IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 774 OF 1999

Shri Mavji Devji Nisar .. Petitioner

v/s.

Shibaji Dash & Ors. .. Respondents

Mr. K. Gopal for the petitioner

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA J.J.

DATED : 31st JANUARY, 2018.

P.C. :

1. This petition under Article 226 of the Constitution of India seeks the following reliefs :-

(a) Certificate dated 19th February, 1999 issued by the respondent no.1 Commissioner of Income Tax, under Section 90(1) of the *Kar Vivad Samadhan Scheme*, 1998 introduced by Sections 86 to 98 of the Finance Act (No.2) Act, 1998 (Kar Vivad Scheme) be quashed and set aside with a direction to issue a fresh Certificate under Section 90(1) of the Kar Vivad Scheme determining the amount payable after completely waiving the interest payable the Income Tax Act, 1961 (the Act). or

(b) In the alternative to (a) above, the respondent no.1

Commissioner of Income Tax be directed to modify / amend the Certificate dated 19th February, 1999 issued under Section 90(1) of the Kar Vivad Scheme after completely waiving the interest payable under the Act.

2. This petition was admitted on 30th March, 1999 at which time the following order was passed :-

> *"Rule, Returnable after six weeks. Respondents waives service.*
>
> *The Counsel for the petitioner stated that in view of the fact that the time for payment was expiring, the petitioner has deposited the amount demanded by the respondents.*
>
> *He, however wants it to be made clear that the payment shall be subject to the outcome of this petition.*
>
> *We clarify accordingly."*

3. This petition was called out and heard on 22nd January, 2018. At that time, the respondents were not present. As the hearing was not complete, the petition stood adjourned from time to time. At none of the dates or even today when the petition was called out, none appeared for the respondents. However, the respondents have filed an affidavit in reply dated 22nd July, 1999 of Mr. Shivaji Dash – respondent no.1 herein opposing grant of any relief to the petitioner. Therefore,

we proceeded to decide the petition in the absence of the Revenue being represented but after taking into consideration the affidavit-in-reply dated 22nd July, 1999 filed on behalf of the respondent.

4. The petitioner is an individual assessed to tax under the Act. For the Assessment Year 1984-85 the petitioner was assessed to tax by an assessment order dated 3rd March, 1993 under Section 143(3) r/w 148 of the Act to a total income of Rs.7,20,540/- as against the returned income of Rs.10,790/-.

5. Being aggrieved by the order dated 3rd March, 1993, the petitioner filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 27th December, 1993, the petitioner's appeal was partly allowed determining the petitioner's income at Rs.60,000/-. Consequent to the above, on 18th January, 1994, the Assessing Officer passed an order giving effect to the order dated 27th December, 1993 of the Commissioner of Income Tax. This resulted in the petitioner being obliged to pay the following to the Revenue :-

Particulars	*Amount*
Tax	*2,31,087/-*
Interest	*3,10,816/-*
Total	*5,41,903/-*

6. In pursuance of the above demand dated 18th January, 1994, the petitioner paid during the period January to September, 1995, a total tax for Rs.2,31,000/- out of total demanded tax of Rs. 2,31,087/- as determined, consequent to the order dated 27th December, 1993 of the CIT(A). Further, in the meantime, the petitioner also filed an appeal on 31st March, 1994 from the order dated 27th December, 1993 of the CIT(A) to the Income Tax Appellate Tribunal (Tribunal). The respondent – Revenue being aggrieved by the order dated 27th December, 1993 of the CIT(A) also filed an appeal to the extent it deleted income which had been added by the Assessing Officer to the Tribunal.

7. During the pendency of the petitioner's and the Revenue's appeals to the Tribunal, the Kar Vivad Scheme was introduced as a part of the Finance No.2 Act, 1998. This Kar Vivad Scheme sought to provide a voluntary settlement of outstanding tax dues as on 31st March, 1998 *inter alia* under the Act with the objective of settling the disputes between the assessee and the Revenue. This by offering to the assessee's who come forward for settlement of disputes waiver of taxes, interest and penalty, besides providing immunity from prosecution. This on the Assessee withdrawing its appeals and paying part of the

arrears of the taxes. The scheme provided that where taxes along with interest and penalty are payable on the assessee opting for the scheme, then on the payment of the arrears of the taxes in terms of the scheme, would result in complete waiver of interest and penalty. However, where only interest and / or penalty is the outstanding due payable under the Act, then, on partial payment of the same, the waiver would be available to the rest of the amount of interest and / or penalty. The above Kar Vivad Scheme come into effect on 1st September, 1998 and was open for availment by any assessee till 31st December, 1998. Thereafter, the time to avail of the scheme was extended from 31st December, 1998 up to 31st January, 1999.

