2017 (4) TMI 359 - DELHI HIGH COURT

Kumudam Publications Pvt. Ltd. Acting Through its Managing Director Mr. P. Varadarajan Versus Central Board Of Direct Taxes And Ors.

W.P.(C) 11216/2016

Dated: - 30 March 2017

Denial of credit for advance tax deposited and tax deducted at source (TDS) - Held that:- The only bar discernable under the scheme in question is evident from Section 189 is that no person declaring under the Act shall not be entitled to "claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment." Also, under that provision the person so declaring shall not be entitled to " to re-open any assessment or reassessment made under the Income-tax Act or the Wealth-tax Act, 1957 (27 of 1957)". Therefore, the court is of the opinion that there is no bar for an assessee or declarant to claim credit of advance tax amounts paid previously relative to the assessment years or periods for which it seeks benefits under the scheme.

In the decision in Shelly [2003 (5) TMI 4 - SUPREME Court] is decisive that advance tax is a mode of tax recovery, which the assessee is bound to pay under the scheme of the Income Tax Act and also the clarification by the Revenue, that credit for TDS paid, can be enjoyed for availing the benefit (under the scheme in question) precludes any meaningful argument by it that advance tax payments relative for the assessment years covered by the declaration cannot be taken into consideration as payments under and for purposes of availing the benefits of the scheme.

Thus the petition has to succeed. Accordingly a direction is issued to the respondents to process the petitioner’s application under the IDS, 2016, and give adjustment or credit to the amounts paid as advance tax and TDS to its account, under the Income Tax Act, and accept the balance amounts (after also giving credit to the amounts paid during the interregnum, pursuant to the interim order of this court dated 29th November, 2016). The respondents shall ensure that the petitioner’s payments and declarations are processed in accordance with the IDS, 2016.

Judgment / Order

MR. S. RAVINDRA BHAT & MR. NAJMI WAZIRI JJ.

Appellant Through: Sh. S. Ganesh, Sr. Advocate with Ms. Pooja Mehra Saigal, Sh. Jitendra Ratta and Ms. Jasmine Kottai, Advocates.

Respondents Through: Sh. Ruchir Bhatia, Sr. Standing Counsel with Sh. Puneet Rai, Jr. Standing Counsel.

MR. JUSTICE S. RAVINDRA BHAT

1. The petitioner impugns an order dated 16th September 2016 of the third respondent which failed to give credit for advance tax deposited for AY 2010-2011 and AY 2016-2017 and tax deducted at source (TDS) to a total extent of 16.49 crores.

2. The petitioner-company incorporated under the Companies Act, has its registered office at Chennai. It has been filing its Return of Income till the financial year 2008-09, i.e. AY 2009-10. Serious disputes amongst its directors, ex-directors and certain shareholders, which arose in financial year 2008-2009, resulted in litigations against the company and its directors etc. from the financial year 2009-2010. As a consequence, the petitioner could not appoint any statutory auditor. Accounts could not be made ready for subsequent years in deference to the disputes and pending litigation. The disputes related to the petitioner's share capital. Resultantly, in the absence of audited accounts, no return of income was filed from financial year 2009-10, i.e. assessment year (AY) 2010-11 till date. The petitioner avers that despite its inability to file income tax returns, it paid advance tax through various amounts, on 23 occasions in the past 5 years or so; details thereof are furnished in a tabular chart, which reveals that a total sum of 14,98,30,000/- was paid through advance tax. The petitioner says that in addition, a total sum of 1,50,93,433/- was paid on its account, for the same period. Thus a total sum of 16,49,23,433/- has been paid towards income tax liabilities by or on behalf of the petitioner.

3. Anticipating that proceedings may be initiated by the Income Tax Department for the Petitioner's failure to file returns required under Section 139 of the Income Tax Act, the petitioner applied under Section 119(2)(b) of the Income-Tax Act on 7th July, 2016 to the Revenue seeking permission to file the Return of Income "based on the unaudited accounts or in any other manner" in view of compelling circumstances. The Revenue issued a notice of hearing dated 22.09.2016 posting the application for hearing on 17.10.2016, but that notice was subsequently cancelled. As on date, the application has not been decided. In the meanwhile, the Income Declaration Scheme, 2016 (IDS) [hereafter referred to variously as "IDS" or "the Scheme"] was notified in May 2016 by the Central Government with effect from 1st June, 2016. Thereafter, by Circular No. 25 of 2016 dated 30th June, 2016 issued by the Union Ministry of Finance issued certain clarifications, on matters relating to the IDS. Pending the disposal of the petitioner's application under Section 119(2)(b), it also made a declaration in Form 1 dated 15.09.2016 under the scheme, for all the assessment years. The income so disclosed under the scheme in terms of the unaudited accounts was disclosed as 43.55 crores. The total tax payable including interest and penalty as under the Scheme was 19.60 crores, against which advance tax paid by the petitioner and TDS deducted to its benefit was 16.49 crores, leaving the net tax payable of 3.11 crores. These details had to be mentioned in the Form 1 at serial No.11 and were duly disclosed (by the Petitioner) in its application. In this background, the petitioner received the impugned order from the Principal Commissioner of Income-Tax, (PCIT) in response to its declaration in Form 1, demanding a tax of 19.60 crores.

