

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No. 3875 of 1999
Date of decision: 07.07.2017**

**Shri Vijay Kumar Jain, Development Officer, 2 Ranbir Marg,
Patiala**

.....Petitioner

Vs.

**Commissioner of Income Tax, Patiala, C/o Income Tax Office,
Patiala**

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL**

Present: Mr. Divya Suri, Advocate for the petitioner.
Mr. Z.S.Klar, Senior Standing Counsel for the revenue.

Ajay Kumar Mittal,J.

1. The petitioner prays for quashing the order dated 22.2.1999, Annexure P.1 in respect of demand of ₹ 61,319/- raised by withdrawal of interest under Section 244A of the Income Tax Act, 1961 (in short, “the Act”) granted to him on refund of tax in pursuance of the appeal decided in his favour by the Commissioner of Income Tax (Appeals) Patiala [CIT(A)] whereas the appeal of the department is pending before the Income Tax Appellate Tribunal (in short, “the Tribunal”). Further prayer has been made for a direction to the respondent to issue a certificate under Section 90(2) of the Kar Vivad Samadhan Scheme, 1998 (in short,

“the KVSS, 1998”) by recovery of the amount of ₹ 1,70,733/- only against a total demand of ₹ 2,33,052/- out of which ₹ 1,70,733/- is due as per the scheme which has already been paid by the petitioner. A direction has also been sought to the respondent to keep all actions under the scheme pending and not to make any declaration invalid under KVSS 1998 till the disposal of the present writ petition.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner retired as Development Officer of the Life Insurance Corporation of India in June 1994. He was a regular income tax assessee. The assessments were made for various years regularly whereas for the assessment years 1988-89 to 1995-96, the assessments were made by the assessing authority raising various demands after making additions/adjustments in the declared income on account of expenses incurred in respect of incentive bonus and additional conveyance allowance received by the petitioner. The income was enhanced against which the petitioner went in appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] who had given necessary relief and decided the said issues in favour of the petitioner and in pursuance of the same for the assessment years in question, the tax amount recovered by the income tax department on account of the said additions alongwith interest under Section 244A of the Act was refunded. Against the said orders, the income tax department filed an appeal before the Tribunal for each assessment year which is pending for adjudication till date. According to the petitioner, after the filing of the appeal by the department before the Tribunal, there was no tax due from him on account of the said assessments. In the meantime, KVSS 1998 was introduced by the Government of India through Finance

(No.2) Act, 1998 passed by the Parliament to remain valid from 1.9.1998 to 31.12.1998 and later on extended upto 31.1.1999 wherein any dispute pending in respect of direct or indirect taxes before an appellate authority whether by the assessee or by the department could be resolved by asking payment of tax on disputed income at a prescribed rate of tax. Initially, this scheme was not made available to cases where the appeals had been filed by the department and it could only be availed by the assessees who were in appeals. After a decision by the Delhi High Court in ***All India Federation of Tax Practitioners vs. Union of India***, (1999) 236 ITR 1 (Del.), one could make declaration for settlement of its dues in full and final settlement even in those cases where appeals had been filed by the department and hence the petitioner opted to file the declaration under the said scheme though the department was in appeal so that his tax disputes could be settled. According to the petitioner, under the said scheme, the tax was to be paid in respect of the disputed income at the rate of 30% of the total disputed income and no interest or penalty levied was to be paid which was waived and if the amount due was on account of interest charged or penalty levied, only then in such cases, 50% of the total amount was to be paid. The other condition was that the said demands should have been raised before 31.3.1998 and it was calculated on the basis of amount due as on the date of making the declaration. The assessee also opted to pay the tax even though the appeal had been decided in his favour. The petitioner also filed declaration before the Income Tax Commissioner, Patiala in respect of the departmental appeal and as per section 90(1) of KVSS 1998 within 60 days of the receipt of the declaration under section 88 of the said scheme determined the amount of tax payable under the scheme by order Annexure P.1 dated