8. On 22nd December, 1998, the petitioner filed his declaration under the Kar Vivad Scheme seeking to avail the benefit of waiver of interest on payment of the tax arrears, as provided thereunder i.e. the amounts payable under the assessment order as modified by the order of the CIT(A) and which were subject matter of appeal filed by him before the Tribunal. The above declaration pointed out that there was an arrears of tax to the extent of Rs.87/- outstanding as on 31st March, 1998. Thus, the petitioner sought to pay the tax arrears at 40% of the disputed income. The disputed income was computed under the Kar

Vivad Scheme on the basis of the tax arrears outstanding as on 31st March, 2099. On payment of the tax at 40% of disputed income i.e. Rs.52/- sought complete waiver of interest.

9. Pending the consideration of the petitioner's declaration dated 22nd December, 1998 under the Kar Vivad Scheme, the petitioner learnt of the Delhi High Court decision in the case of ***All India Federation of Tax Practitioners Vs. Union of India, 236 ITR 01.*** In the above case, the Hon'ble Delhi High Court while dealing with the constitutional validity of the Kar Vivad Scheme, partly allowed the petition by observing as under :-

> *To sum up, our conclusions are: (a) The proviso to section 92 is ultra vires article 14 of the Constitution as it results in creating two artificial classes between the same class of assessees, i.e., the litigating assessees in arrears ; (2) the definition of "tax arrears" in clause (m) of section 87 should be so read as to mean the amount of tax, penalty or interest determined by any competent authority on or before March 31, 1998, though such determination might have been set aside at a later stage, if such set ting aside has not been accepted by the Department and continues to remain under challenge before a court or Tribunal. (3) The rest of the Scheme is intra vires the Constitution."*
>
> *(emphasis supplied)*

10. In view of the decision of the Delhi High Court in *All India*

Federation of Tax Practitioners (supra) the definition of tax arrears as provided under the Kar Vivad Scheme was widened. It is now to be read as that amount of tax, penalty or interest determined by the competent authority on or before 31st March, 1998 and which is a subject matter of challenge by the Revenue either before the Tribunal or Court and the tax is unpaid, then, the benefit of Kar Vivad Scheme would be available to an assessee even in respect of the tax arrears involved in the pending appeals of the Revenue. The aforesaid decision of the Delhi High Court in *All India Federation of Tax Practitioners (supra)* was accepted by the Revenue and a Circular dated 17th December, 1998 to that effect was issued by the Central Board of Direct Taxes (CBDT).

11. On learning of the above, on 22nd January, 1999, the petitioner filed a revised declaration under the Kar Vivad Scheme seeking to review the earlier declaration after taking into account the tax arrears attributable to the pending appeals filed by the Department. The revised declaration was in effect a consolidated declaration taking into account the pending appeals of both the assessee as well as the Revenue in respect of which the tax was not paid. In its revised declaration, the arrears of tax outstanding on 31st March, 1998 was

determined at Rs.2,31,788/- and the arrears of interest was Rs.6,32,475/-. In terms of the Kar Vivad Scheme, the petitioner paid the tax at 40% on the disputed income of Rs.1,37,356/- and sought complete waiver of interest in terms of the Kar Vivad Scheme.

12. Thereafter, on 19th February, 1999, the respondent no.1 issued Certificate under Section 90(1) of the Kar Vivad Scheme settling the tax dispute between the petitioner and the Revenue. The Certificate dated 19th February, 1999 after referring to the petitioner's declaration dated 22nd December, 1998, appears to be a common Certificate disposing of the petitioner's two declarations dated 22nd December, 1998 and revised declaration dated 22nd January, 1998. The Certificate dated 19th February, 1999 works out the tax arrears for Assessment Year 1984-85 at interest of Rs.6,58,152/- as reflected in the declaration dated 22nd December, 1998 and determines the settlement of the interest payable at 50% thereof i.e. Rs.3,29,071/-. It completely ignores the amount of Rs.87/- of income tax which was unpaid on the date of filing the declaration. It works out the income tax payable in the Revenue's pending appeal at Rs.1,37,356/- (40% of the disputed income on the basis of the tax arrears of Rs.2,31,655/-). In view of the aforesaid figure being lost sight of in the Certificate, the petitioner was called

upon to pay 50% of the disputed interest of Rs.6,58,000/-. It does not also grant waiver of interest despite holding that the petitioner is liable to pay 40% of the disputed income i.e. Rs.1,37,064/- in case of pending appeals of the Revenue (Declaration dated 22nd January, 1999).

