

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION**

WRIT PETITION NO. 14709 OF 2018

Umesh D. Ganore .. Petitioner.
v/s.
The Principal Commissioner of Income Tax-1
Nashik & Others .. Respondents.

**WITH
WRIT PETITION NO.14710 OF 2018**

Mangesh D. Ganore .. Petitioner.
v/s.
The Principal Commissioner of Income Tax-1
Nashik & Others .. Respondents.

Mr. Mihir Naniwadekar with Mr. Rohan Deshpande and Ms. Alisha Pinto,
for the Petitioner in both the Petitions.
Mr. Sham Walve, for Respondent Nos. 1 and 2 in both the Petitions.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.
DATE : 8th MARCH, 2019.**

ORAL JUDGMENT : (Per Akil Kureshi, J.)

1. These Petitions involve common question of law. They have been heard together and would be disposed of by this common judgment. For convenience, we may record facts from Writ Petition No.14709 of 2010.

2 Petitioner is an individual. Petitioner has challenged a

decision of the Revenue-Authority in not accepting the Petitioner's declaration under Income Tax Declaration Scheme, 2016 (herein after referred to as Scheme of 2016). Petitioner has further challenged the re-assessment notices issued by the Assessing Officer for the assessment years covered under such declaration as well as orders of assessment passed pursuant to such notices. Petitioner has also challenged notices for prosecution issued by the competent authority under Section 276CC of the Income Tax Act, 1961 (in short "the Act").

3 The Union Legislature framed said Scheme under Section 183 of the Finance Act, 2006, giving an opportunity to the assesseees to make declarations under the said Scheme of undisclosed income. Subject to the declarant fulfilling the conditions contained in the said Scheme and acceptance of the declaration by the authority, the declarant would be spared the penalty and prosecution. We would advert to the provisions of the said Scheme in detail later.

4 The Petitioner, desirous of taking benefit of the said Scheme made a common declaration of undisclosed income for the Assessment Years 2011-12 to Assessment Years 2014-15 on 29th September, 2016. The Petitioner declared his un-disclosed income for the subject Assessment Years, as under:-

Sr. No.	A.Y. relevant to undisclosed income	Amount of undisclosed income
1	AY 2011-12	Rs.7,88,617/-
2	AY 2012-13	Rs.9,60,883/-

3	AY 2013-14	Rs.9,51,181/-
4	AY 2014-15	Rs.1,54,19,837/-
	TOTAL	Rs.1,81,20,518/-

5 It is undisputed that on such declaration, the Petitioner had to pay tax, surcharge and penalty at the rates prescribed under the said Scheme, which worked out as under:-

- “(i) Tax payable @ 30% of undisclosed income – Rs.54,36,156/-.*
- (ii) Surcharge payable @ 25% of tax – Rs.13,59,039/-*
- (iii) Penalty payable @ 25% of tax – Rs.13,59,039/-.”*

6 According to the Petitioner, he had already paid a sum of Rs.8,19,465/- to the Income Tax Department by way of advance tax, self assessed tax and tax deducted at source. Out of the said sum of Rs.81,54,233/-, therefore, after deducting said sum of Rs.8,19,465/- the Petitioner had to pay the remaining of Rs.73,34,770/-. The Petitioner made such payment on different dates as under:-

- “(i) An amount of Rs.18,33,690/- was paid on November 25, 2016 i.e. before the prescribed date of November 30, 2016;*
- (ii) An amount of Rs.18,33,690/- was paid on March 27, 2017, i.e. before the prescribed date of March 31, 2017;*
- (iii) Lastly, the balance amount of Rs.36,67,385/- was paid on September 27, 2017.”*

7 We may note that, the total amount paid by the Petitioner as noted above along with the said sum of Rs.8,19,465/- was short by Rs.4/- as compared to the requirement arising under the said Scheme. Petitioner points out that this short fall of sum of Rs.4/- was on account of

pure oversight and calculation error and should not be allowed to defeat the Petitioner's declaration under the said Scheme since the same was otherwise in order in all respects.

8 We may record that, this short fall of Rs.4/- was not the central controversy between the two sides. In other words, had this been the only ground for rejecting Petitioner's declaration, we would have readily granted relief to the Petitioner as prayed. While examining the legal dispute between the two sides, we would eliminate this factor of short fall of Rs.4/-.