22.2.1999. The petitioner was to pay it within 30 days of the passing of the order upto 23.3.1999 and certificate of full and final settlement was finally to be issued by the authority. The respondent in the case of the petitioner issued a certificate showing amount payable at ₹ 2,32,052/- which includes the amount of ₹ 61,319/- as payable under the scheme on account of interest withdrawn which had already been allowed under Section 244A of the Act as refund. According to the petitioner, under the scheme, it was only the tax in respect of the disputed income which was to be paid at the rate of 30% and no other amount if due on or before 31.3.1998 shall be payable and hence raising of the demand by withdrawal of interest given on refund under Section 244-A of the Act in consequence of appeal effect to the extent of ₹ 61319/- had not been decided in accordance with KVSS 1998. The said amount was neither legally created nor payable under Section 244A(3) of the Act and, therefore, it could not be taken or raised under the KVSS scheme. The last date of making the payment was 23/24th of March 1999 and hence the petitioner had no other alternative except to approach this court through the present writ petition. The petitioner has made the payment of ₹ 1,70,733/- which was the tax due in accordance with the said scheme and for the balance amount, the petitioner has filed the instant writ petition.

3. A written statement has been filed on behalf of the respondent by Commissioner of Income Tax, Patiala wherein it has been inter alia stated that the stand taken by the department on merits of the controversy regarding taxability of incentive bonus stands accepted by this court in a similar case reported in (1999) 235 ITR 679 in the case of ***B.M.Parmar Development Officer, Life Insurance Corporation of India***

vs. CIT. As regards the KVSS 1998, it has been submitted that the scheme was not initially made available to the cases where appeals had been filed by the department and it was limited to those cases against which the assessee had preferred an appeal. However, on receipt of decision of the Delhi High Court in the case of *All India Federation of Tax practitioners' case (supra)*, which was accepted by the department, the scheme of tax arrear was modified to cover tax, penalty or interest under dispute in departmental appeal and the pending departmental appeals were made eligible to be covered under the Scheme provided the original demand had been determined on or before 31.3.1998. In such cases, the entire income under dispute constituted disputed income and the tax payable was required to be worked out on that income at the prescribed percentage. Since the petitioner wanted to settle the dispute by paying taxes on the income disputed in second appeal, the interest given under section 244A of the Act was not to be allowed on such taxes refunded to him while giving effect to the first appellate order and therefore, it was rightly withdrawn.

4. The primary question that arises for consideration is whether the interest given under Section 244A of the Act at the time of refund in pursuance to order of CIT(A), was required to be paid back by the petitioner in case his application under KVSS, 1998 for settlement of dispute was accepted.

5. We have heard learned counsel for the parties and do not find any merit in the writ petition.

6. Admittedly, the petitioner filed a declaration under Section 88 of the Finance (No.2) Act, 1998 which was received on 28.01.1999 in the office of the Designated Authority. In exercise of the powers

conferred by Sub Section 1 of Section 90 of the Finance (No.2) Act, 1998, the Designated Authority after consideration of the relevant material determined the following amount payable by the petitioner towards the full and final settlement of its tax arrears covered by the above said declaration under the KVSS, 1998:-

S.No.	Direct Tax enactment	A.Y.	Tax Arrears	Amount payable
1.	I.T. Act,1961	88-89	----	Rs.11086
2.	---do---	89-90	---- Intt. u/s 244A withdrawn	Rs.21464 Rs.27300 Rs. 48764
3.	---do---	90-91	---- Intt. u/s.244A withdrawn	Rs. 32351 Rs. 15065 Rs. 47416
4.	---do---	91-92	---- Intt. u/s 244A withdrawn	Rs. 32553 Rs. 7833 Rs. 40386
5.	---do---	92-93	---- Intt. u/s 244A withdrawn	Rs. 41310 Rs. 5754 Rs. 47064
6.	---do---	94-95	---- Intt. u/s 244A withdrawn	Rs. 13968 Rs. 1917 Rs. 15885
7.	---do---	95-96	---- Intt. u/s 244A withdrawn	Rs. 18001 Rs. 3450 Rs. 21451

The petitioner was directed to make the payment of sum payable within 30 days from the date of the certificate.