4. In terms of the impugned order, 25°/o of the tax liability was payable by 30.11.2016, the next 25% is payable by 31.03.2017 and the balance by 30.09.2017. Immediately on receipt of the impugned order, the petitioner submitted a letter dated 16.09.2016 to the PCIT requesting clarification that the net tax payable was 3.11 crores only. Simultaneously, the representation was also forwarded by email to the Chairman, CBDT. No response was, however, forthcoming from the respondents, on that representation. The petitioner sent reminders by email on 22.09.2016 and 29.09.2016.

5. The petitioner relies on a circular (No. 25 of 2016), which clarified that credit for TDS shall be given while computing tax liability under IDS the. However, the impugned order of the respondents disregards the said credit even though complete details of the same were stated by Petitioner in the declaration in Form 1 along with required proof. Therefore, the petitioner urges that the impugned order is in disregard of the

intent and ambit of the IDS and cannot be sustained. When TDS credit is specifically permissible, the denial of credit to advance tax paid, is illogical and illegal. The petitioner argues that there is no justification for denying the credit of advance tax paid and the TDS paid on its behalf of Petitioner in determining the tax payable under the Scheme. Any other interpretation would fall foul of the provisions of the Income Tax Act and would result in unjust enrichment of the Revenue and the petitioner assessee being subjected to double taxation without the authority of law.

6. Mr. S. Ganesh, learned senior counsel for the petitioner argued that the terms of IDS and its intent is to deal with a situation that tax would have been paid before declaration is made under Form I and the assessee is required to make a disclosure of the same in point 11 of the Form 1. Counsel states that the petitioner made complete disclosure of advance tax paid and the TDS and therefore, reasonably expects a due credit to be given for the same while computing liability under the IDS. Learned senior counsel argued that since the Revenue admitted that TDS credit is to be given to an assessee under the Scheme, there is no intelligible differentia for treating advance tax paid any differently from TDS as the nature of both taxes is that of "tax paid in advance". Thus, the interpretation advanced by the Revenue is untenable. Furthermore, the petitioner's applications and representations under Section 119(2)(b) of the Income Tax Act and the representations in respect of the impugned order are pending adjudication till date and in compliance with the covenants of the IDS, 25% of tax assessed has to be paid by 30th November, 2016 in order to avail the benefit of the Scheme. If the case of Petitioner is correct then the total balance tax liability is only 3.11 crores out which 25% will be due and payable by 30th November 2016.

7. The petitioner's senior counsel argued that, in the event there is no response with respect to the clarification sought from the CBDT by 30th November, 2016, the Petitioner, who desires to avail the benefit of the IDS will be compelled to pay 25% of the tax liability determined under the impugned order by 30 November, 2016 failing which the Petitioner shall be completely denied the benefits of the scheme. At the stage of the filing of the petition, it was argued that if the payment of 25% of the tax liability as incorrectly determined by the third respondent is made without prejudice to its rights, the Petitioner would have been unable to seek a refund of it in the event the issue were ultimately decided in its favour as the scheme makes any payment made under the Scheme as nonrefundable.

8. The Revenue's contention – to oppose the relief claim is that the Income Declaration Scheme, 2016 enacted under Chapter IX of the Finance Act, 2016 is a self-contained and complete code exclusive from the other provisions of the Income Tax Act (hereafter "the Act"). The Revenue refers to Section 183 which enables declaration of income chargeable to tax for any assessment year prior to the assessment year beginning 01.04.2017, in respect of eventualities mentioned in Sections183(a) to (c). It then refers to Section 184 which is the charging section providing for tax and surcharge at specified rates. The Revenue emphasizes and highlights Section 184(1), especially the non-obstante clause which overrides the provisions of the Act or in any Finance Act. Likewise, it is urged that Section 185 being a non-obstante clause to override other provisions of the Act or other Finance Acts, directs that one declaring undisclosed income in addition to tax and surcharge under Section 184 "shall be liable to penalty" @ 25% of such tax. Section 187 again is emphasized to say that it mandates that tax surcharge and penalty should be paid on or before the date notified by the Central Government.

