

(1999) 04 GUJ CK 0052

In the Gujarat High Court

Case No : Spl. Civil Application No. 1818 of 1999

Shaily Engineering Plastics Ltd.

APPELLANT

Vs

Designated Authority under Kar Vivad Samadhan Scheme

RESPONDENT

Date of Decision : 16-04-1999

Acts Referred:

Finance Act, 1998 — Section 87, 88, 90(1), 95

Income Tax Act, 1961 — Section 116, 143(1), 143(2), 143(3), 154

Citation : (1999) 239 ITR 90 : (1999) 106 TAXMAN 289

Hon'ble Judges : Rajesh Balia, J; Anil R. Dave, J

Bench : Division Bench

Advocate : S.N. Soparkar, for the Appellant; Manish R. Bhatt, for the Respondent

Judgement

1. This petition is relating to dispute which arises out of the special scheme enacted by the Finance Act of 1998 to settle the disputes under the direct tax as well as indirect taxes known as Kar Vivad Samadhan Scheme (hereinafter referred to as "KVSS").

2. The facts giving rise to this petition are that the petitioner which is a company has filed its return of income for asst. yr. 1996-97 on 29th Nov., 1996, declaring a total income of Rs. 1,19,69,413 on which Rs. 55,05,930 was the amount of tax payable. The said amount was not paid by the assessee. On 18th Nov., 1997, the second respondent AO intimated to the petitioner under s. 143(1)(a) about making a prima facie adjustment to the income returned by the assessee by making additions of sums of Rs. 1,12,12,567 bringing the total taxable income at Rs. 2,32,01,977 correspondingly specifying the increased tax liability of Rs. 1,65,32,082. The assessee disputed the adjustment made under s. 143(1)(a) by filing appeal on 26th Dec., 1997. However, the said appeal was not liable to be admitted for want of compliance with the requirement of sub-s. (4) of s. 249, namely, non-payment of tax payable as per the return of the income. However, no order rejecting the appeal had been made. The assessee before filing appeal had moved an application for rectification also on 22nd Dec., 1997, under s. 154

of the IT Act, before the AO. The AO vide his order dt. 27th July, 1998, partially accepted the application and reduced the adjusted income under s. 143(1)(a) to Rs. 1,33,77,190. Corresponding thereto tax payable as specified in intimation was reduced to Rs. 57,09,640. Thus, as on 31st March, 1998, under IT Act the tax stood determined at Rs. 57,09,640, under s. 143(1)(a) of the Act. The assessee had preferred a revision under s. 264 against the order dt. 27th July, 1998, which was pending.

3. Under the Finance Act (No. 2) of 1998 which came into force w.e.f. 1st April, 1998, a scheme known as Kar Vivad Samadhan Scheme was introduced which was contained in Chapter IV of the Finance Act of 1998 which comprised of ss. 86 to 98. The KVSS provided that where any person makes on or after the first September, 1998, but on or before 31st day of December, 1998 (the later date was extended by subsequent notification to 31st day of January, 1999), a declaration to the designated authority in accordance with the provisions of s. 89 in respect of tax arrears, then notwithstanding anything contained in any direct tax enactments or indirect tax enactments or any other provision of any law for the time being in force, the amount payable under the scheme by the declarant is to be determined at the specified rates provided under s. 88, and on determination of such amount payable under s. 90(1) the declarant is required to make payment within 30 days and intimate the same to designated authority with proof of such payment. On actual payment of the amount so determined by the person filing declaration would require a certificate to be issued under s. 90(2) which will result in concluding the matters covered by the order and immunity in respect of such matters from being reopened in any other proceedings under the relevant direct tax enactment or indirect tax enactment or under any other law for the time being in force.

4. For the present purposes, it further need be noticed that under s. 95 areas where no declaration was permissible to be filed were pointed out. One of the area where no provision under the scheme would operate was a case where no appeal or reference or writ petition is admitted and pending before the appellate authority of High Court or Supreme Court on the date of filing of declaration or no application for revision is pending before the CIT on the date of filing declaration in respect of tax arrear under any direct tax enactment. After the scheme became effective petitioner filed a revision before the CIT under s. 264 which was within limitation on 30th Dec., 1998. Thus, fulfilling all the conditions, namely, tax was determined under s. 143(1)(a) prior to 31st March, 1998, and part of the tax payable as per such determination was unpaid, and a revision filed by the assessee petitioner disputing his liability filed within limitation was also pending before the CIT, when the petitioner filed declaration on 31st Dec., 1998. "Assessee"s eligibility as declarant as on 31st Dec., 1998, is not in dispute.

