(2007) 02 MAD CK 0216

In the Madras High Court

Case No : Writ Petition No. 12607 of 2003

TVS Motor Company Ltd., (formerly known as TVS Suzuki Ltd.) — APPELLANT

Vs

The Assistant Commissioner of Income Tax — RESPONDENT

Date of Decision : 27-02-2007

Acts Referred:

Constitution of India, 1950 — Article 226
Finance (No. 2) Act, 1998 — Section 90, 90(1), 90(3), 91
Income Tax Act, 1961 — Section 143, 148, 80HH, 88

Citation : (2007) 209 CTR 334 : (2007) 293 ITR 394

Hon'ble Judges : P.D. Dinakaran, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : R. Venkatnarayanan, for the Appellant; Pushya Sitaraman, Sr. SC, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Dinakaran, J.—The writ petition is filed for the issue of a writ of Certiorarified Mandamus to call for the records in P.A. No. /G.I.R. No. 32024 on the file of the respondent and quash the order dated 27.3.2003 and consequently direct the respondent to drop the proceedings.

2. The case of the petitioner, in brief, is as under:

2.1. The petitioner is a public limited company. For the assessment year 1995-96, the assessing officer had set off the unabsorbed depreciation and investment allowance carried forward while computing the relief u/s 80HH of the Income Tax Act, 1961. With regard to that, an appeal was pending before the Appellate Tribunal.

2.2. In the meanwhile, the petitioner opted to avail the Kar Vivad Samadhan Scheme and ultimately, paid the amount determined by the department. However, the assessing officer issued notice u/s 148 of the Income Tax Act to reopen the assessment and ultimately, withdrew the relief granted u/s 80HH of the Act by the impugned order dated 27.3.2003.

2.3. u/s 90(3) of the Kar Vivad Samadhan Scheme (Finance (No. 2) Act, 1998), the sum determined under the Scheme is conclusive and no matter covered by such order shall reopened. The petitioner therefore claims that the assessing officer is not entitled to reopen the assessment.

2.4. The petitioner opted for the Kar Vivad Samadhan Scheme only on the basis of the assurance given by the Government that all issues covered by the Kar Vivad Samadhan Scheme would not be reopened. The petitioner also withdrew the appeal before the Income Tax Appellate Tribunal. When Section 90(3) of the Finance (No. 2) Act, 1998 provides that the matter covered by the order cannot be reopened in any other proceedings, it is not open to the assessing officer to reopen the assessment.

2.5. The reopening of assessment was made on the basis of an issue which has been considered and accepted under the Kar Vivad Samadhan Scheme. The petitioner cannot have the right of appeal against the order of reassessment, in view of Kar Vivad Samadhan scheme being availed by the petitioner. The rights of the petitioner being seriously prejudiced, the petitioner has come forward with this writ petition, as there is no alternative remedy except to approach this Court under Article 226 of the Constitution of India.

3. Controverting the allegations of the petitioner, the respondent, in the counter affidavit filed, has stated the following:

3.1. In the return of income for the assessment year 1995-96, the assessee, the petitioner herein, claimed deduction u/s 80HH of the Act to which the petitioner is not entitled, as the deduction u/s 80HH of the Act is allowable only for 10 years and the 10th year in the case of petitioner happened to be the assessment year 1994-95.

3.2. The immunity conferred by the Kar Vivad Samadhan Scheme is applicable to the issues which have directly resulted in the tax demanded. The petitioner availed the Kar Vivad Samadhan Scheme only with regard to tax arrears arising by setting off of brought forward loss first and later allowing deduction u/s 80HH of the Act. But, it has nothing to do with the very eligibility of claim of deduction u/s 80HH of the Act.

3.3. What is questioned in the reassessment proceedings is the very eligibility of deduction u/s 80HH of the Act, but not the issue of allowing deduction u/s 80HH of the Act. The stand of the assessing officer in rejecting the claim of the petitioner is correct. The writ petition is liable to be dismissed.

4. Heard the Learned Counsel for the respective parties. The entire dispute revolves on the short point, whether the immunity under the Kar Vivad Samadhan Scheme gets affected by the reopening of assessment, and to appreciate the same in proper perspective, it is apt to refer the relevant portion

of Section 90 of the Finance (No. 2) Act,1998, which reads as under:

90. Time and manner of payment of tax arrear- (1) Within sixty days from the date of receipt of the declaration u/s 88, the designated authority shall, by 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 the declarant setting forth therein the particulars of the tax arrear 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.

5. The contention of the Learned Counsel for the petitioner that the order passed u/s 90(1) of the Finance (No. 2) Act, 1998 is conclusive and no matter covered by such order shall be reopened in any other proceedings appears to be correct, but, a reading of the Section 90(1), more particularly, the provisos to the said section would give a wider meaning, viz., the designated authority can revive the proceedings if any material furnished in the declaration is found to be false and he may amend the certificate for reasons to be recorded in writing. Therefore, it cannot be stated that the matter covered by the order u/s 90(1) of the Finance (No. 2) Act, 1998 shall not be revived.

6. The Apex Court in Killick Nixon Ltd., Mumbai Vs. Deputy Commissioner of Income Tax, Mumbai and Others, held as under:

As far as the provisions of the Kar Vivad Samadhan Scheme are concerned, we agree with the contention of the learned senior counsel for the assessee that the order to be made by the designated authority u/s 90 is a considered order which is intended to be conclusive in respect of tax arrears and sums payable after such determination towards full and final settlement of tax arrears. Once the declarant makes payment of the amount so determined u/s 90, the immunity u/s

91 springs into effect. We are also of the view that upon such declaration being made, tax arrears being determined, paid and certificate issued under the Kar Vivad Samadhan Scheme, there is no jurisdiction for the Assessing Officer to reopen the assessment by a notice u/s 143 of the Act except where the case falls under the proviso (2) of Sub-section (1) of Section 90 as it is found that any material particular furnished in the declaration is found to be false.

7. In the present case, the reopening of assessment was made to decide the question of eligibility of the petitioner for deduction u/s 80HH of the Act, which material was not available before the designated authority while granting certificate u/s 90(1) of the Finance (No. 2) Act, 1998. While availing the benefit of the Kar Vivad Samadhan Scheme, the petitioner had not made any declaration as to its eligibility to claim deduction u/s 80HH of the Act. Therefore, the declaration of the petitioner has to be presumed as if it was never made and consequently, the petitioner cannot claim that the matter should not be reopened, as it is a case falling under the provisos to Section 90(1) of the Finance(No. 2) Act, 1998.

8. In this view of the matter, we hold that the respondent is justified in reopening the assessment and deciding the tax liability of the petitioner by the order impugned in this writ petition.

9. In fine, the writ petition stands dismissed. No costs. It is open to the petitioner to challenge the demand of tax, if it is so advised, in accordance with law.