9. It is submitted that the Central Government issued notification no. 32/2016 on 19.05.2016 – which was amended later on 20.07.2016. These provided for the time for payment of tax, surcharge and penalty. Similarly, reliance is placed upon Section 188 which states that income declared in accordance with Section 183 will not be included in the total income of declarant in any assessment year under the Income Tax Act if the surcharge and penalty is paid by the specified date under Section 187. To say that in such cases where

Parliament intended that the provisions of a self-contained code are to operate independently of other existing laws, learned counsel relies upon the decision of the ***Supreme Court in Hemalatha Gargya v. CIT and Anr. 2003 (253) ITR 1 (SC); Union of India v. Nitdip Textile Processors Private Limited 2011 (273) ELT 321 (SC) and that of the Madras High Court in Smt. Jayapradha vs. Chief CIT and Anr. 2006 (284) ITR 385 (Mad).***

10. The Revenue also relies upon Section 140A of the Act that mandates that self-assessment tax is payable at the time of paying returns under various provisions, including Sections 139, 142 and 148. Referring next to Section 219, it is submitted that tax credit for advance tax is no doubt given but that is in the case of "regular assessment" as defined in Section 2(40). The definition clause merely refers to assessments under Section 143(3) or default assessments under Section 144. Again, in support of this submission, reliance is placed upon ***CIT v. Shelly Products 2003 (261) ITR 367 (SC).*** The Revenue refers to and relies upon the recent ruling of this Court in ***Intercraft Ltd. v Commissioner of Income Tax 2017 (78) Taxmann.com 141 (Del)*** which dealt with the Kar Vivad Samadhan Scheme, 1998 and submits that the Court had rejected the assessee's argument that advance tax could be adjusted while determining the amounts payable under the Scheme.

11. The Revenue also resists the petitioner's contention to the extent that it drew analogy from the TDS based upon its circulars and instructions. It is pointed out that the instruction clarified that credit for TDS shall be allowed only in those cases where the relative income is declared under the Scheme and credit for the tax has not already been claimed in the return of income. The Revenue argues that by seeking stay of or credit of advance tax which was payable on estimated basis, what the petitioner is seeking to achieve is to really evade the provisions of the Income Tax Act even in respect of income for which it has not established transaction trail for corresponding receipt of income. In case the Court were to grant relief, the Revenue, it is stated, would be remedy-less.

12. Lastly it was argued that the Scheme is only an option available to the petitioner and is not mandatory. In the event the petitioner desires to obtain credit for all taxes paid under the Act, it is open to file an application for condonation of delay under Section 119(2)(b) of the Act which it has chosen to apply under. In short, submits the Revenue, if the petitioner were to be allowed to opt to the Scheme and given credit for amounts paid as advance tax, it would be allowed to achieve indirectly what it is forbidden to secure directly.

13. The relevant provision of the Scheme in the Finance Act, 2016 are as follows:

> ***"Provisions of the Scheme contained in the Finance Act, 2016***
>
> ***182. In this Scheme, unless the context otherwise requires,—***
>
> *(a) "declarant" means a person making the declaration under sub-section (1) of section 183;*
>
> *(b) "Income-tax Act" means the Income-tax Act, 1961;*
>
> *(c) all other words and expressions used herein but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.*
>
> ***Declaration of undisclosed income.***
>
> *183. (1) Subject to the provisions of this Scheme, any person may make, on or after the date of commencement of this Scheme but before a date to be notified by the Central Government in the Official Gazette, a declaration in respect of any income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year beginning on the 1st day of April, 2017-*

(a) for which he has failed to furnish a return under section 139 of the Income-tax Act;

(b) which he has failed to disclose in a return of income furnished by him under the Income-tax Act before the date of commencement of this Scheme;

(c) which has escaped assessment by reason of the omission or failure on the part of such person to furnish a return under the Income-tax Act or to disclose fully and truly all material facts necessary for the assessment or otherwise.

(2) Where the income chargeable to tax is declared in the form of investment in any asset, the fair market value of such asset as on the date of commencement of this Scheme shall be deemed to be the undisclosed income for the purposes of subsection (1).

(3) The fair market value of any asset shall be determined in such manner, as may be prescribed.

(4) No deduction in respect of any expenditure or allowance shall be allowed against the income in respect of which declaration under this section is made.

Charge of tax and surcharge.

184. (1) Notwithstanding anything contained in the Income-tax Act or in any Finance Act, the undisclosed income declared under section 183 within the time specified therein shall be chargeable to tax at the rate of thirty per cent of such undisclosed income.