5. Under s. 90(1) of KVSS the Designated Authority was to make an order determining the amount payable by the declarant within 60 days from the date of receipt of declaration. The order is required to set forth the particulars of tax

arrears and sum payable towards full and final settlement of tax arrears. Within 30 days of the making of such order under s. 90(2) the declarant is required to pay the sum so determined by the designated authority. He has also to intimate the fact of payment to the Designated Authority along with the proof thereof, on receipt of which the Designated Authority is to issue the certificate to the declarant.

6. After furnishing declaration on 31st Dec., 1998, the next thing which assessee-petitioner came to know was impugned order dt. 26th Feb., 1999, passed by the Designated Authority recording that the AO has informed the Designated Authority that in exercise of his power under s. 154 on 26th Feb., 1999, the AO has deleted the entire adjustment made under s. 143(1)(a). Taking note of the order of AO dt. 26th Feb., 1999, the Designated Authority who was also the authority before whom revision filed by the assessee, was pending, further held that in view of the fact that the AO has deleted all the adjustments made to the returned income by rectifying his order under s. 143(1)(a) and has accepted the income returned by the assessee, no dispute as mentioned in revision petition under s. 264, dt. 30th Dec., 1998, survives, and therefore, case cannot be referred under the scheme and accordingly declaration was dismissed as having become infructuous. The Designated Authority also referred to the fact that the petitioner had filed an appeal against prima facie adjustment made under s. 143(1)(a) which was yet to be disposed of but taking note of the fact that assessee had not deposited the amount of tax on the returned income as required under s. 249(4)(a), no valid appeal can also be said to be pending before the CIT(A).

7. Manyfold grounds have been raised challenging this order dt. 26th Feb., 1999, rejecting the declaration and refusing to determine the amount payable under s. 88 r/w s. 90 of the Finance Act (No. 2) of 1998 by the Designated Authority as a consequence of rectification order made under s. 154 by the AO on 26th Feb., 1999.

8. The first contention that has been raised before us is as to the validity of the order passed by the AO under s. 154 on 26th Feb., 1999, which according to the respondents had the effect of taking the case of the petitioner outside the purview of the scheme. The contentions are two fold. Firstly, that the order under s. 154, assuming it has potentiality to affect the assessee's eligibility to lose the benefit under the scheme, was certainly an order affecting the assessee adversely made without giving the assessee any opportunity of being heard. The order is not only violative of general principles of natural justice, but is in clear breach of the mandate of sub-s. (3) of s. 154. The second contention is that the order dt. 26th Feb., 1999, apparently suffers from malice in law. In the chain of events noticed above, it was urged that the AO having already exercised his power under s. 154 on an application being made in that regard by the petitioner, has concluded the matter as to the prima facie adjustments to be made under s. 143(1)(a). As far as he was concerned, by application of mind as

early as on 27th July, 1998, he had concluded the questions and no application for rectification was pending before him. His belief as to the chargeability of the amount in question to tax, which was not included by the assessee in his returned income, was still persisting. That is manifest from the fact that in regular assessment under s. 143(3) which has come into existence on 30th March, 1999, barely a month after the passing of the order under s. 154, again shows the very same additions in the returned income, by the very same AO which has been deleted in purported suo motu exercise of jurisdiction under s. 154 without giving notice to the assessee, and the fact that proceedings for regular assessment had already been initiated by issuing notice under s. 143(2) much prior to having recourse to exercise of jurisdiction under s. 154. All these clearly suggest that exercise of jurisdiction under s. 154 on 26th Feb., 1999, on his own by the AO was not as a matter of any belief held by him as to there being any mistake apparent on the face of record in determining adjustment under s. 143(1)(a) but was purely with a view to infructuate the declaration filed by the assessee under s. 89 of the Finance Act of 1998 to receive benefits of KVSS.

