with the provisions of Section 89 in respect of tax arrears and after payment of tax in accordance with the said Scheme, a due certificate was issued to him by the designated authority in accordance therewith. Acting upon the provisions of the Scheme, an application was filed before the Tribunal for dismissing the appeals pending before it, The Tribunal, however, was of the view that the composition of the amount under the scheme and the certificate granted thereunder did not have any adverse effect on the pending appeals of the Department and rejected the preliminary objection. It is against the rejection of the said preliminary objection that the present appeals have been filed which have been admitted on the questions hereinabove stated.

6. Learned counsel for the appellant has submitted that there was a purpose of the Scheme as reflected by the speech of the Finance Minister. Even in the Finance (No. 2) Act, 1998 (hereinafter referred to as the "Finance Act") the provisions are very clear, unambiguous, unequivocal and in no manner of doubt convey that all matters pending against the assessee relating to the assessment year in question come to an end with the acceptance of the declaration and issuance of the certificate. Section 86 states that the Scheme shall be called the "Kar Vivad Samadhan Scheme, 1998. Section 87(b) defines the "designated authority" to be a person not below the rank of CIT and notified by the Chief CIT for the purposes of the Scheme. The definition, thus, makes it clear that it is a senior official in the Department who deals with the matters concerning acceptance of the proposals contained in the declaration and issuance of the certificate. Clause (e) defines "disputed income", to mean the whole or so much of the total income as is relatable to the disputed tax. This definition also shows that the matter will even encompass the income which the Department alleges to be chargeable to tax and which has not been charged to tax. In cl. (f), definition of "disputed tax" includes the tax determined and payable, in respect of an assessment, year under any direct tax enactment but which remains unpaid.

7. Section 88 provides for settlement of tax payable and lays down that subject to the provisions of the 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 arrears, 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 the Scheme by the declarant shall be determined at the rates specified under the said section. Thus, the income declared is charged to tax at the rates specially prescribed. Section 89 provides for particulars to be furnished in the declaration. It says that a declaration under s 88 shall be made to the designated authority and shall be in such form and shall be verified in such manner as may be prescribed.

8. We may pause here to point out that power has been left to the authorities to prescribe mode and manner in which the declaration may be made and it is open

to the authorities to make it compulsory for an assessee to give details including the details with regard to the remedies resorted to by the Department against the assessee including remedy against the order reducing the liability by any lower authority and other information consistent with the object of the Act.

9. Section 90 provides that within 60 days from the date of receipt of the declaration u/s 88, the designated authority shall grant a certificate in such form and setting forth such particulars therein with regard to the tax arrear and the sum payable after determination towards full and final settlement of tax arrears. As the controversy revolves around the provisions of Sections 90, 91 and 92, for ready reference these provisions are being reproduced hereunder:

90. Time and manner of payment of tax arrears.-(1) Within sixty days from the date of receipt of the declaration u/s 88, the designated authority shall, order determine the amount, payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form as may be prescribed to declarant setting forth therein the particulars of the tax arrears and the sum payable after such determination towards full and final settlement of tax arrears:

Provided that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived:

Provided further that the designated authority may amend the certificate for reasons to be recorded in writing.

(2) The declarant shall pay the sum determined by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment to the designated authority along with proof thereof and the designated authority shall thereupon issue the certificate to the declarant.

(3) Every order passed under Sub-section (1), determining the sum payable under this Scheme, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force.

(4) Where the declarant has filed an appeal or reference or a reply to the show-cause notice against any order or notice giving rise to the tax arrear before any authority or Tribunal or Court, then, notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in Sub-section (2) is passed:

Provided that where the declarant has filed a writ petition or appeal or reference

before any High Court or the Supreme Court against any order in respect of the tax arrear, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the Court, furnish proof of such withdrawal along with the intimation referred to in Sub-section (2).

91. Immunity from prosecution and imposition of penalty in certain cases.?The designated authority shall, subject to the conditions provided in Section 90, grant immunity from instituting any proceeding for prosecution for any offence under any direct tax enactment or indirect tax enactment, or from the imposition of penalty under any of such enactments, in respect of matters covered in the declaration u/s 88.

92. Appellate authority not to proceed in certain cases.?No appellate authority shall proceed to decide any issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear specified in the declaration and in respect of which an order had been made u/s 90 by the designated authority or the payment of the sum determined under that section:

Provided that in case an appeal is filed by a Department of the Central Government in respect of such issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear (except where the tax arrear comprises only penalty, fine or interest), the appellate authority shall decide the appeal irrespective of such declaration.

