IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.08.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.3223 of 2010 and
M.P.No.1 of 2010

Shri Subash Chand Jain ... Petitioner

Vs.

1. The Commissioner of Income Tax
   3, Gandhi Road, Salem - 2

2. The Income Tax Officer,
   Ward - I(2),
   Salem - 7 ... Respondents

Writ Petition filed under Article 226 of Constitution of India for issuance of Writ of Certiorari to call for the records of the 1st respondent's order in C.No.9651(140)/2007-2008/SLM dated 08.07.2009 and quash the same.

For Petitioner : Mr.G.Baskar
for Philip George

For Respondents: Mr.Jayaprathap

O R D E R

The petitioner has prayed for issuance of a Writ of Certiorari, to quash the order passed by the 1st respondent in C.No.9651(140/2007-2008/SLM dated 08.07.2009.

2. The brief facts leading to the present case as stated in the affidavit filed in support of the writ petition is that the petitioner is a partner in a partnership firm by name, Bakliwal Trading Company carrying on business of 'Sago Trading'. The petitioner also claims that he has income from other income sources like property interest etc., and he is regular in filing his income tax returns. The petitioner claims that during the financial year 1993-1994 relevant to the assessment year 1994-1995, the petitioner and his two minor children had received Rs.2,00,000/- each as a gift from overseas, which the petitioner brought it to the respective accounts and added to the capital account as early as 31.03.1994. He has also filed his return of income to that effect.

3. The petitioner states that in the mean while, the Union Budget was presented on 28.02.1997 had introduced the Voluntary Disclosure of Income Scheme,1997, [in short, hereinafter referred to 'VDIS'] which the petitioner is entitle to avail. However, the petitioner submits that he was forced to file return of income as a revised return of income on 08.05.1997 by including the said gift of Rs.6,00,000/- as his own income. After the VDIS was notified, the petitioner declared Rs.6,00,000/- as gift under VDIS and the Commissioner of Income Tax, Coimbatore issued certificates under Section 68(2) of VDIS to the petitioner as well as to his two minor children. While that being the case, when the earlier returns filed under Section 143(1) of Income Tax Act for the assessment year 1994-1995 was pending before the second respondent, the said certificates under Section 68(2) of VIDS came to be issued and hence, the Commissioner of Income Tax, Coimbatore has issued a show cause notice seeking to revise the order of assessment on the ground that the foreign gift had already been offered for taxation in return of income filed by the petitioner on 08.05.1997 and in the said return, such availing of VDIS was not proper and the petitioner is not entitle to get the benefits under the Scheme, to which the petitioner had filed an objection.

4. It is also further stated in the affidavit that the Commissioner of Income Tax, Coimbatore on the objection made by the petitioner, passed an order under Section 263 of Income Tax Act on 28.03.2001, as against which, the petitioner preferred an appeal before the Income Tax Appellate Tribunal in I.T.A. No.676/Mds/2001, which finally came to be disposed by the Appellate Tribunal on 05.10.2007. Thereafter, the 1st respondent issued a notice dated 11.03.2008 seeking to cancel the certificate issued under Section 68(2) of VIDS to the petitioner and his two sons on the ground that the certificates have been obtained on 'Misrepresentation of Facts'.

5. According to the petitioner, he had filed his response to the notice dated 11.03.2008 However, the 1st respondent by an order dated 08.07.2009 has cancelled / revoked the certificate issued under Section 68(2) of VDIS invoking Section 21 of General Clauses Act, 1897 as against which the present writ petition has been filed.

6. Mr.Baskar, learned counsel for the petitioner submits that the jurisdiction under Section 21 of General Clauses Act cannot be invoked by the 1st respondent to revoke the certificates issued under Section 68(2) of VDIS. The learned counsel also submitted as there being three certificates issued independently under Section 68(2) of VDIS, all the three certificates cannot be cancelled under the single order made the 1st respondent that too by issuing a single show cause notice.

7. The learned counsel for the petitioner would further contend that the 1st respondent has no jurisdiction to revoke the certificate issued under VDIS after a long gap of 10 years, the delay and latches are not being properly appreciated by the 1st respondent. The impugned order passed by the 1st respondent is perse illegal.

