(2003) 02 CAL CK 0012

In the Calcutta High Court

Case No : Writ Petition No. 850 of 1999

Rani Sati Devi Trust APPELLANT

Vs

Commissioner of Income Tax and Others RESPONDENT

Date of Decision : 03-02-2003

Acts Referred:

Finance (No. 2) Act, 1998 — Section 88

Citation : (2003) 185 CTR 320 : (2003) 263 ITR 93 : (2003) 132 TAXMAN 803

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Advocate : J.P. Khaitan, for the Appellant; P.K. Mullick and J.C. Saha, for the Respondent

Final Decision : Partly Allowed

Judgement

Girish Chandra Gupta, J.—The subject matter of challenge in this writ petition is the determination of amount payable by the petitioner under the Kar Vivad Samadhan Scheme, 1998, and a clarification dated January 5, 1999, issued by the member (Legislation) of the Central Board of Direct Taxes. The facts and circumstances of the case are as follows :

2. For a number of assessment years the petitioner was made liable to pay penalty, particulars whereof are as follows :

"Assessment year Penalty (Rs.) 1990-91 48,000 1991-92 52,000 1992-93 22,000 1994-95 23,200"

3. The Kar Vivad Samadhan Scheme, 1998, came into force on September 1, 1998. Section 88 of the aforesaid scheme in so far as the same is material for our purpose provides as follows :

"88. 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."

4. It is not disputed that the time for making declaration was extended from time to time after December 31, 1998. During the extended period the petitioner made a declaration in respect of each of the aforesaid assessment years proposing to pay 50 per cent. of the penalty in accordance with Section 88(a)(iv) of the aforesaid Scheme set out hereinabove. In pursuance of the aforesaid declaration the Department determined the sum payable by the petitioner by its order dated February 23, 1999, wherein it appears that the Department has added 50 per cent. interest on the amount of penalty u/s 220(2) of the Income Tax Act from the date when the penalty was levied until March 31, 1998. The addition of interest was sought to be justified by the Department on the ground of a letter dated January 5, 1999, issued by the member (legislation) to the Chief Commissioner of Income Tax which reads as follows :

"A number of references have been received raising doubts about the charging of interest u/s 220(2) in respect of tax arrear declared under the Kar Vivad Samadhan Scheme, 1998.

2. It is obvious from Sub-clause (iii) of Section 88(a) that where tax arrear comprises tax, interest or penalty, the entire amount of interest u/s 220 will get waived off. However, where the tax arrear comprises only interest payable or penalty levied, the interest u/s 220 may be worked out till March 31, 1998, and the declarant would be entitled to a waiver of 50 per cent. thereof. In view of the provisions contained in Clause (iv) of Section 88(a) and the definition of ''tax arrear'' appearing in Clause (m) of Section 87, no interest u/s 220(2) can be charged in such cases beyond March 31, 1998."

5. Mr. Khaitan, the learned advocate appearing for the petitioner, contended that the addition of interest is plainly contrary to the provisions of Section 88 of the aforesaid Scheme set out hereinabove and, therefore, the addition of interest was an act without jurisdiction in excess of the authority and is bad and is liable to be set aside.

6. Mr. Mullick, the learned senior advocate appearing for the Department, submitted that the question has become academic because the Scheme is no longer in force. The petitioner has admittedly not paid even the amount which according to the petitioner is payable according to the Scheme and therefore the question of the petitioner now being able to avail itself of the benefit of the aforesaid Scheme does not arise. This court was unable to accept the submission of Mr. Mullick in its entirety for the simple reason that it was not open to the Department to refuse the benefit of the Scheme to the petitioner by adding interest if that was not payable under the Scheme and in case the Department has done that, then it is the Department itself which has precluded the petitioner from making payment of the just amount payable under the Scheme but then again the fact remains that the petitioner has continued to enjoy the benefit of the amount which was payable under the Scheme. Therefore, the petitioner cannot be allowed to have this matter heard without first undertaking to pay interest, on the amount which should have been assessed in accordance with the Scheme, from 30 days after the date of determination till the date of payment. Accordingly, this court directed Mr. Khaitan to take instructions as to whether his client is willing to pay interest from 30 days after February 23, 1999, until the date of actual payment at the rate prescribed u/s 220 of the Income Tax Act with the statutory amendments thereof. Mr. Khaitan took time to take instructions and on the adjournment day submitted that his client is willing to pay such interest. It is on this basis that the hearing of the petition was taken up.

7. The question for determination is "does the Scheme envisage payment of any interest on the tax arrear comprising of penalty simpliciter ?"

8. This question has to be answered on the basis of Section 88 of the Scheme, the relevant portion whereof has been set out hereinabove. Section 88 contains a non obstante clause and excludes operation of all provisions contained in any other law or a direct tax enactment and provides that "the amount payable under this Scheme by the declarant shall be determined at the rates specified hereunder" and "in the case where tax arrear comprises only interest payable or penalty levied", the amount payable is 50 per cent. thereof. This goes to show that the scheme does not oblige the declarant to pay any amount on account of interest. The fact that interest is not intended to be paid would also be evident from the provision contained in Clause (iii) set out hereinabove. It would appear that even in case where the tax arrear includes Income Tax, penalty and interest the amount payable is the specified percentage of the disputed income in spite of the fact that the determination earlier made obliges the assessee to pay penalty or interest as the case may be. This court is therefore of the view that the

Scheme does not envisage payment of any interest even in a case where interest was levied at the time of assessment or at any other point of time of determination. In the case in hand no interest was determined at any point of time. The plain and simple meaning in my view is that where the tax arrear comprises of interest or penalty simpliciter no interest is payable and all that the declarant has to pay is 50 per cent. of the penalty or interest determined before March 31, 1998. Addition of interest therefore made by the authorities was clearly not authorised by the Scheme. The contrary view taken by the member (legislation) in his letter dated March 5, 1999, quoted hereinabove is not borne out by the Scheme and is based on a misreading thereof.

9. Accordingly, the petition partly succeeds. The addition of interest in the determination dated February 23, 1999, is set aside. The petitioner is directed to pay 50 per cent. of the penalty in respect of each of the aforesaid four assessment years together with further interest at the rates provided u/s 220 of the Income Tax Act commencing from 30 days after February 23, 1999, until the date of payment. It is made clear that in computing the interest statutory modifications if any of Section 220 of the Income Tax Act shall be taken into consideration. Such payment is to be made within 30 days from the date hereof. In default, the petition shall stand dismissed. There will be no order as to costs.

10. Urgent xerox certified copy be issued to the parties expeditiously if applied for.