10. Learned counsel for the appellant contends that under Sub-section (4) of Section 90 of the Finance Act the appeal or reference or reply filed by the parties shall be deemed to have been withdrawn on the date on which order referred to in Sub-section (2) of Section 90 is passed. Only exception has been made in respect of the writ petition, appeal or reference before the High Court and the Supreme Court and since the appeals pending before the Tribunal do not fall in the excepted category, the effect of the declaration granted to the appellant would be that the appeal filed by the Department would also be rendered infructuous and the Tribunal, therefore, ought to have allowed the preliminary objection and dismissed the appeals. Learned senior advocate for the Department, per contra has placed heavy reliance on the proviso to Section 92, which specifically saves the appeal of the Department, the declaration under the scheme notwithstanding.

11. A reading of the proviso to Section 92 does show that where an appeal is filed by a Department of the Central Government in relation to an issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear, etc., the appellate authority is enjoined with the obligation to decide the appeal irrespective of the

declaration. Our attention has, however, been drawn to the decision of the Delhi High Court in *All India Federation of Tax Practitioners Vs. Union of India and Others*, wherein Their Lordships have considered the provisions of the Finance Act and in view of the fact that the Act provides two different consequences in relation to the persons who are prosecuting appeal and the persons who are defending, the provision has been found discriminatory and struck down the said proviso to Section 92. In the concluding paragraph it has been observed, thus:

To sum up, our conclusions are : (1) The proviso to Section 92 is ultra vires Article 14 of the Constitution as it results in creating two artificial classes between the same class of assessee, i.e., the litigating assessee in arrears; (2) the definition of "tax arrears" in cl. (m) of Section 87 should be so read as to mean the amount of tax, penalty or interest determined by any competent authority on or before 31st March, 1998, though such determination might have been set aside at a later stage, if such setting aside has not been accepted by the Department and continues to remain under challenge before a Court or Tribunal. (3) The rest of the scheme is intra vires the Constitution.

12. Though the learned Counsel for the Revenue has vehemently argued that the decision of the Delhi High Court should not be taken as conclusive in view of the decision of the *Dr. Mrs. Renuka Datla Vs. Commissioner of Income Tax and Another*, we find that the case relied upon by the learned Counsel is distinguishable. In the said case there was no tax arrear against the assessee within the meaning of cl. (m) of Section 87 nor any disputed tax or income on the date of the declaration. Also, no appeal was pending on the date of filing of declaration in respect of the tax arrears for the clearance of which the petitioner could have sought resort to the Scheme. It is, therefore, not a case where a person had legitimately sought relief under the Scheme and was granted a declaration from which consequences flowed. Our attention has also been drawn to the circular of CBDT, in which the respondents have themselves clarified that they have decided to follow the judgment of the Delhi High Court. Since it is a short press note/release, the same is extracted hereinbelow:

Kar Vivad Samadhan Scheme? Enlargement of the scope of the Scheme to Departmental appeals.... The constitutional validity of the KVSS, 1998 was challenged before the High Court of Delhi in a public interest litigation. In its judgment delivered on 17th Nov., 1998, the High Court has upheld the provision of the KVSS except proviso to cl. 92 which provided that the Departmental appeal shall not be withdrawn. The scope of tax arrear has also been modified to cover tax, penalty or interest under dispute in Departmental appeals. The effect of the judgment is that the pending departmental appeals will be eligible to be covered under the Samadhan Scheme : Provided the original demand has been determined on or before 31st March, 1998.

2. It has been decided by the Central Government to accept this decision of the High Court of Delhi.

3. Suitable procedural instructions are in the process of being issued to the designated authorities to extend the benefits of the Scheme to the disputes raised by the Department before various appellate authorities.

4. Taxpayers are advised to avail of the Samadhan Scheme, in the extended area of Departmental appeals/references also.

13. Learned counsel for the Revenue also referred to the decision in *Shree Amarlal Kirana Stores Vs. Commissioner of Income Tax and Others*, , but the said decision has no applicability in the facts and circumstances of the case.

14. In view of the fact that proviso to Section 92 was struck down by the Delhi High Court and the Department itself proceeded to accept the decision, we are of the view that the Department cannot; try to take a different stand from the position to which it stands committed. However, if the Department finds that any material particular furnished in the declaration is false, it can always approach the designated authority for cancellation of the certificate under the first proviso to Section 90(1) or for amendment under the second proviso or for such other action as is permissible under the said Finance Act, However, once the valid declaration has been made and till the declaration continues to be valid, the Department's appeal shall not survive,

15. Accordingly, the questions formulated are answered in favour of the appellant and against the Revenue. These appeals are consequently allowed and the appeals pending before the Tribunal are dismissed as having become infructuous. In view of the certificate granted under s 90 of the Finance Act (*supra*). There shall be no order as to the costs.