8. The learned counsel for the petitioner also contended that the petitioner having filed the revised return to the assessment year 1994-1995 to the financial year 1993-1994, eventhough filed under VDIS, the petitioner was forced to file the same and having availed the benefits of VDIS 1997, which came into the effect and notified on 01.07.1997, there is nothing wrong in filing the return under VDIS by disclosing the said Rs.6,00,000/- received by way of gift as his own income.

9. It is represented on behalf of the petitioner that there is no misrepresentation neither when returns were filed for the financial year 1993-1994 in the assessment year 1994-1995, nor when availing the benefits under VDIS.

10. Apart from agitating the above points, the learned counsel for the petitioner also submitted that if at all the certificates are withdrawn by the 1st respondent, the 1st respondent ought to have refunded the entire amount paid under VDIS, which till date, the 1st respondent has not done so.

11. On the above said grounds, the learned counsel for the petitioner prayed to quash the impugned order passed by the 1st respondent. In support to his arguments, he had relied upon the following Judgments:

(i) (1967) AIR 107 (SC) in Ghaurul Hasan and Others V. the State of Rajasthan by the Hon'ble Supreme Court of India.

(ii) (1966) 61 ITR 269 (Mad) in Carborundum Universal Limited V. Union of India by the Division Bench of this Court.

(iii) (2002) 254 ITR 255 (Gujarat) in Vasantlal Tulsidas Agarwal V. C.I.T. by High Court of Gujarat.

(iv) (2000) 241 ITR 287 (AP) in Patchala Seetharamaiah V. Commissioner of Income Tax by the Division Bench of High Court of Andhrapradesh.

(v) (1998) 230 ITR 536 (AP) in Shankarlal V. I.T.O. and Others by the Division Bench of High Court of Andhrapradesh

(vi) (2007) 295 ITR 0136 in M.Srinivasa Rao V. The A.C.I.T by this Court.

(vii) (2002) 253 ITR 334 C.I.T. V. Mintu Kaltia by the Division Bench of High Court of Gauhati.

12. In response to the said averments made by the petitioner, the respondents had filed a detailed counter rebutting all the allegations made by him.

13. Per contra, Mr.Jayapratap, learned counsel for the respondents submitted that the petitioner for the assessment year 1994 -1995 had declared the total income of Rs.1,62,890/- However, in his capital account filed along with the return of income, he had showed Rs.2,00,000/- for him and Rs.2,00,000/- each as loan for his two minor sons. After filing such return, the petitioner sent a letter to the Assessing Officer dated 20.02.1997 stating that he received gift from non-resident Indian in the year 1994, totaling Rs.6,00,000/-.

14. The learned counsel for the revenue would further submit that the petitioner, in order to declare the income under VDIS, filed a revised return voluntarily admitting the gift as income and sought for waiver of interest and penalty. Apart from that, the learned counsel also submitted that the notice under Section 143 (2) was initiated against the petitioner for the assessment year 1994-1995 to which he promptly filed his reply and only thereafter, the Commissioner of Income Tax, Coimbatore had passed an order under Section 263 of the Income Tax Act, 1961 on 28.03.2001 and the same was challenged by the petitioner before the Income Tax Appellate Tribunal, who has passed an order dated 05.10.2007, which had become final.

15. In respect of the plea put forward by the learned counsel for the petitioner that Section 21 of General Clauses Act cannot be invoked or the respondent has no jurisdiction to invoke the said Section, the learned counsel for the respondents would contend that Section 21 of General Clause Act is of general application and embodies a Rule of Construction that can be applied, if a particular statute does not give assistance in leading to any reasonable construction so as to meet his objects. The learned counsel would also contend that the petitioner has availed the VDIS by total misrepresentation of facts and abusing the Scheme. When the petitioner had already declared the income in response to the notice under Section 148, by filing the so-called revised return, the disclosure under VDIS by misrepresenting the facts, the certificates were rightly withdrawn by the 1st respondent, who has jurisdiction to do so. Under these circumstances, the respondents prayed to sustain the impugned order.

16. Heard both the learned counsel appearing for the petitioner as well as the learned counsel for the respondents and perused the materials available on record.