13. Therefore, the petitioner by his letter dated 5th March, 1999 addressed to the respondent no.1 – the Commissioner of Income Tax, invited his attention to the fact that the tax in arrears as reflected in the declaration dated 22nd December, 1998 was Rs.87/- while the tax arrears in the declaration dated 22nd January, 1999 was Rs.2,31,655/-. In the above view, it was submitted that there should have been a complete waiver of interest payable by the petitioner. The petitioner further alluded to the fact that the Revenue had adjusted the tax arrears of Rs.87/- with the refund of Rs.10,800/- payable to him for the A.Y. 1997-98. This inspite of the petitioner's objection to the same by letter dated 21st September, 1998 wherein it was pointed out that they are in the process of filing a declaration under Kar Vivad Scheme. Therefore, no adjustment of the refund of Rs.10,800/- against the outstanding demand of Rs.87/- was payable. Thus, sought clarification / amendment to the Certificate dated 19th February, 1999.

14. The respondent no.1 by letter dated 10th March, 1999 invited the petitioner's attention to the CBDT instructions dated 17th December, 1998 post the Delhi High Court decision in *All India Federation of Tax Practitioners (supra)*. The above instruction had clarified that an assessee seeking to avail of the benefit of Kar Vivad Scheme in respect of his pending appeals as well as the Revenue's pending appeals, would have been to file two separate declarations in respect of each of the two pending appeals. Therefore, the communication dated 10th March, 1999 stated that no clarification / modification of the Certificate dated 19th February, 1999 is called for. However, it must be noted that the above communication did not address the issue of tax arrears of Rs.87/- as declared in the declaration dated 22nd December, 1998.

15. This non correction / modification of the Certificate dated 19th February, 1999 by the respondent no.1 led to the filing of this petition. At the time of admission of this petition, it was made clear that although the payment in terms of declaration had been made, it is subject to the result of the petition.

16. The affidavit dated 22nd July, 1999 of the respondent no.1 in reply to the petition was filed. This affidavit states that the tax arrears

of Rs.87/- which was unpaid as on 31st March, 1998 had been adjusted against the refund of Rs.10,800/- due to the petitioner for the Assessment Year 1997-98. In the above view, the affidavit states that there was no arrears of tax which would enable the petitioner to secure complete waiver of interest under the Kar Vivad Scheme. However, the affidavit is silent on the date when the above adjustment of the pending tax arrears of Rs.87/- was made against the refund of Rs.10,800/-.

17. Mr. Gopal, learned Counsel appearing for the petitioner, in support of the petition, submits as under :-

(a) The Certificate dated 19th February, 1999 under the Kar Vivad Scheme as issued to the petitioner is a consolidated Certificate in respect of the two declarations dated 22nd December, 1998 and 22nd January, 1999 filed by the petitioner. Therefore, the contention of the Revenue as stated in the affidavit that there should be two separate declarations in respect of each of the pending appeals (Assessee's and Revenue's pending appeals), falls to the ground. If it was so then, in that case, it must follow that two separate Certificates ought to have been issued, one relating to the Department's appeal and the other relating to the tax arrears with regard to the assessee's appeal. This has not been done. It must follow that the Certificate has been issued on the basis of the revised declaration dated 22nd January, 1999 filed by the petitioner. Admittedly, in terms of that declaration, there is a tax arrears of Rs.2,31,000/- and 40% tax on the disputed income comes to Rs.1,37,356/-. This would have warranted a complete waiver of interest.

(b) In the alternative, even if the two declarations are considered to be separate in terms of the CBDT's instruction dated 17th December, 1998, then, the first declaration made on 22nd December, 1998 declares a tax arrears of Rs.87/- as on 31st March, 1998. This would result in tax at 40% on the disputed income payable under the Kar Vivad Scheme, resulting in the complete waiver with regard to payment of interest.