(2) The amount of tax chargeable under sub-section (1) shall be increased by a surcharge, for the purposes of the Union, to be called the Krishi Kalyan Cess on tax calculated at the rate of twenty-five per cent of such tax so as to fulfill the commitment of the Government for the welfare of the farmers.

Penalty.

185 Notwithstanding anything contained in the Income-tax Act or in any Finance Act, the person making a declaration of undisclosed income shall, in addition to tax and surcharge under section 184, be liable to penalty at the rate of twenty-five per cent of such tax.

186 (1) A declaration under section 183 shall be made to the Principal Commissioner or the Commissioner and shall be in such form and be verified in such manner, as may be prescribed.

(2) The declaration shall be signed,-

(a) where the declarant is an individual, by the individual himself; where such individual is absent from India, by the individual concerned or by some person duly authorised by him in this behalf; and where the individual is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf;

(b) where the declarant is a Hindu undivided family, by the Karta, and where the Karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;

(c) where the declarant is a company, by the managing director thereof, or where for any unavoidable reason such managing director is not able to sign the declaration or where there is no managing director, by any director thereof;

(d) where the declarant is a firm, by the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign the declaration, or where there is no managing

partner as such, by any partner thereof, not being a minor;

(e) where the declarant is any other association, by any member of the association or the principal officer thereof; and

(f) where the declarant is any other person, by that person or by some other person competent to act on his behalf.

(3) Any person, who has made a declaration under sub-section (1) of section 183 in respect of his income or as a representative assessee in respect of the income of any other person, shall not be entitled to make any other declaration, under that sub-section in respect of his income or the income of such other person, and any such other declaration, if made, shall be void.

Time for payment of tax.

187 (1) The tax and surcharge payable under section 184 and penalty payable under section 185 in respect of the undisclosed income, shall be paid on or before a date to be notified by the Central Government in the Official Gazette.

(2) The declarant shall file the proof of payment of tax, surcharge and penalty on or before the date notified under subsection (1), with the Principal Commissioner or the Commissioner, as the case may be, before whom the declaration under section 183 was made.

(3) If the declarant fails to pay the tax, surcharge and penalty in respect of the declaration made under section 183 on or before the date specified under sub-section (1), the declaration filed by him shall be deemed never to have been made under this Scheme.

Undisclosed income declared not to be included in total income.

188 The amount of undisclosed income declared in accordance with section 183 shall not be included in the total income of the declarant for any assessment year under the Income-tax Act, if the declarant makes the payment of tax and surcharge referred to in section 184 and the penalty referred to in section 185, by the date specified under sub-section (1) of section 187.

Undisclosed income declared not to affect finality of completed assessments.

189 A declarant under this Scheme shall not be entitled, in respect of undisclosed income declared or any amount of tax and surcharge paid thereon, to re-open any assessment or reassessment made under the Income-tax Act or the Wealth-tax Act, 1957 (27 of 1957), or claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment.

XXXXXX XXXXXX XXXXXX

192. Notwithstanding anything contained in any other law for the time being in force, nothing contained in any declaration made under section 183 shall be admissible in evidence against the declarant for the purpose of any proceeding relating to imposition of penalty, other than the penalty leviable under section 185, or for the purposes of prosecution under the Income-tax Act or the Wealth-tax Act, 1957."

The avowed objective of the Scheme is to enable assessees who did not file their returns, an opportunity to do so. In the words of the Supreme Court in various decisions (primarily relied upon by the Revenue) such schemes are tax composition schemes or tax litigation settlement schemes, by their nature and effect.

14. A salient- and perhaps most distinguishing feature which sets apart the present Scheme from the Kar Vivad Samadhan Scheme,1998 [hereafter “the 1998 Scheme”] is that there is no express bar to inclusion of previously paid amounts, or tax arrears. In the 1998 scheme, to the extent it provided for direct tax settlement, the following condition was stipulated:

> "(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;"

Likewise, Explanation to Section 2 (m) of the Finance Act (No. 2) of 1998, which introduced the scheme (of 1998) provided that:

> *"**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 under section 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;"*
>
> *The above feature alone, in the opinion of this court is sufficient to distinguish the ratio of the decisions cited by the Revenue; there is no provision similar to Section 2 (m) or the Explanation thereto, of the 1998 Scheme, that debars giving adjustment or credits to amounts paid in the past in respect of the period or assessment years sought to be covered by the declaration under the IDS. That apart, the decisions also are in the context of entirely different facts. **Nitdip (supra)** was in the context of a challenge to the statutory scheme on the ground of discrimination; the court had no occasion to deal with past paid amounts. **Jayapradha (supra)** was a case where the assessee was facing a pending prosecution when the scheme was brought into force; it contained an express bar preventing such accused from the benefits under it. **Hemalatha (supra)** no doubt states that those who seek benefits under the scheme such as the present one are strictly bound to comply with its terms.*