9. Coming to the first contention it would be appropriate to reproduce the relevant clause of s. 154 :

"154. (1) With a view to rectifying any mistake apparent from the record an IT authority referred to in s. 116 may,

(a) xxxxx xxxxx xxxxx (b) amend any intimation sent by it under sub-s. (1) of s. 143, or enhance or reduce the amount of refund granted by it under that sub-section.

(1A) xxxxx xxxxx xxxxx

(2) Subject to the other provisions of this section, the authority concerned. -

(a) may make an amendment under sub-s. (1) of its own motion, and

(b) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee, and where the authority concerned is the CIT(A), by the AO also.

(3) An amendment, which has the effect of enhancing an assessment or reducing a return or otherwise increasing the liability of the assessee, shall not be made under this section unless the authority concerned has given notice to the assessee of its intention so to do and has allowed the assessee a reasonable opportunity of being heard.

(4) xxxxx xxxxx xxxxx (5) Subject to the provisions of s. 241, where any such amendment has the effect of reducing the assessment, the AO shall make any refund which may be due to such assessee.

(6) xxxxx xxxxx xxxxx (7) xxxxx xxxxx xxxxx

10. The three expressions used in sub-s. (3) mandating a pre-decisional hearing before order of rectifications can be made are "enhancing the assessment", "reducing the refund" or "increasing the liability of the assessee". All are in the context relatable to the determination of taxable income, reduction of refund as a result of enhancing the liability of tax, and otherwise, resulting in adverse effect on the assessee's liability arising under the IT Act, which in its wider connotations includes not only the tax at specified rates on the taxable income, but also the interest and penalties payable in respect thereof. Such adverse orders may also be relating to determining the status of person as assessee though may not affect computations of income inasmuch as determination of status may affect rate of Income Tax applicable to a person depends on his status as well, attracting other provisions which in the end result in enhancing the liability of the assessee under the Act. It cannot be referable to liabilities and obligations or rights beyond the precincts of the IT Act. In this connection it Would also be apposite to notice that the KVSS does not affect the liability of the assessee to any tax in any sense. In fact it does not adjudicate as to the liability of the assessee to assessment of income under the IT Act or liabilities to tax under the different Acts mentioned in the schedule to scheme. KVSS only concerns the liability already determined and existing and remain outstanding because the assessee has failed to discharge such obligation. No part of the scheme determines the liability of the assessee that arise under the IT Act or other different Acts. It only concerns itself with recovery of the unpaid tax as on the date of declaration, and to compute the amount payable in relation to such unpaid tax for giving an opportunity to the defaulter to make payment of amount so determined to gain immunity offered under the provisions of the scheme. It is misconception to consider that the operation of the scheme is to decrease or increase in the liability of the assessee, which exist independent of the scheme, and is to be determined in accordance with the enactment under which the arrears are due. This is clear from the definition of "tax arrears" itself which postulates that the amount of tax, penalty or interest must be determined on or before 31st day of March, 1998, under the enactment in respect of an assessment year as modified in consequence of giving an effect to appellate order. Therefore, the existence of liability on account of tax, penalty or interest is directly referable to the determination under the enactment under which it is to be determined. Viewed in that light, by deleting the adjustment made under s. 143(1)(a) the AO was neither enhancing the assessment nor it was an exercise which would result in reducing the refund or claim or refund, if any, nor deletion of such additions would result in enhancing of assessee's liability under the IT Act in any manner. As a matter of fact deleting the additions made accorded with the claim made by the assessee since the date the adjustments under s. 143(1) (a) were made by the AO and the assessee has challenged the same to be erroneous, promptly by filing an application under s. 154 on 22nd Dec., 1997, which was allowed only partly against which also the assessee had preferred a revision under s. 264. Making an order in favour of the assessee for which he has been litigating since beginning cannot be said to be an order enhancing the

liability of the assessee otherwise within the meaning of s. 154(3) nor prejudicial to assessee under the enactment governing the tax, in question, which would call for giving an opportunity of hearing before the order was made,