9 The controversy between the Petitioner and the department is much deeper and revolves around Petitioner's claim that, advance tax, self assessed tax and TDS paid by the Petitioner prior to filing of declaration, should be adjusted towards discharge of the Petitioner's liability to pay tax, surcharge and penalty under the said Scheme. The department contends states that such adjustment can be made only in relation to the tax deducted at source, if the co-relation between such TDS and the declaration of undisclosed income under the Scheme can be established.

10 There is another angle to this controversy. Counsel for the Petitioner pointed out that, in relation to Assessment Years 2011-12 and 2012-13, the amounts deposited by the Petitioner would be sufficient as per the requirements of the said Scheme, even ignoring the Petitioner's main contention of adjustment of advance tax and self assessed tax, since in these years, the Petitioner does not claim benefit of either advance tax or self assessment tax. The department contends that, the declaration of

an assessee under the said Scheme would be composite and not-severable for different Assessment Years. Once the Petitioner has made such a declaration for several Assessment Years, said declaration would either to be accepted in its entirety or rejected in toto. In other words, according to the Department, the Petitioner can not claim the benefit of the declaration in relation to only some of the Assessment Years, covered under such declaration.

11 We have heard the learned Counsel for the parties at length. Learned Counsel Shri Naniwadekar, for the Petitioner contended that:-

- (i) there is nothing in the said Scheme, refusing the adjustments of the advance tax and self assessment tax. The Scheme granted benefit to a declarant. Such beneficial provision should be interpreted in such a manner that the purpose of framing the Scheme is not lost;
- (ii) Counsel submitted that, the CBDT itself has clarified under a Circular No.25 of 2016 dated 30th June, 2016 that the benefit of TDS would be available for making payment under the said Scheme. There is no rationale why similar treatment should not be given to the advance tax and self assessed tax.
- (iii) Counsel took us through the provisions of the Scheme, the Rules framed by the legislature under the said Scheme and prescribed format for making declaration to contend that, there is clear intention on the part of the legislature to grant such adjustments.
- (iv) Counsel sought to distinguish earlier similar income declaration schemes which contained a specific bar against any adjustment of taxes paid in the past. In this context, the Counsel also sought to

distinguish the decision of Division Bench of this Court in *Earnest Business Services Pvt. Ltd. v/s. Commissioner of Income Tax and Others* reported in **393 ITR 453**, which was rendered in the context of the Voluntary Disclosure of Income Scheme, 1977 (in short “VDIS”);

- (v) Counsel placed reliance on the decision of the Division Bench of the Delhi High Court in *Kumudam Publications Pvt. Ltd., v/s. CBDT* reported in **393 ITR 599**, in which, in the context of the present Scheme, Delhi High Court held that adjustment of advance tax and self assessment tax would be permissible;

12 On the other hand, learned Counsel Shri Walve, for the Revenue opposed the Petitions, contending that:-

- (i) The said Scheme makes special provisions for disclosure of undisclosed income. The same must be construed strictly ;
- (ii) The Scheme does not envisage any adjustment of the past taxes as is sought to be done in the present case by the assessee;
- (iii) Heavy reliance was placed on the decision of this Court in case of *Earnest Business Services Pvt. Ltd., (supra)*. It was argued that in the said decision, this Court has laid down certain important principles which have direct applicability in the present case;
- (iv) Counsel submitted that, in any case, the Petitioner cannot segregate the declaration since the Scheme does not envisaged any such segregation.

13 Having heard the learned Counsel for the parties, we may first take note of the provisions of the said scheme.

- (a) The Scheme is contained in Chapter IX of the Finance Act, 2016.

Section 182 contained in such Chapter defines certain terms for the purpose of the said Scheme. The declarant under clause (a) – means the person making the declaration under sub-section (1) of Section 183. Clause (c) of Section 182 provides that all other words and expressions which are not defined in the said Chapter but defined in the Act would have the same meaning as assigned in the Act;

- (b) Section 183 of the Act pertains to declaration of undisclosed income. A person desirous of making such a declaration of undisclosed income would make a declaration as provided in sub-section (1) of Section 183 of the Act, which reads as under:-

“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 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.”