(c) The adjustment of the arrears of tax of Rs.87/- with the refund available to the petitioner of Rs.10,800/- has not been adjudicated upon by any speaking order. The petitioner has not till date received any order adjusting the arrears with the tax demand. In support, he placed reliance on the decision of this Court in ***Hindustan Uniliver Ltd. Vs. Deputy Commissioner of Income Tax & Ors. 377 ITR 281***.

18. We have considered the submission made on behalf of the petitioner. As the respondents are not represented, we have perused

the affidavit in reply dated 22nd July, 1999 filed by the respondent no.1. We shall first take up the alternative submission on behalf of the petitioner. For the purposes of this petition, we proceed on the basis that in terms of the CBDT instructions dated 17th December, 1998, two separate declarations under the Kar Vivad Scheme, one relating to the pending appeals of the Revenue and the other relating to the pending appeals of the assessee have to be filed by an assessee wanting to take the benefit of the scheme and both the declarations are to be individually disposed of. We find that the action of the Department of respondent no.1 in issuing only one Certificate in respect of two separate applications filed by the petitioner, would itself evidence the fact that the Department has not strictly been following directions contained in letter dated 17th December, 1998 to all the Chief Commissioners of Income Tax. The necessity of having issuing two separate Certificates when the instructions of the CBDT requires two separate declarations to be filed, would make it open for the assessee to comply with the conditions within a period of 30 days, in respect of any of the one of the two declarations filed by him. Once the consolidated Certificate has been issued, then, the option of seeking to settle one of the two declarations filed by the assessee is no longer available.

19. In any view of the matter, the above larger issue need not be addressed for the purpose of this petition. We proceed on the basis that it is open to dispose of two declarations by one Certificate. Nevertheless, we find that the declaration dated 22nd December, 1998 did mention the tax arrears of Rs.87/- as on the date of filing the declaration. We find that there is nothing on record to indicate that the tax arrears of Rs.87/- have been adjusted with the tax refund of Rs.10,800/- for the Assessment Year 1997-98. Mr. Gopal, learned Counsel for the petitioner has, on instructions, stated before us that till date the petitioner has not received any order passed under Section 245 of the Act by the authorities under the Act adjusting the tax arrears of Rs.87/- payable for Assessment Year 1984-85 with the refund of Rs.10,800/-. We also note that in the communication dated 10th March, 1998 in response to the petitioner's application dated 5th March, 1999 seeking modification of the Certificate dated 19th February, 1999 issued the Revenue did not mention the above adjustment has taken place. For the first time, we find that in the affidavit dated 22nd July, 1999 of the respondent no.1 such a claim has been made. Moreover, it merely states that the tax arrears of Rs.87/- has been adjusted against the refund of Rs.10,800/- due to the petitioner. However, it is completely silent as to the date when this adjustment took place nor has the

affidavit-in-reply annexed to it the order passed under Section 245 of the Act which made the adjustment. In view of the affidavit being silent on the date on which the adjustment was done, an adverse inference must be drawn that the adjustment, if any, had not taken place before filing of the declaration on 22nd December, 1998. Thus, on the date when the declaration was filed on 22nd December, 1998 tax arrears of Rs.87/- was payable by the petitioner to the Revenue and 40% of the disputed tax amount which would be Rs.52/- which would be payable under the Scheme. Thus, if the amount of Rs.52/- is paid, it would resulted in a complete waiver of the interest payable by the petitioner.

20. In the above circumstances, the collection of amounts on account of interest consequent to the Certificate dated 19th February, 1999 is outside the Kar Vivad Scheme and retention thereof by the State is without authority of law.

21. In the above view, it would be appropriate to direct the respondent no.1 to modify / amend its Certificate dated 19th February, 1999 under Kar Vivad Scheme and grant a complete waiver of interest payable under the Act in view of there being tax arrears on disputed

income as on the date of filing of the declaration.

22. Accordingly, the petition is allowed in terms of prayer clause (b1). The respondent no.1 is directed to amend the Certificate dated 19th February, 1999 issued under Section 90(1) of the Kar Vivad Scheme to grant complete waiver on payment of interest.

23. At the time of admission, the petitioner had informed the Court that they had deposited the entire amount in terms of the Certificate dated 19th February, 1999 and subject to the result of this petition. The petitioner does not seek any interest. Accordingly, the respondents are directed to refund the amount of Rs.3,29,071/- collected from the petitioner.

24. The Petition is disposed of in above terms. No order as to costs.

(RIYAZ I. CHAGLA, J.) **(M.S. SANKLECHA, J.)**