11. Considering the second contention we find there is substance in it. The chain of events noticed above leave no room of doubt that the purported exercise of power under s. 154 was clearly not referable to any satisfaction on the part of the AO as to the mistake committed by him in making adjustment under s. 143(1)(a), but was directed to infructuate the declaration made on 31st Dec., 1998, under the scheme which followed filing revision on 30th Dec., 1998, against the order dt. 27th July, 1998. The AO had made certain additions in the first instance on being satisfied prima facie about their apparent exigibility to tax in addition to returned income, on 18th Dec., 1997. The assessee had filed an appeal against the intimation under s. 143(1)(a) on 26th Dec., 1997. However, before appeal was filed, which require as a condition to be admitted, payment of tax as per the returned income, the petitioner had preferred a rectification application also before the AO. The AO had considered that application, accepted partly the claim of the assessee as to the debatability or non-taxability of additions made by the AO to a large extent, but not fully. Notice under s. 143(2) had also been issued for regular assessment during which the issue as to disputed additions could be agitated and brought back to assessment. Thus, the proceedings had already reached at a stage where 143(1)(a) order as per the AO had become final and was subject to assessment order to be made under s. 143(3) for which steps were already taken by the AO by issuing notice of hearing. The assessee had already availed of remedy against order under s. 154 by filing a revision under s. 264 within limitation. That by itself would not have prompted ordinarily the AO to have recourse to s. 154 at that stage. The only thing that happened during this period appears to be the coming into existence of the scheme under which an assessee having tax arrears could avail benefit under certain conditions which requires, apart from existence of "tax arrear" as on the date of declaration pendency of appeal, reference or writ or a revision in relation to "tax arrear" before appropriate authority.

12. Before us it is not in dispute that intimation under s. 143(1)(a) making adjustments amounted to determination of tax under the IT Act, the assessee has not paid the tax as per amount specified in intimation under s. 143(1)(a) of the Act and the revision filed on 30th Dec., 1998, was within limitation hence could be said to be pending as on 31st Dec., 1998, when declaration was filed. Remedy of appeal under the provision of the IT Act could be available only if the assessee deposits a part of the amount of tax payable as per return. Assessee having not paid even the tax payable as per return, was not entitled to maintain appeal. The Central Government in its guidelines issued on 1st Sept., 1998, in the form of question and answer had stated the scheme is available to entire demand of an assessment year. The only reason in the circumstances that prompted the AO to make an order under s. 154 on 26th Feb., 1999, communicated to Designated Authority, who is also revisional authority, and can

legitimately be inferred, is that as the assessee has entered the eligibility zone of KVSS scheme on the last date of making declaration on 31st Dec., 1998, by filing a revision on 30th Dec., 1998, and giving effect to that may result in reduction of tax recovery even below the admitted tax liability under the return, the device of s. 154 was adopted, notwithstanding having no belief in non-taxability of the items of addition already made. In proceeding under s. 143(3), which could be made on hearing, he had no intention to delete the addition and allow the tax reduction as per intimation under s. 143(1)(a), which is apparent from the fact that having reduced the tax payable under s. 143(1)(a) on 26th Feb., 1999, by treating the additions to be a mistake apparent from order, an order which was not intimated to assessee, the officer hastened to make an order under s. 143(3) subjecting the assessment to same additions raising the liability to a level which would sustain the assessee to a person with "tax arrear" again, viewed in this background the chain of events declaration was filed by the petitioner fulfilling all the contentions prescribed therein for availing whatever benefits the legislation offered under the scheme. Thereafter the order on the declaration is to be made within 60 days by the Designated Authority for determining the amount payable under the scheme by the declarant. That were to expire on 1st of March. On 26th Feb., 1999, the order is made under s. 154 in purported exercise of powers under s. 154 reducing the assessment to returned income. Same is communicated to the Designated Authority who dismisses the declaration and revision both by holding them to be infructuous, making a reference to the fact of appeal under s. 246 which had hitherto had not been disposed of making it doubly sure that the petitioner may not still be found entitled to operation of the scheme because of the pendency of appeal. The assessee is informed of the order under s. 154 through rejection of declaration, and before the close of assessment year the same demand is again created by making assessment order under s. 143(3). These chain of events clearly disclose that the AO, right from the date of making adjustments under s. 143(1)(a) until the date of making the order under s. 143(3) had firmly believed that additions, finally sustained after partially allowing first application moved by the assessee under s. 154 were taxable income. There was no occasion for him to have revised intimation under s. 143(1)(a) suo motu at that stage unless it was directly concerned that giving a foothold for making declaration under the scheme infructuous.