Under sub-section (1) of Section 184 of the Act, the undisclosed income as declared under Section 183 of the Act would be chargeable to tax and surcharge as prescribed in the said provision. Section 184 reads as under:-

“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 purpose 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.”

Section 185 of the Act pertains to penalty and reads as under:-

“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 percent of such tax.”

Section 186 pertains to the manner of declaration. Section 187 of the Act lays down the time frame for making payment of the tax. Sub-section (1) of Section 187 of the Act provides that tax, surcharge and penalty payable under Sections 184 and 185 of the Act in respect of undisclosed income shall be paid on or before the date to be notified by the Central Government. Sub-section (3) of Section 187 of the Act provides that, if the declarant fails to pay the tax, surcharge and penalty before the due date as specified in sub-section (1), the declaration filed by him shall be deemed never to have been made under the Scheme.

Section 188 of the Act pertains to undisclosed income declared not to be included in the total income and reads as under:-

“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.”

Section 189 of the Act provides that a declarant under the said Scheme shall not be entitled in respect of undisclosed income declared or any amount of tax or surcharge paid to re-open any assessment or re-assessment made under the Income Tax Act or the Wealth Tax Act or claiming any set off or relief in any appeal in other proceedings in relation to any such assessment or re-assessment.

Section 191 of the Act provides that any amount of tax and surcharge or penalty paid by the declarant under Section 183 of the Act shall not be refundable.

Section 193 of the Act provides that where a declaration has been made by misrepresentation or suppression of facts, such declaration shall be void and shall be deemed never to have been made under the Scheme.

Section 195 of the Scheme retains applicability of provisions contained in the said Act, including Section 119 in relation to the said scheme.

Section 197 of the Act inter alia provides that, for removal of doubts, it is declared that where *any declaration has been made under Section 183 but no tax, surcharge and penalty referred to in section 184 and section 185 has been paid within the time specified under section 187, the undisclosed income shall be chargeable to tax under the Income tax Act in the previous year in which such declaration is made.*

14 Analysis of the above provisions of the Scheme would clearly establish that the Scheme is a complete code in relation to the declaration of undisclosed income by the Assessee. A declaration would be made as

provided under sub-section (1) of Section 183. The liability of an assessee upon such declaration would be computed for payment of tax and surcharge as prescribed in sub-section (1) and (2) of Section 184 and penalty under Section 185 of the Act. Such amount would be deposited within the time prescribed by the Government of India as envisaged in sub-section (1) of Section 187 of the Ac. Scheme also contains provisions for the consequence of the declaration being accepted as well as the circumstances, under which, said declaration would be rendered non-est as also the consequences thereof. To appreciate the Petitioner's contention of the adjustment of advance tax and self assessed tax, therefore, may be seen in light of such provisions of the Scheme.

15 While doing so, we must notice yet another aspect, emerging from the Scheme. As noted, upon the declaration of undisclosed income being made, liability to pay tax with surcharge arises under Section 184 and that of penalty under Section 185. Both these Sections start with the non-obstinate clause providing that notwithstanding anything contained in the Income Tax Act, or any Finance Act, the undisclosed income would be charged to tax at rates specified therein and the declarant would be liable to pay the penalty as per the prescribed rates. In other words, Sections 184 and 185 of the Act which are charging provisions of tax, surcharge and penalty respectively are concerned.

16 This Court in case of Earnest Business Services Pvt. Ltd., (supra) in the context of the VDIS had brought out such distinction. It was a case, in which, assessee claimed benefit of TDS for depositing the tax and penalty liability, arising out the declaration under the VDIS 1997. The

Court referred to Section 64 of the said Scheme which pertain to charge of tax on voluntarily disclosed income and held and observed as under:-

“ We note that the Scheme is a part of the Finance Act, 1997 and it is self contained. The Scheme of 1997 Act is a different and distinct statute from the 1961 Act. The subject matter of tax and rate of tax are different under the Scheme of 1997 Act and under the 1961 Act. Therefore, even though the tax which is payable under the Scheme of 1997 Act, is a tax on income, it is not a charge to tax under Section 4 of the 1961 Act, but an income tax charged to tax under section 64 of the Scheme of 1997 Act.