17. It is an admitted fact that the petitioner during the financial year 1993-1994 relevant to the assessment year 1994-1995 filed a return along with Rs.6,00,000/- added to the capital income accounts which was processed by the 2nd

respondent. It is also not in dispute by the petitioner that he had filed a revised return on 08.05.1997 for the return filed on 14.03.1996. Only in the revised return, the petitioner had mentioned about Rs.2,00,000/- for himself and Rs.2,00,000/- received as gifts from NRI for each of his minor sons. However, when the VDIS was notified during the year 1997, the petitioner once over again filed his declaration before the Commissioner of Income Tax disclosing Rs.6,00,000/- as income and sought waiver of penalty and certificates dated 06.01.1998 were also issued under Section 168(2) of VDIS to the petitioner and his two minor sons.

18. On perusal of the records, it is also clear that for the return filed belatedly on 14.03.1996 for the assessment year 1994-1995, the petitioner received a notice under Section 143 (2), which was issued on 21.01.1998 and subsequently, a notice under Section 148 also came to be issued, to which the petitioner had responded by filing objection to the said notices and thereafter, the Commissioner of Income Tax, Coimbatore passed a final order dated 28.03.2001 under Section 263 of Income Tax Act.

19. Further, on Perusal of the order dated 28.03.2001, this Court does not find any stand taken by the petitioner for non-service of notices under Sections 143(2) and 148 of Income Tax Act, which is a proposal under Section 263 of Income Tax Act. The Commissioner of Income Tax, Coimbatore by an order dated 28.03.2001 had given a detail finding and held that as per Section 148 of Income Tax Act, notice has been issued prior to the revised return filed by the assessee, the completion of assessment on the basis of return filed by the assessee on 08.05.1997 was in order and the action of assessing officer in ommitting to bring the tax of the NRI gifts on the erroneous assumption that a valid declaration had been filed under VDIS is erroneous and prejudicial to the interests of the revenue and had set aside the order dated 10.02.1999 passed under Section 143 of Income Tax Act and directed to re-do the assessment in accordance with law. This order was challenged by the petitioner herein before the Income Tax Appellate Tribunal [ITIT] and by order dated 05.10.2007 the said authority has passed the following order:

> '4. After carefully considering the rival's submissions, the basic question which is important for deciding these appeals, when valid certificate is issued u/s.68(2) of VDIS, 1997, then whether immunity is available to the assessee or not. We are of the view that unless and until such certificate is withdrawn, immunity would be available to the assessee. We specifically asked the learned Departmental Representative at the Bench, as to whether such VDIS

certificate has been withdrawn. He could not produce any evidence that VDIS certificate has been withdrawn. Therefore, this certificate still remains alive and the assessee shall be entitled to amnesty granted under VDIS, 1997. In this background of the matter, we are of the considered view that the assessee's appeal filed against the order passed u/s 263 should succeed.'

20. In the meanwhile, the 1st respondent had initiated the proceedings by issuing a proper notice to cancel the certificates issued under Section 68(2) of VDIS, 1997 dated 06.01.1998 on the ground that such certificates were obtained by fraud and misrepresentation. It would be appropriate to reproduce Sections 64 and 68 of VDIS and the same is as follows:

Section 64 Charge on tax on voluntarily disclosed income – (1) Subject to the provisions of this scheme, where any person makes, on or after the date of commencement of this Scheme but on or before the 31st Dec., 1997 a declaration in accordance with the provisions of S.65 in respect of any income chargeable to tax under the IT Act for any assessment year –

(a) for which he has failed to furnish a return under Section 139 of the act;

(b) which he has failed to disclose in a return of income furnished by him under the IT Act before the date of commencement of this schedule;

(c) which has escaped assessment by reason of the omission or failure on the part of such person to make a retrun under the IT Act or to disclose fully and trully all materials facts necessary for his assessment or otherwise.

Then, notwithstanding anything contained in the IT Act or in any Finance act, income-tax shall be charged in respect of the income so declared (such income being hereinafter referred to as the voluntarily disclosed income) at the rates specified hereunder, namely:

(i) in the case of a declarant, being a company or a firm, at the rate of 35 per cent of the voluntarily disclosed income;

(ii) in the case of a declarant, being a person other than a company or a firm, at the rate of 30 per cent of the voluntarily disclosed income.