15. Does the expression (the) "tax and surcharge payable under section 184 and penalty payable under section 185 in respect of the undisclosed income, shall be paid on or before a date to be notified by the Central Government in the Official Gazette" mean only amounts paid immediately prior to the declaration count, thus precluding any amounts paid for the relative or corresponding period, or does it include all such payments? Thereby hangs a tale. In the opinion of this court, there is no bar, express or implied, which precludes the reckoning or taking into account of previously paid amounts which have nexus with the periods sought to be covered by the scheme.

16. Granted, such schemes are to be seen as containing special dispensations, etc and interpreted in a "stand alone" or sui generis manner. Equally, those who seek its benefits are to go by it. But there should be something which provides a clear insight that Parliament wished that such past amounts are not to be reckoned at all, for purposes of payments. All that the words of the statute enjoin are that the tax and surcharge amounts under the scheme "shall be paid on or before a date to be notified". These words necessarily refer to all payments. They are not limited in their meaning to only what is paid immediately before, or in the proximity of the declaration filed.

17. The provision of Section 182 itself states that for the purposes of the IDS, undefined terms and expressions shall be in terms of the Income Tax Act, by incorporating those into the Finance Act and the scheme. "Undisclosed income" which is the foundational provision to be invoked by declarants, thus is

based on the definition under the Income Tax Act (Section 132 (1) (c)) the provision reading as to include "money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property [which has not been, or would not be, disclosed] for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property)". Undisclosed income is also defined in Section 158B (for the purposes of the chapter in which that provision is located) and Section 271 (for the purposes of that section). That apart, the only bar discernable under the scheme in question is evident from Section 189 is that no person declaring under the Act shall not be entitled to "claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment." Also, under that provision the person so declaring shall not be entitled to " to re-open any assessment or reassessment made under the Income-tax Act or the Wealth-tax Act, 1957 (27 of 1957)". Therefore, the court is of the opinion that there is no bar for an assessee or declarant to claim credit of advance tax amounts paid previously relative to the assessment years or periods for which it seeks benefits under the scheme. This interpretation is in no way inconsonant with the ratio of the Supreme Court's rulings, relied upon by the Revenue.

18. The decision in Shelly (supra) is decisive that advance tax is a mode of tax recovery, which the assessee is bound to pay under the scheme of the Income Tax Act. The court, after considering Section 140A, Section 4, Section 139 and Section 240 of the Income tax Act, observed as follows:

> *"Section 4 of the Act creates the charge and provides inter alia for payment of tax in advance or deduction of tax at source. The Act provides for the manner in which advance tax is to be paid and penalises any assessee who makes a default or delays payment thereof. Similarly the deduction of tax at source is also provided for in the Act and failure to comply with the provisions attracts the penal provisions against the person responsible for making the payment. It is, therefore, quite apparent that the Act itself provides for payment of tax in this manner by the assessee. The Act also enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self-assessment and to compute the tax payable on such income and to pay the same in the manner provided by the Act. Thus the filing of return and the payment of tax thereon computed at the prescribed rates amounts to an admission of tax liability which the assessee admits to have incurred in accordance with the provisions of the Finance Act and the Income Tax Act. Both the quantum of tax payable and its mode of recovery are authorized by law. The liability to pay income tax chargeable under Section 4 (1) of the Act thus, does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. The assessee is himself required to compute his total income and pay the income tax thereon which involves a process of self-assessment."*

19. Furthermore, the court also is of the opinion that the clarification by the Revenue, that credit for TDS paid, can be enjoyed for availing the benefit (under the scheme in question) precludes any meaningful argument by it that advance tax payments relative for the assessment years covered by the declaration cannot be taken into consideration as payments under and for purposes of availing the benefits of the scheme.

20. In the light of the above findings, the petition has to succeed. Accordingly a direction is issued to the respondents to process the petitioner’s application under the IDS, 2016, and give adjustment or credit to the amounts paid as advance tax and TDS to its account, under the Income Tax Act, and accept the balance amounts (after also giving credit to the amounts paid during the interregnum, pursuant to the

interim order of this court dated 29th November, 2016). The respondents shall ensure that the petitioner's payments and declarations are processed in accordance with the IDS, 2016. The writ petition is allowed in these terms; there shall be no order as to costs.

Issue judgment dasti under signatures of Court Master.