13. Duty to act fairly is the backbone of the fundamental right of the citizens to be governed under the Constitution. This duty to act fairly inheres into it, that the power which is vested in an authority for a particular purpose had to be exercised for that purpose alone and not for extraneous consideration for a purpose different for which such power has been conferred. That would be abuse of authority. If such a case is made out, the action cannot be sustained.

14. Accepting the contention of respondent will be opening the gates of defeating legislative will. The legislature willed to provide a scheme to collect revenue from litigating assessee with outstanding arrears. The class to which this scheme was extended was an assessee with tax arrear in respect of which a dispute is

pending on date of declaration. If the contention of respondent is accepted it will create a situation where notwithstanding on date of declaration an assessee fulfill the criterion under KVSS the Department can before the date of determination by exercise of various powers under the relevant enactment reduce the liability to nil, deny the provision of scheme to assessee on the ground that no tax arrear is dispute exist and next day after rejecting the declaration redetermine the liability which will resurrect tax arrear as well as litigation, as has happened in this case demonstrably.

15. One cannot fail, no notice that within sixty days of declaration Designated Authority has to make an order under s. 90(1) determining the sum payable by the assessee towards full and final settlement of "tax arrears" and on payment of such sum within a period of 30 days from passing order under s. 90(1) the assessee gets the consequential reliefs which include under s. 90(3) that every order passed under s. 90(1) determining the sum payable under the scheme shall be conclusive as to matters stated therein and no matter covered by such order shall be reopened in any other proceeding not only under the concerned tax enactment but also under any other law for the time being in force, and results in withdrawal of litigation pending at assessee's behest under s. 90(4). Thus, by prohibiting reopening the matter pertaining to tax determination in respect of which tax was in arrear and "directly withdrawal of pending litigation the legislature made it clear that dispute which is being litigated in respect of tax arrear as on the declaration must come to a conclusive end and not survive the recovery. By acting in a matter so that no recovery is made and dispute remain alive the authority only acts at cross purpose with the legislative will. In slightly different context, the Delhi High Court in All India Federation of Tax Practitioners Vs. Union of India and Others, found the distinction drawn under the scheme on the basis as to who is the appellant or respondent in the litigation found the proviso to s. 92 ultra vires and read down the definition of "tax arrear" under s. 87(m). The Court speaking through Lahoti, J (as His Lordship then was) observed :

"In our opinion, once a liability to pay the tax was incurred and determined on or before 31st March, 1998, the assessee could be treated to be in arrears in spite of his having succeeded at one stage of the litigation if the Revenue has chosen to continue with the litigation and there is no reason why the benefit of the scheme should be denied to him, to this extent, the scheme is discriminatory and violative to Art. 14 of the Constitution. All the assessee's litigating and in arrears belong to one class. Any attempt at carving out further classes by reference to who is the prosecutor/appellant/applicant in the pending litigation is void as based on no intelligible differentia. It is arbitrary, irrational and evasive. It will have no rational relation to the object sought to be achieved by the Act. The twin test laid down in R.K. Garg and Others Vs. Union of India (UOI) and Others, would fail. On the other hand, keeping them in one class would enable the twin objectives of the legislation being achieved - (i) the reduction of litigation, and (ii) the realisation of revenue."

We are in respectful agreement. We are further told that Central Government by issuing a press note on 28th Nov., 1998 has accepted the verdict.

We are, therefore, of the opinion that the order made on 26th Feb., 1999, in purported exercise of s. 154 by the respondent No. 2 AO was tainted with ulterior object and was not exercised for the purpose for which the power was conferred on him. That vitiates the order dt. 26th Feb., 1999, made under purported exercise of power under s. 154 without hearing the assessee, as it suffers from malice in law.

16. Even otherwise, we are satisfied that merely because there is modification or alteration in the quantum of tax arrears as on the date when order under s. 90(1) is to be made from the one which exist as on the date declaration was filed, as a result of orders which come into existence during the interregnum period to the extent permissible under the scheme, would not make the declaration infructuous but at best may affect the determination of amount payable by the declarant, depending upon the dispute that continue to exist.