(2) Nothing contained in sub-s. (1) shall apply in relation to-

(i) the income assessable for any assessment year for which a notice under Section 142 or Section 148 of the IT Act has been served upon such person and the return has not been furnished before the commencement of this Scheme;

(ii) the income in respect of the previous year in which a search under Section 132 of the IT Act was initiated or requistioned under section 132A of the IT Act was made, or survey under Section 133A of the IT Act was carried out or in respect of any earlier previous year.

Section 68:

'The amount of the voluntarily disclosed income shall not be included in the total income of the declarant for any assessment year under the Income-Tax Act, if the following conditions are fulfilled, namely:

(i) the declarant credits such amount in the books of account, if any, maintained by him for any source of income or in any other record, and intimates the credit so made to the Assessing Officer; and

(ii) the income-tax in respect of the voluntarily disclosed income is paid by the declarant within the time specified in section 66 or section 67.

(iii) The Commissioner, shall on an application made by the declarant, grant a certificate to him setting forth the particulars of the voluntarily disclosed income and the amount of income-tax paid in respect of the same.'

21. On the cursory reading of Section 64 (2)(i), it is clear that no person can avail the scheme in relation to the income assessable for any assessment year, for which a notice under Sections 142 or 148 of Income Tax Act has been served upon such person and return has not been furnished before the commencement of this scheme.

22. The petitioner, who is fully aware that if a notice under Section 148 of the Income Tax Act has been served upon him, the scheme would not be applicable to him or he cannot avail the benefits of the scheme, had filed his return of income for the assessment year 1994-1995 with the 2nd respondent only on 14.03.1996 belatedly, under Section 139(4) of Income Tax Act and subsequently, a revised return on 08.05.1997 seems to have been served with notice under Section 148 of Income Tax Act.

23. It also clear from the records that the petitioner had appeared before the assessing officer in response to the notice issued under Section 148, which subsequently was dealt with culminating into a final order being passed on 28.03.2001 under Section 263 of Income Tax Act. Thereafter, as against the said order, admittedly, the petitioner had preferred an appeal, which came to be finally decided on 05.10.2007. When the scheme restricts the application of the benefits under the Scheme for those persons, who have been served with Notice under sections

142 or 148 of the Income Tax Act, prior to the notification of the VDIS scheme, 1997, the petitioner cannot avail the benefits under the scheme, he having been served with the notice under Section 148 of Income Tax Act.

24. On a mere perusal of the records, it is clear that the petitioner has misrepresented in the VDIS scheme that Rs.6,00,000/- as his own income, which was not disclosed earlier. Contradicting to his own original returns filed earlier on 14.03.1996 for the Assessment year 1994-1995 declaring that 6,00,000/- of Rupees was received by him as gift from overseas, a revised return on 08.05.1997 has been filed under VDIS. It is clear that VDIS was notified by the Central Government on 01.07.1997 only. Suppressing the returns filed earlier on 14.03.1996, the petitioner has filed his revised return on 08.05.1997 by including Rs.6,00,000/- as gift received from the NRI.

25. This Court is unable to accept the arguments put forth by the learned counsel for the petitioner that there was no misrepresentation in filing the returns or availing the benefits under the VDIS and also not able to accept the contention raised by the petitioner's counsel that the petitioner has not received any notice under Section 148 for the assessment year 1994-1995. The records are contradicting the petitioner's argument. The petitioner had participated and filed his response to the show cause notice under Section 263 of Income Tax Act seeking to revise the order of assessment year 10.02.1999 and thereafter, the issue went up to the stage of appeal before the Income Tax Appellate Tribunal which passed the final order on 05.10.2007 and thereby leading to cancellation of certificates by order dated 08.07.2009 by the 1st respondent. However, the proceedings initiated by the 1st respondent in withdrawing or revoking the certificates issued under Section 68(2) of VIDS is totally on the ground of misrepresentation made by the petitioner.

26. With regard to the argument put forth by the learned counsel for the petitioner that the 1st respondent had no jurisdiction to invoke Section 21 of General Clauses Act, and to revoke the certificates issued under Section 68(2) of VDIS, it would be appropriate to see Section 21 of General Clauses Act.

> '21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws - Where, by any Central act, or Regulation, a power to issue notifications, orders, rules or bye-law is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend vary or rescind any notifications, orders, rules or bye-laws so issued'.