As held by the Supreme Court in Mathuram Agarwal v/s. State of MP [1998] 8 SCC 667, a taxing statute should convey three components of a taxing statute, i.e. person to be taxed, subject matter of tax and rate of tax. Undisputedly, the subject matter and rate of tax in the case of Scheme of 1997 Act is different from that of the 1961 Act. The subject matter of tax in case of the above Scheme as evident from the charge of tax therein is on voluntarily disclosed income, which though chargeable to tax under the 1961 Act, had not been disclosed earlier thereunder. The charge under the 1961 Act is on the total income of the previous year and the scope of the total income is income received/ deemed to be received/ accrued/ arises during the previous year. As against the above, the charge under the Scheme of 1997 Act, is the undisclosed income under the 1961 Act which is voluntarily disclosed. There is no obligation under the Scheme of 1997 Act that every person who has not disclosed his income under the 1961 Act is required to disclose and pay taxes. It is optional. This unlike the 1961 Act, which obliges every person by whom tax is payable to disclose and pay the tax payable on its income at the peril of penalty and prosecution, if income is not disclosed and taxes thereon not paid. Similarly, the rate of tax is also different under the 1961 Act from that under the Scheme of 1997 Act. In fact, it is one flat rate and not at progressive rate as under the 1961 Act. Therefore, as the tax payable under the Scheme is different and distinct from the tax payable under the 1961 Act, the benefit of tax paid on the undisclosed income as and by way of tax deduction at source under the 1961 Act,

cannot be availed under the Scheme. This is also evident from section 64 of the Scheme providing “notwithstanding anything contained in the Income Tax Act or Finance Act, income shall be charged in respect of income so declared...” Thus, the charge is different.”

17 It is undisputed that the Scheme does not make any specific provision for adjustment of any of the pre-deposited taxes such as advance tax or self assessment tax or even tax deducted at source.

18. The analysis of the scheme would show that in absence of such a scheme, an assessee who has intentionally not disclosed an income, would be subject to the normal provisions under the Act for assessment, levy of tax, interest and penalty. Without there being any specific provision in the scheme granting benefit of tax voluntarily paid, or deposited as self-assessed tax or by way of advance tax, a declarant under the scheme cannot claim set off such tax against his liability to pay tax in terms of the provisions contained in the scheme. When as in the present case, the assessee was either depositing or paying such tax, the said scheme was nowhere in horizon. The said scheme makes special provisions for declaration of undisclosed income under Section 187 which provides for the time frame for deposit of tax, surcharge and penalty. Immediately preceding Section 188 provides that the amount of undisclosed income declared would not be included in the total income of the declarant in any assessment year under the Income Tax Act, 1961. Section 184 provides that the declarant under the said scheme shall not be entitled in respect of undisclosed income declared or any amount of tax and surcharge paid to reopen the assessment or reassessment under the Income Tax Act or the Wealth Tax Act. Section 191 provides that any

amount of tax and surcharge and penalty paid pursuant to the declaration shall not be refundable. Thus, the scheme makes clear demarcation between an undisclosed income declared under the said scheme and the assessment of the assessee's declared income under the Income Tax Act, 1961. Therefore, in absence of any specific provision in the scheme, granting benefit of the self assessed tax or advance tax under the Act, for the purpose of discharging the assessee's liability under the said scheme, the same cannot be readily presumed.

19. To reiterate these provisions provided for two separate compartments between the assessment proceedings under the said Act and declaration of undisclosed income under the said scheme. The self assessed tax and advance tax would be adjusted against an assessee's liabilities arising in the assessment under the said Act and cannot be transposed for the purpose of discharging the liability to pay tax, surcharge or penalty by a declarant of undisclosed income under the said scheme.

20. The reference to the Rules or the formant for making declaration or payment would not change this provision. Nothing contained in the Rules or the formats prescribed therein would indicate any intention on the part of the legislature to grant the benefit of advance tax or self assessed tax for the purpose of the said scheme. In any case, such right had to be recognized under the Act and cannot be interpreted on the strength of prescribed formants for making declaration. We are conscious that CBDT Circular dated 30.6.2016 has clarified the provision in relation to the tax deducted at source, providing that adjustment under

the scheme would be permissible in cases where relation between the income declared under the scheme and the advance tax can be established and such tax has not been claimed in the return of income filed for any assessment year. This clarification made by the CBDT would neither indicate that the legislature while framing the scheme envisaged the adjustment of other taxes namely the advance tax or self assessed tax, nor would state different treatments given to the two kinds of taxes rendered the provisions of the said scheme ultra virus, the constitution being in violation of Article 14 of the Constitution. The CBDT exercises its power vested under Section 119 of the Act. As is well settled, it is within the power of CBDT to issue clarifications for reducing the rigors of the statutory provisions. Even otherwise the very nature of tax deducted at source is different from the other two categories namely advance tax and self assessment tax, since tax deducted at source is always relatable to certain income which the assessee would disclose under the said scheme.