17. As the question directly do not arise in this petition we refrain from expressing any firm opinion on the exact amount with reference to which the quantum of amount payable under the scheme is to be determined. Prima facie, we are of the opinion that except in case where amount of tax, interest or penalty determined under the enactment as a result of orders made under the concerned enactment before the date of determination is reduced to zero and the Revenue does not intend to dispute such result, the scheme operates so long there is "tax arrears" to be recovered. This is in consonance with the twin object of scheme which has its avowed object of declogging the system of pending litigations at different levels resulting in locking up of considerable revenue in such disputes, by providing a quick and voluntary settlement through recovery of sum determined in terms of KVSS in respect of tax arrear under various tax enactments both direct and indirect by offering waiver of part of "tax arrear" and providing immunity against institution of prosecution and imposition of interest and penalties. The twin objects of clearing arrears and settling disputes are intertwined and are not independent or separate. AS has been noticed by Delhi High Court in All India Federation of tax Practitioners v. Union of India & Ors. (supra), while considering the question as to the validity of the scheme, the Court observed :

"The objective of the scheme is to realise the tax arrears along with reducing the litigation and not reducing the tax litigation merely. The two qualifications taken together make one and it is incorrect to attempt at treating the twin object as two objects to be seen in isolation of each other or to assign one ingredient more weight than the other."

18. Viewing the entire scheme in that light, the Court found that classification of the beneficiary of the scheme on the basis as to who is the disputant party at the stage when the scheme operates, cannot provide a valid ground for excluding or

including a person to the benefits of the scheme. Thus, finding, it had declared proviso to s. 92 as ultra vires, and read down the definition of tax arrears in clause (m) of s. 87 by holding that definition of tax arrears in clause (m) of s. 87 of the Act of 1998 should be so read as to mean 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. This had two-fold outcome. Firstly, that scheme applies and operates notwithstanding subsequent modification in the amount of "tax arrear" at the time of making an order. Secondly, if the modification resulting in reduction of "tax arrear" as a result of reduction in amount of tax determined is not acceptable by the Revenue, still the scheme operates. In that event the scheme operates by ignoring the reduction as a result of existing order.

19. The above declaration of law as to the validity of proviso to s. 92 and reading down of clause (m) of s. 87 has been accepted by Union of India by issuing a press note released on 26th Nov., 1998. Thus, the Revenue has accepted that even in case as a result of subsequent decision tax liability is reduced that is subject-matter of dispute in future, the conditions of the scheme having been satisfied enabling a person to make a declaration would not disentitle him to the benefit of the scheme. He is entitled to insist for an order under s. 90(1) for computation of amount payable under the scheme by ignoring the order passed in his favour and to secure immunities and benefits from levy of interest, penalty and prosecution by not desiring to enter into the field of litigation any further.

20. Taking any other view in the circumstances, would mean that the scheme would remain wide open to abuse by making the declarations infructuous just before the day for determining amount payable by making orders under the respective enactments, reduce the tax liability or deleting the tax liability temporary in exercise of powers under the relevant tax enactment and restoring proceedings by resorting to the Act. This is amply demonstrated in the present case. The liability of the disputed sum was deleted a few days before the designated authority was under an obligation to make an order on the existing state of affairs, resulting in making of the impugned order which has not intended to be sum ordered and the very same liability was restored by regular assessment under s. 143(3)154 of the IT Act which may further be subjected to litigation the arrears still remaining outstanding. If the view now commanded by the Revenue is to be accepted, it would result that notwithstanding the valid declaration having come into existence under which the existing dispute could be buried and outstanding tax arrear would be recovered on that basis as per KVSS statutorily sanctioned the litigation and arrear shall still continue to exist, without giving it a chance to settle under the statutory scheme brought into existence for that purpose alone, whatever be the merit of scheme, its validity cannot be questioned by the authorities created under the particular enactment, nor the purpose be defeated by such methodology.

21. It has been urged by learned counsel for the Revenue that even if it be accepted that merely because of the making of an order under s. 154 deleting the additions made may not result in making the declaration infructuous, but, it must result in at least continued existence of the necessary condition for the operation of the scheme. He develops his argument thus : mere existence of tax arrears does not give right to any taxpayer to enter the scheme for procuring its benefits. It also posits that apart from there being "tax arrear" there must be an existing dispute in respect of such tax arrears. There cannot be any existing dispute in respect of admitted tax liability. As on account of reduction of assessment to the returned income by the impugned order under s. 154 the tax liability has been reduced to the admitted amount no part of tax arrears as on the date the order was made or order could be made that would call for determination of amount under s. 88 of the KVSS under Finance Act (No. 2) of 1998.

