

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

WRIT PETITION NO. 2825 OF 2019

Samir Narain Bhojwani

.. Petitioner

v/s.

Deputy Commissioner of Income Tax
Central Circle 3(4), Mumbai & Ors.

.. Respondents

Mr. J.D. Mistri, Senior Counsel a/w Mr. Madhur Agarwal i/b Mr. Atul K. Jasani for the petitioner

Mr. Sham Walve for the respondents

CORAM : M.S. SANKLECHA &

NITIN JAMDAR, J.J.

DATED : 22nd OCTOBER, 2019

P.C.

1. In view of the extraordinary urgency made out by the petitioner as the last date of filing of return of income is 31st October, 2019, both the petitioner and the respondents have requested that the petition be disposed at the stage of admission. Therefore, we have taken up the petition for final disposal at the stage of admission.

2. This petition under Article 226 of the Constitution of India seeks a direction to the respondent no.1 – Assessing Officer and respondent no.2 – the Central Board of Direct Taxes to accept the petitioner's return of income for Assessment Year 2019-20 in paper form under Section 139(1) of the Income Tax Act, 1961 (the Act).

3. The petitioner has been compelled to move this Court on urgent basis as the petitioner is obliged under Section 139D of the Act read with Rule 12 of the Income Tax Rules, 1961 (Rules) to file its return of income electronically with his digital signature. This prescribed return of income which has to be filed electronically does not permit the petitioner to make his claim to set off of his profits of this year from the carried forward losses of the previous year in terms of Section 72 of the Act. This for the reason the prescribed electronic returns do not enable making the above claim as it is largely self populated. Resulting in excess income being declared, which would require more amount being required to be paid as tax. Thus, in view of the same, if the return of income is filed as prescribed, it would be either processed under Section 143(1) of the Act, demanding excess tax or being treated as defective (if some entries/collumns are not filled). This as last date for filing the return of income is 31st October, 2019 and unless the paper return of income is directed to be accepted, prejudice would be caused to the petitioner.

4. Briefly, the facts leading to the filing of the petition as claimed

by the petitioner are as under :-

(a) The petitioner is an individual who carries on business as a developer and landlord i.e. giving flats constructed by him on leave and license / rent basis (rent) and disclosing the rent received as his income from business being assessed to tax under the head “business income”. As these flats given on rent, are business assets, they form part of the block of assets on which depreciation has been claimed and reflected as its written down value (WDV).

(b) During the previous year relevant to the subject assessment year, the petitioner sold three residential flats. The consideration received in excess of the written down value of the assets was Rs. 77 crores (approximately). This excess amount of Rs.77 crores (approximately) is to be offered to tax as short term capital gain under Section 50 of the Act.

(c) During the subject assessment year, the petitioner has otherwise suffered a business loss of Rs.57 crores (approx). This business loss, the petitioner is entitled to set off against the income of Rs.77 crores which was subject to tax under the head “capital gain” in terms of Section 71 of the Act. Thus, leaving a balance of Rs.20 crores (approx) as taxable income. It is this balance of Rs. 20

crores, the petitioner was entitled to set off from the carry forward business loss of Rs. 166 crores (approx) (see Exhibit-B to petition) in terms of Section 72 of the Act. It is the case of the petitioner that such setting off of carry forward business loss of the earlier years in respect of amounts taxed under the head “short term capital gains” has been allowed by the Tribunal in numerous cases.

(d) However, when the petitioner attempted to file its return of income in the prescribed electronic form, the petitioner was able to reflect the set off in terms of Section 71 of the Act i.e. setting of the losses against gains of the subject assessment year. However, the petitioner was not able to reflect in the prescribed return of income in electronic form, the set off available in terms of Section 72 of the Act i.e. setting off of current years business loss against the carry forward loss from the earlier years. This for the reason that the return which is filed electronically requires certain columns to be filled in by the petitioner and the other columns are self populated. The petitioner is unable to change the figures and make a claim for set off under Section 72 of the Act in the present facts. This results in excess income being declared, resulting in an obligation to pay more tax on income which in term of section 72 of the Act is allowed

to be set off against carried forward losses of earlier years. It is in these circumstances, the petitioner has prayed that he be allowed to file his return of income in appropriate form for the subject assessment year in paper form and the same be taken up for assessment in accordance with the Act.