21. We have perused the decision of the Delhi High Court in the case of Kumudam Publications Pvt Ltd (supra). The judgment mainly proceeds on the basis of the clarification of CBDT Circular dated 30.6.2016. After taking note of the said clarification, the Court expressed an opinion that the Revenue had made such a clarification which would preclude it from arguing that the advance tax payments in relation to the declaration covered in this scheme cannot be taken into consideration. The Court observed as under:-

"14. Furthermore, the court also is of the opinion that the clarification by the Revenue, that credit for tax deducted at source 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."

We are in respectful disagreement with the view of the Delhi High Court in the said case of Kumudam Publications Pvt Ltd. We have given our separate reasons for not accepting the petitioner's contention in this respect. The petitioners main challenge, therefore, must fail.

22. The subsidiary issue of the segregation of the declaration still survives. The provisions contained in the scheme enable the assessee to disclose undisclosed income. There is no provision in the scheme which requires the declarant to make a composite declaration in relation to several assessment years for which he desirous to make a declaration of undisclosed income. The scheme does not prohibit multiple declarations by the assessee, making separate declarations for different assessment years. Under these circumstances, we do not find any provision under the said scheme requiring competent authority to either accept or reject the declaration in respect of several assessment years in entirety. In other words, if the declaration of the assessee of undisclosed income for the particular assessment year fulfills all requirement of the scheme, there is no reason why such a declarant should not get benefit of such declaration simply because in relation to other assessment years, the declaration may fail for any reason.

23. Sum total of this discussion would be that in relation to those assessment years where the petitioner relied on the adjustment of self assessed tax or advance tax for making good, the requirement of

depositing tax, surcharge and penalty under the scheme, the declaration must fail and the action of the Revenue Authorities must be confirmed. In relation to those assessment years where without any adjustment of advance tax or self assessed tax, deposits made by the petitioner were sufficient to cover the tax, surcharge and penalty under the scheme by the due dates, such declaration must be accepted.

24. In the second petition, barring change in figures, all relevant facts are identical. We have, therefore, not discussed the facts separately.

25. The petitions are, therefore, disposed of with following directions :-

- (i) In Writ Petition No. 14709 of 2018, the petitioner's declaration under the Scheme for assessment years 2013-14 and 2014-15 would fail. Action of the Revenue Authority is confirmed;
- (ii) In Writ Petition No. 14710 of 2018, the petitioner's declaration for assessment years 2011-12 and 2012-13 would be accepted by the department. Necessary certificate would be issued accordingly. Consequently, orders of reassessment in relation to those assessment years and the notices of prosecution would stand set aside;
- (iii) In Writ Petition No. 14710 of 2018, the petitioner's declaration for assessment years 2011-12 and 2014-15 would fail. The action of the Revenue Authority stands confirmed;

- (iv) In Writ Petition No. 14710 of 2018, the petitioner's declaration for assessment years 2012-13 and 2013-14 would be accepted by the department. Necessary certificate shall be issued. Consequently, reassessment order in relation to those assessment years and prosecution notice would stand set aside;
- (v) Since the petitioner was bona fide pursuing the remedies before this Court in this petition, if the petitioner files a appeals before the Appellate Commissioner in relation to those assessment years where the petitioner has failed, latest by 30th April, 2019, such appeals would be considered on merits without objection on limitation;
- (vi) At this stage, learned counsel for the petitioner argued that in relation of those assessment years where the declarant has failed, amount deposited by the petitioner be returned. The said ground was never argued nor any prayer is made for such purpose and therefore, we do not entertain the same leaving it open for the petitioner to pursue the remedies under the law.

26. Both the petitions are disposed of.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]