22. Having given our careful and anxious consideration to this contention we are unable to accept it. Undoubtedly, it is true that pending litigation or dispute is necessary condition for entering the field of the scheme. It is reflected from the provisions of s. 88 as well as 95 of the Finance Act of 1998. The amount to be determined under s. 88 is with reference to disputed income, disputed wealth, disputed gift, disputed chargeable expenditure, disputed chargeable interest. Section 95 makes it abundantly clear that unless an appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration or application or revision is pending before CIT on the date of filing declaration the provisions of the scheme would not apply. So also in the case of indirect tax enactments the provision that in case where no appeal or reference or writ petition is admitted and pending before appellate authority or High Court or Supreme Court or no application for revision is pending before Central Government on the date of declaration made under s. 88 the provision of the scheme shall not apply. These provisions leave no room of doubt that it is only that assessee who can attract the provisions of the scheme who has "tax arrears" and a live dispute pending in respect of such tax arrear. The provisions as enacted rule out the possibility where a dispute at higher echelons is pending at the instance of Revenue and assessee is not disputing that liability because order as on that date is in his favour. The Delhi High Court in the decision referred to above have held this distinction to be ultra vires and has read down the definition of tax arrears as noted above. The decision which has been accepted by Union of India must be taken to be now governing the scheme. If that be so, necessary consequence would be that where there exists a tax arrear within the meaning of s. 87 and a dispute is pending at the date of declaration its subsequent decision, which is not final, before the order under S. 90(1) is made, cannot affect the operation of the scheme, even if it may affect the determination of quantum to be determined as payable by the assessee. Prima facie we are of the view that the determination of amount may take into consideration the exact tax arrears as on the date of

determination, with addition of tax amount which was in arrears as on the date of declaration but ceased to be payment as per the later decisions in any proceedings under the concerned enactment, where the Revenue is still disputing the reduction in such liability. Taking any other view would mean that notwithstanding fulfilling all the conditions for invoking the provisions of the scheme as on the date of filing declaration on the filing of which it vests a right in the assessee that amount payable by him under the scheme is determined and on such determination if he makes the payment within time allowed, the dispute as to determined tax comes to an end and he is entitled to the benefits under the scheme. Obviously if the arrears are not cleared in terms of the scheme the position remains as it were.

23. It is to be noticed that s. 87(m) defines the tax arrears to mean unpaid tax liability which was initially determined on or before 31st March, 1998, as it stands modified by subsequent orders under the relevant enactments, before the date of making declaration, remains, unpaid. So also requirement of pendency of appeal or revision is referable to the date of declaration. Therefore, the basic concept of tax arrears as well as the conditions which make a person eligible to make a declaration of tax arrears have direct relevance to the date of declaration. While the condition that there must be dispute pending in respect of tax arrears, there is no such condition which requires or can lead to this conclusion that tax arrear would constitute only such tax arrears which are disputed and not the arrears in respect of admitted tax liability. Therefore, once the case is made out that the assessee was a person who had "tax arrears" as on the date of making declaration and dispute was also pending in respect of such "tax arrears" which may not concern the entire amount of "tax arrears" he is entitled to make a declaration and claim the benefit that may have to be computed in accordance with the provisions of the Act. The subsequent determination of pending dispute which does not wipe out the tax liability of the arrears altogether cannot make the case falling in category where there are no tax arrears within the meaning of s. 87(m). Even in respect of a case where as a result of orders made under the relevant taxing statute tax liability is set aside altogether or reduced but such order is not accepted by the Revenue and is subject to remedial proceedings under such enactment, we have already noticed that in view of now accepted position the scheme operates and pending dispute as to enhance the liability too comes within the purview of KVSS, so that dispute stands settled in favour of Revenue on payment of sum determined under KVSS. This is so because in that event, the assumption of tax arrears has to be on the basis as if determination of liability under tax concerned tax enactment in respect of tax, interest or penalty has been in favour of the Revenue. That is necessary corollary of reading down s. 87(m) to include liability as reduced by orders under enactment but disputed by the Department. However, if the Revenue accepts the reduced liability the question of computing benefit to that extent shall not arise as the same shall cease to be a "tax arrear" in respect of which dispute is pending. The concept of "dispute", existence of tax liability is