7. It would be advantageous to refer to certain relevant provisions of the KVSS, 1998 Scheme. The definition of “tax arrear” under the KVSS, 1998 as enumerated therein reads as under:-

“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.”

Section 88 of the KVSS, 1998 reads as under:-

Settlement of tax payable:

“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 dispute 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.
- V. Where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search and seizure proceedings under section 132 or

Section 132A of the Income-Tax Act-

(A) In the case of a declaration, being a company or a firm, at the rate of forty-five per cent of the disputed income,

(B) In the case of a declarant, being a person other than a company or a firm, at the rate of forty per cent of the disputed income.”

Section 90 of the KVSS, 1998 reads as under:-

Time and manner of payment of tax arrear.

90. (1) Within sixty days from the date of receipt of the declaration under section 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 particulars 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) xxxxxxxx.....”

8. A perusal of above provisions shows that “tax arrears”

means the amount of tax, penalty or interest determined on or before 31st of March 1998, under the 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. As per Section 88 of the KVSS 1998, any person who makes on or after first day of September, 1998 but on or before 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 the Scheme by the declarant shall be determined at the rates specified there under. Section 90 of the KVSS, 1998 provides that within sixty days from the date of the declaration under Section 88, the designated authority shall determine the amount payable in accordance with the Scheme and grant a certificate.

9. Adverting to the facts of the present case, the petitioner made a declaration for the assessment years 1988-89 to 1995-96 before the respondent vide application dated 28.01.1999. The scheme in question was initially not available to the cases where appeals had been filed by the department but after the decision rendered by the Delhi High Court in *All India Federation of Tax practitioners'* case (supra) the scope of tax arrear was modified to cover tax, penalty or interest under dispute in departmental appeal and the pending departmental appeals were thus made eligible to be covered under the scheme in question provided the original demand had been determined on or before 31.03.1998. On receipt of declaration by the petitioner, the respondent issued a certificate of intimation under Section 90 (1) of the Finance

(No.2) Act, 1998 by considering the income under dispute in second appeal as disputed income. The amount of tax was worked out on that income at the prescribed rate. On that basis, the tax payable under the KVSS 1998 was determined at ₹ 1,70,733/- payable by the applicant-assessee in respect of assessment years 1988-89 to 1995-96. Besides, the interest of ₹ 61,319/- allowed under Section 244A of the Act on account of order of CIT(A), in pursuance to which the refund had been allowed to the assessee, was withdrawn.

10. In those cases, where the department was in appeal, the tax arrears were to be calculated by taking the amount which was subject matter of appeal before the appellate authority. However, wherever refund of tax in pursuance to any order favourable to the assessee alongwith the interest under Section 244A of the Act had been made, the assessee could not take benefit of the interest and retain the same. It could not be successfully pleaded by the assessee that he was legally entitled to keep the interest amount. In other words, the entire income under dispute in appeal constituted the disputed income on which tax was to be calculated and any interest allowed under Section 244-A of the Act could not be allowed to be retained by the assessee. Further, since no tax arrear was pending against the petitioner on the date of filing the declaration and no such demand was created on that date, no separate order under Section 244-A(3) of the Act was required to be issued. Further in **B.M. Parmar's** case (supra), it has been held by this Court that the incentive bonus is assessable under the head "salary" and not under head "profits and gains of business or profession". The upshot of the above discussion is that the petitioner is not entitled to claim benefit of interest of ₹ 61,319/- paid to him under Section 244A of the Act while

availing the benefit of KVSS 1998 and thus it has been rightly concluded by the respondent-authority that the interest cannot be refunded which was withdrawn. The demand raised by the respondent by including the said amount of ₹ 61,319/- thus cannot be faulted.

11. Learned counsel for the petitioner has not been able to point out any error in the view taken by the respondent authority. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

July 07, 2017
'gs'

(Amit Rawal)
Judge

Whether speaking/reasoned
Whether reportable

Yes
Yes