5. Mr. Mistri, learned Senior Counsel in support of the petition submits as under :-

(a) The prescribed return of income to be filed electronically does not permit the petitioner to raise a claim of set off under Section 72 of the Act. Thus, what is available under the Act is taken away by the Rules;

(b) The only manner in which the petitioner can now raise its claim for set off under Section 72 of the Act is by filing a return in paper form. In the absence of such a paper return being allowed, the petitioner will be taxed on amounts which is not taxable;

(c) In the above circumstances, the Assessing Officer be directed to accept the return of income in paper form, as the last date of filing the return is 31st October, 2019; and

(d) The filing of return in electronic form will entail the

petitioner not being able to fill all entries in its attempt to disclose the correct income, may visit him with consequences of being a defective return and penal proceedings.

6. Mr. Walve, learned Counsel appearing for the Revenue, on instructions of the Assessing Officer, who is present in Court, submitted as under :-

(a) The return of income has to be filed by the petitioner in terms of Section 139D of the Act read with Rule 12 of the Rules, only in the electronic form, as prescribed by the Central Board of Direct Taxes (CBDT);

(b) There is no provision for filing a hard copy (paper copy) of the return of income in the class of cases to which the petitioner belongs; and

(c) The Assessing Officer cannot accept the return of income in paper form as the Act and the Rules, do not grant this facility to the petitioner.

Thus, no directions as sought by the petitioner be given as it would be contrary to the Act and the Rules.

7. We find that the claim sought to be urged by the petitioner viz.

Set off of business profits of this year offered to tax under the head “capital gain” being set off against carried forward loss is *prima facie* supported by the decisions of the Tribunal in the case of ***M/s. M.K. Creations Vs. ITO, Ward-14(1)(3), (2017) 6 TMI 821*** and in ***ITO Vs. Smart Sensors & Transducers Ltd. (2019) 104 taxmann.com 129***. It is also not disputed before us by the Revenue that the return of income in electronic form is self populated i.e. on filling in some entries, the other entries in the return are indicated by the system itself. Thus, the petitioner is unable to make a claim which according to him, he is entitled to in law. In case, the petitioner is compelled to file in the prescribed electronic form, it could be declared by the Assessing Officer as defective (if all entries are not filled) or raise a demand for tax on the basis of the declared income under Section 143(1) of the Act or if the assessment is taken to scrutiny under Section 143(3) of the Act, then the petitioner will not be entitled to raise a claim of set off under Section 72 of the Act during the assessment proceedings. This in view of the decision of the Hon’ble Supreme Court in the case of ***Goetze (India) Ltd. Vs. Commissioner of Incoem Tax, 284 ITR 323*** wherein it has been held that if a claim is not made by the assessee in its return of income,

then, the Assessing Officer would have no power to entertain a claim otherwise than by way of revised return of income. The revised return of income if the petitioner attempts to file, would result in the petitioner not being able to make the claim, for which the revised return is filed as the revised return of income would also have to be filed in the prescribed electronic form which does not provide for such an eventuality. Thus, for the purposes of the subject assessment year if the return of income is filed electronically, it would have given up at least before the Assessing Officer his claim to benefit of Section 72 of the Act. This whether the return of income is processed under Section 143(1) of the Act or under goes scrutiny under Section 143(3) of the Act.