primarily to relate the scheme to the twin objects of settlement of dispute on payment of amount computed under the scheme which results in clearance of tax arrears. That can reasonably lead to conclusion that benefit of computation at reduced rate may be related only to the disputed tax, and not to the undisputed tax. That is the prima facie opinion to which we have come by perusing the scheme as a whole. Section 88 provides for settlement of tax arrears. While it provides for computation of tax arrears in respect of disputed income at the rates prescribed under clause (a) of s. 88. Section 90(1) requires setting forth of tax arrears and sum payable after determination of arrears after full and final settlement of arrears. Looking to the scheme of the Act one plausible view appears to be that as the scheme does not apply where there is no dispute between the assessee and Revenue and the tax determined and arrears of tax are admitted, the benefit which has been extended under the scheme is only to settle disputed liability by reducing the extent of that disputed liability as provided under s. 88, and require the payment of reduced liability of the disputed tax maximum to such extent the same is outstanding, along with full admitted tax, if the same is outstanding, and to grant immunity from liability of interest, penalty and prosecution, etc. In case there are no arrears of tax but only of interest and penalty, demand in respect of such arrears is reduced to half. That construction saves the provision from the vulnerability to fall foul with Art. 14 on the ground of hostile discrimination. A person who for any reason has not paid admitted tax but is honest in his declaration is placed to a disadvantage position vis-a-vis a person not so transparent assessee whose tax declaration are not found acceptable and addition in income has been made, interest and penalties levied and also with those assesseees who have recourse to even a wholly untenable dispute the benefit of reduction in tax liability is extended to admitted tax liability as well, inasmuch as a non-disputant assessee is prohibited to get any benefit under KVSS, a disputant assessee will get benefit not only in respect of tax arrear in respect of which dispute is pending, settlement of which is one of the purpose, but also in respect of undisputed liability, when recovery of all arrears is not the sole purpose but is intertwined with settlement of dispute. In such event, a case of honest assessee being unequally treated is prima facie made out.

24. The other view contended by learned counsel for the petitioner is that in view of the definitions given to disputed tax and disputed income, once the declarant enters the field of applicability of the scheme, he is entitled to computation of amount payable towards full and final settlement of tax arrears would include determination of amount in respect of undisputed liability as well.

25. As the question was not examined by the Revenue authorities and does not directly arise before us, we refrain ourselves from expressing any final opinion on the issue.

26. In view of our conclusion that order under s. 154 dt. 26th February, 1999, is vitiated and that the proceedings would not become infructuous by dint of that

order and that we have also reached conclusion that even in case the existing tax liability which included both admitted as well as disputed liability is reduced to admitted liability as a result of a subsequent order (assuming the order under s. 154 to be valid), it still does not take the case outside the purview of the scheme though it may affect the question of determining the quantum of amount payable under the scheme which will have to be determined by the Designated Authority, in accordance with law, at the time of determination of amount of tax payable. Where the scheme has been invoked the entire amount which is unpaid as on the date of declaration and as on the date when the order is being made falls within the definition of "tax arrears", merely because the amount which is considered to be "tax arrear" as on the date of order is an admitted tax would not make the declaration, which was valid at the time of making it, infructuous and inoperative, particularly keeping in view if the dispute about the order which has resulted in reducing the quantum of unpaid tax as on the date of making an order, is not acceptable to Department, would still be governed by the scheme in view of the decision of Delhi High Court referred to above and accepted by the Union of India. The impugned order of the Designated Authority also will have to be quashed, as the same "is solely founded on the facts that no dispute is pending as on the date of making order because of orders under s. 154 and rejection of revision application on 26th February, 1999, though the facts disclosed that the reduced sum of tax was never accepted by the Revenue.

27. Accordingly, the order of the second respondent the AO dt. 26th February, 1999, under s. 154 of the IT Act, as well as the order of the CIT, Designated Authority dt. 26th February, 1999, to the extent it rejects the declaration under KVSS as having become infructuous are set aside and the Designated Authority is directed to consider the declaration afresh in accordance with law.