27. On a careful reading of the above Section, it is clear that the scope of the Act will apply to any Central Act or Regulation and also to the Constitutions, as it is the Rule of interpretation which has been made applicable to the Constitution in the same manner as it applied to any Central Act or Regulation. No doubt, under the above Act, the power is vested with the authority to make an order which implies a power to revoke or modify or vary that order at any subsequent stages, unless there is a specific bar.

28. On a conjoint reading of Section 68 of VDIS and Section 21 of General Clauses Act, it is clear that the Scheme does not provide for any enquiry or investigation prior to the issuance of certificates under Section 68(2) of VDIS, when that being so, the only remedy available for the respondents is to avail Section 21 of General Clauses Act, which is a General application and the Rule of construction that can be applied to statute does not provide any assistance for reasonable construction, so as to meet its object. In this regard also, this Court has no hesitation to reject the argument of the learned counsel appearing for the petitioner, as the authority has jurisdiction to invoke Section 21 of the General Clauses Act to withdraw or revoke the certificates issued Section 68(2) of VDIS.

29. With regard to the citations referred by the learned counsel for the petitioner, this Court is of the view that all the citations on facts as well as on the legal grounds and on their legal preposition are not applicable to the present case as per the details given below:-

(i) (2002) 254 ITR 255 (Gujarat) in Vasantlal Tulsidas Agarwal V. C.I.T., as the facts of the case pertains to the refund of excess amount, whereby Section 70 of the Finance Act 1997 cannot be invoked to deny the refund of excess amount paid by the declarant over and above the tax payable on the declared income, under the voluntary disclosure scheme, excess amount directed to the refunded to the petitioner together with 15% thereon. The facts of the case is not applicable to the present case on hand.

(ii) (2000) 241 ITR 287 (AP) in Patchala Seetharamaiah V. Commissioner of Income Tax here also Section 70 of the Finance Act 1997 cannot have any application to a situation, where the tax paid beyond the prescribed period and accordingly, retention of the said tax department is illegal and the petitioner is entitle to refund the same. This case is not applicable to the case on hand. The case in hand pertains to the refund of tax paid beyond the prescribed period of VDIS scheme and not applicable.

(iii) (1998) 230 ITR 536 (AP) in Shankarlal V. I.T.O. and Others, deals with Section 64(2) of the Finance Act and it only denies the benefit of voluntary disclosure of income that was not returned within the income prescribed under notice Sections 142 or 148 and which expired before the commencement of the scheme, or the income which is detected in a search under Section 132, on a requisition under 132A or in a Survey under Section 133A and they would say that the undisclosed income other than such detected income in relation to the previous year can still be declared, and hence it is constitutionally valid, this case on hand pertains to adjustment of amount and declaration itself is not acceptable and not falling under Section 68(1) of VDIS 1997.

(iii) (2007) 295 ITR 0136 in M.Srinivasa Rao V. the A.C.I.T., eventhough time limit is not p20rescribed under Section 153(3) of the Act, the impugned proceedings initiated by the respondent after a lapse of 6 years cannot be allowed to continue and the impunged order was quashed. But this case is pertaining to the limitation and applicability to Section 153(3) of the Act has no application to the case on hand.

30. Under these circumstances, this Court is of the view that the petitioner cannot avail the benefits under VDIS, having contravened Section 64(2)(1), and as the notice under Section 148 of the Act was issued on 22.06.1997, which is prior to the notification of VDIS, wherein which the petitioner declared the gifts from NRI amounting to Rs.6,00,000/- and since there is prohibition under VDIS, that when the amount so declared is already disclosed by the assessee in the return of income filed before the Scheme came into operation, the same cannot be stated once again by way of revised return of income.

31. In the result, the order passed by the 1st respondent is well found and the petitioner has misrepresented before the authority to avail the benefits under the Scheme VDIS by suppressing the declaration made in the returns filed prior to the notification of VDIS. Hence the Writ Petition is dismissed. Consequently, connected miscellaneous petition is also dismissed. Consequently, connected miscellaneous petition is also dismissed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

ssd

To

1. The Commissioner of Income Tax
   3, Gandhi Road, Salem - 2

2. The Income Tax Officer,
   Ward - I(2),
   Salem - 7

+1cc to Mr.M.P.Senthil Kumar, Advocate sr.68755

W.P.No.3223 of 2010 and
M.P.No.1 of 2010

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nr 26/09/2019