8. The purpose and object of e-filing of return to have simplicity and uniformity in procedure. However, the above object cannot in its implementation result in an assessee not being entitled to make a claim of set off which he feels he is entitled to in accordance with the provisions of the Act. The allowability or dis-allowability of the claim is a subject matter to be considered by the Assessing Officer. However, the procedure of filing the return of income cannot bar an

assessee from making a claim under the Act which he feels he is entitled to. We accept the Assessing Officer's submission that in terms of Rule 12 of the Rules, the returns are to be filed by the petitioner only electronically and he is bound by the Act and the Rules, thus cannot accept the paper return. However, in terms of Section 139D of the Act, it is for the CBDT to make rules providing for filing of returns of income in electronic form. This power has been exercised by the CBDT in terms of Rule 12 of the Rules. However, the form as prescribed do not provide for eventuality that has arisen in the present case and may also arise in other cases. Thus, this is an issue to be brought to the notice of the CBDT, which would in case it finds merits in this submission, issue necessary directions to cover this gap.

9. In the normal course, we would have directed the petitioner to file representation with the CBDT making a demand for justice, before we considered issuing of a writ of mandamus. However, in the peculiar facts of this case, the petitioner is required to file return of income by 31st October, 2019. It is only now when the petitioner was in the process of filing his return electronically that the

petitioner realized that he is unable to make a claim of set off under Section 72 of the Act, even though the claim itself is prima facie allowable in view of the decisions of the Tribunal in *M.K. Creation* (supra) and *Smart Sensors & Transducers Ltd.* (supra). In the absence of the petitioner filing its return of income on or before 31st October, 2019, the petitioner is likely to face penal consequences. We also in the present facts are of the view that awaiting the order of the Assessing Officer under Section 139(9) of the Act, declaring the return as defective, will not help as the issue would continue to remain even if a fresh return is filed. The issue raised is a fundamental issue, which needs to be addressed by the CBDT.

10. It is in these aforesaid unusual circumstances, that we have not adopted the course of directing the petitioner to first demand justice from the Authority concerned before moving this Court in its writ jurisdiction. This view of ours is also supported by the fact that Mr. Walve, learned Counsel appearing for the Revenue on instructions states that the Assessing Officer who is present in Court states that in his experience he has not come across a case like this where the return which are prescribed under Section 139D of the Act r/w Rule

12 of the Rules do not take into account the situation where the assessee's claim cannot be considered. Moreover, from the facts as noted above, this situation (like the present) may not be restricted only to this petitioner but could generally arise in other cases also.

11. Therefore, it would be appropriate that the petitioner make a representation on the above issue to the CBDT, who would then consider it in the context of facts involved in the present case and issue necessary guidelines for the benefit of the entire body of the assessees, if the petitioner is right in his claim that the prescribed return of income to be filed electronically provides prohibits an assessee from making its claim. However, in the meantime, the petitioner without prejudice to his rights and contentions would file the return of income in electronic form on the system before the last date. Besides, also file his return of income for the subject assessment year in paper form with the Assessing Officer before the last date. This return of income in paper form would be accepted by the Assessing Officer without prejudice to the Revenue's contention that such a return cannot be filed.

12. In the meantime, till such time as the CBDT takes a decision on

the petitioner's representation, the respondent Revenue would not act upon the electronically filed return of income so as to initiate any coercive recovery proceedings. The petitioner is directed to file a representation with the CBDT before the last date of filing the return of income expires i.e. 31st October, 2019. If such a representation is filed within the above time (with a copy thereof to the Assessing Officer), the CBDT would consider and dispose of the same as expeditiously as possible. The Assessing Officer will also bring to the notice of the CBDT the aforesaid anomaly and the decision of this Court. It is only after the decision of the CBDT, would the return of income of the petitioner for the subject assessment year be taken up for consideration.

13. Before closing, we would emphasize that we have directed the petitioner to make a representation to the CBDT, to enable it to take a proper view on it. The issue raised by the petitioner does not appear to be an issue only in an individual case, but may affect the whole body of the assessee's (whose claim may not fit in the prescribed proforma). Thus, a clarification on this issue by the CBDT may be beneficial to the entire body of assessee, in fact, who

seek to make a claim which according to them, the prescribed proforma does not provide for.

14. The petition is disposed of in the above terms.

(NITIN JAMDAR, J.)

(M.S. SANKLECHA, J.)