Sharayu Khot.

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

WRIT PETITION NO. 859 OF 1999

M/s. Kapurchand Jethaji & Co. ...Petitioner

Versus

The Commissioner of Income Tax & Anr. ...Respondents

Mr. B.M. Chatterjee, Senior Counsel, i/by S.V. Pikale & Co., for the Petitioner.

CORAM : M.S. SANKLECHA & RIYAZ I. CHAGLA, JJ.

DATE : 7 February 2018

ORDER :

1. None appears for Respondents. This inspite of the fact that at the time of admission of this Petition on 28 April 1999, it had waived service.

2. This Petition, under Article 226 of the Constitution of India, challenges orders dated 14 January 1999 and 19 February 1999 passed by the Respondent No. 1-Commissioner of Income Tax. Both the impugned orders dated 14 January 1999 and 19 February 1999 are passed by Respondent No. 1 also as the Designated Authority under the Kar Vivad Samadhan Scheme ("***the Scheme***" for short) introduced as a part of the Finance (Article No. 2) Act, 1998.

3. On 29 November 1998, the Petitioner filed a declaration under Section 88 of the Scheme seeking to settle the tax arrears pending as on 31 March 1998 for the assessment year 1983-84 to 1986-87. The impugned order dated 14 January 1999 passed by the Respondent No. 1 rejected the declaration dated 29 November 1998 on the ground that there is no pending Appeal, Writ Petition, Revision or Reference pending for assessment year 1983-84 to 1987-88 for which the declaration was made. Thus, could not be entertained as there is no pending dispute.

4. Consequent to the above, the Petitioner filed on 29 January 1999 a Reference Application under Section 256(1) of Income Tax Act, 1961 ("***the Act***" for short) to the Income Tax Appellate Tribunal in respect of the order dated 1 April 1998 of the Tribunal. Immediately thereafter i.e. on 29 January 1999, itself the Petitioner filed second declaration under Section 88 of Samadhan Scheme for the assessment year 1983-84 to 1987-88 seeking to settle the dispute. This second declaration dated 29 January 1999 was rejected by the impugned order dated 19 February 1999 of Respondent No. 1 on the ground that there are no arrears and/or outstanding dues under the Act in respect of assessment year 1983-84 to 1987-88 on the date the declaration was filed i.e. 29 January 1999.

5. The Petition was admitted on 28 April 1989 at that time the Respondents had waived service.

6. By an order dated 30 March 1999, the Petitioner's application to the Court seeking interim reliefs so as to avail the

benefit of the Samadhan Scheme was rejected. However, as the Petitioner was insistent upon depositing the amount payable, according to him, under Samadhan Scheme, the Court directed the Respondents to prepare a challan so as to enable the Petitioner to deposit the amount which is payable by him under the Samadhan Scheme, if accepted. Accordingly, this Court made it clear in the order dated 30 March 1999 that the payment by the Petitioner is without prejudice to the rights and contentions of the Respondents. Thus, the Petitioner is not entitled to the benefit of the Samadhan Scheme.

7. Mr. Chatterjee, the learned Counsel for the Petitioner, on instructions informs us that the amount of Rs. 7,64,630/- has been deposited by the Petitioner consequent to a challan issued by the Respondents.

8. Mr. Chatterjee, very fairly states that the Petitioner does not have any grievance with the order dated 14 January 1999 passed by the Respondent No. 1. This is so as on the date

when the first declaration was filed on 26 November 1998, there was no pending dispute in respect of the assessment year 1983-84 to 1987-88. Therefore, the challenge in this Petition is restricted to only the impugned order dated 19 February 1999.

9. The grievance of the Petitioner to the impugned order dated 19 February 1999 is that the declaration was rejected on the ground that after giving effect to the order dated 1 April 1998 of the Tribunal, there were no arrears outstanding. This no arrears being outstanding, according to the Petitioner, was for the reason that the tax arrears has been adjusted by the refund due to it, without giving necessary notice to the Petitioner under Section 245 of the Act.

10. The submissions made by the Petitioner has no factual basis in as much as no document/order, etc. in case relating to refund and demand has been cited in support. In fact the impugned order dated 19 February 1999 also does not proceed on the above basis. It would be appropriate that we

reproduce the order dated 19 February 1999 passed by the Respondent No. 1 rejecting the Petitioner's declaration under the Samadhan Scheme, which reads as under:-

> *" Kindly refer to the above.*
>
> *As per the provisions of section 88 of Finance [No. 2] Act, 1998 the provisions of KVSS Scheme are applicable when the declaration as prescribed is made in accordance with the provisions of section 89 in respect of a tax arrear determined on or before 31st March, 1998. In your case, the A.O. has reported that after giving effect to ITAT order No. ITAT 6372 to 6381 Bom of 1991 dated 1.4.1998, no arrears are outstanding for the impugned years. Therefore your declaration filed under KVSS on 29.1.99 for A.Y.s 1983-84, 1984-85, 1985-86, 1986-87 and 1987-88 is not maintainable and hence filed."*

11. Therefore, it would be noticed that it is not a case of adjusting the refund due for the arrears of tax.

12. Thereafter, the Respondent No. 1 has filed an Affidavit dated 28 April 1999 wherein it has been specifically stated on oath as follows:-

> *"As per the records of the Assessing Officer there was no arrear outstanding as on the date of declaration, as the demand has been remitted after giving effect to the order of ITAT and no fresh orders are yet passed. Under the circumstances rejection of the application made by the Petitioner under KVSS was in accordance with the law."*

In response, the Petitioner has filed an Affidavit in Rejoinder dated 16 June 1999, wherein in response to the contention of the Respondent No. 1, it has been stated that :-

> *"The Petitioner has been kept in dark as to the remission of the arrears and the Petitioner honestly believes that the arrears were still existing."*

13. The Respondent No. 1 thereafter, filed Affidavit in Sur-Rejoinder dated 26 July 1999, wherein it has

been specifically stated that Section 245 of the Act, which provides any adjustment only after giving intimation in writing will have no application in the instant case, as once the assessment is set aside the demand will get remitted. Clearly, we find that the Petitioner has barked up the wrong tree.

14. Thus, from the reading of the impugned order, the Affidavit in Reply filed by the Respondent No. 1 dated 28 April 1999 and Affidavit in Sur-Rejoinder dated 26 July 1999, it is clear that on the date of filing of second declaration i.e. 29 January 1999, there were no arrears of tax payable by the Petitioner to the Revenue. Thus, no fault can be found with the impugned order dated 19 February 1999 rejecting the second declaration dated 29 January 1999.

15. In the above view, the Petition is dismissed.

16. However, the Petitioner is entitled to the voluntarily deposited amount of Rs. 7,64,630/- with the

Respondents. This payment/deposit was consequent to what has been recorded in the order dated 30 March 1999. Therefore, on the Petition furnishing evidence of deposit to the Respondent No. 1, the Revenue will refund the amount of Rs. 7,64,630/- as expeditiously as possible preferably within a period of six months from today.

17. Mr. Chatterjee sought interest on the above amount. This prayer is rejected, as the deposit was made by the Petitioner inspite of the Respondents not wanting/demanding the same.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**