

Sharayu Khot.

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

WRIT PETITION NO. 1246 OF 2021

Mantelone Investment Ltd.
DimitriouKaratasou 15,
Anastasio Building,
6th Floor, Office 601,
2024, Nicosia, Cyprus

...Petitioner

Versus

1. The Commissioner of Income-tax (IT)
Mumbai – 3.
2. The Deputy Commissioner of Income Tax
(International Tax) – 3 (2) (1), Mumbai.
3. Union of India, Thru Secretary,
Department of Revenue, New Delhi – 110
001

...Respondents

Shri Percy Pardiwalla, Senior Advocate a/w Shri Madhur Agrawal
i/by Shri Atul K. Jasani for the Petitioner.

Shri Parag A. Vyas for the Respondents.

CORAM : K.R. SHRIRAM &
R.I. CHAGLA, JJ.

DATE : 15 September 2021
(V.C.)

PER :- K.R. SHRIRAM, J.

1. Petitioner is impugning Form No. 3 dated 11th December

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2020 issued by respondent No. 1 under the Direct Tax Vivad se Vishwas Act, 2020 (*“the VSV Act”*) for the assessment year 2015-16 and seeks direction to respondents to settle the dispute of petitioner and/or issue revised Form No. 3 for settlement of the dispute of petitioner for assessment year 2015-16 without withdrawing the interest already granted under Section 244A of the Income Tax Act, 1961 (*“the Act”*) at the time of completion of the assessment proceedings.

2. The facts in brief are as under :-

- A) Petitioner is a Company incorporated in Cyprus on 17th December 2008 as a Private Limited Liability Company under the Cyprus Company Law, CAP-113.
- B) Petitioner filed its return of income for the assessment year 2015-16 on 30th September 2015, declaring total income at Rs. 28,35,66,580/-. The income of petitioner, inter-alia, consisted of the interest income earned by petitioner by subscribing to interest bearing securities from Indian entities. Petitioner had offered the said interest income at the rate of 10% as per Article

11 of the India-Cyprus Double Taxation Avoidance Agreement ('DTAA'). For the year under consideration, tax of Rs. 8,50,69,973/- was deducted by the payer and was claimed as credit on the income so offered to tax by petitioner. As per petitioner, the total tax liability was Rs. 2,83,56,658/- for the assessment year 2015-16. Petitioner had claimed a refund of Rs. 5,67,13,320.

- C) Respondent No. 2 passed the assessment order dated 6th February 2018 under section 143(3) read with section 144C(13) of the Act read with rectification order dated 30 March 2018 under section 154 of the Act for the assessment year 2015-16, holding that petitioner is not entitled to the benefit of the India-Cyprus DTAA as petitioner is not the beneficial owner of the interest income. Respondent No. 2, accordingly, held that the interest income of petitioner would be chargeable to tax at the rate of 20% under section 115AD(1)(a)(i) of the Act. Respondent No. 2, computed the total refund of Rs. 2,37,34,523/- and interest on the said amount under section 244A of the Act at Rs. 42,72,210. Out of the total refund of Rs. 2,80,06,730, refund of Rs. 2,62,11,376 was received through

cheque dated 11th April 2018. The balance refund of Rs. 17,95,354 was not received by way of cash or by way of credit of tax deducted at source before filing the application in Form No. 1. However, vide rectification order dated 28 December 2020 passed under section 154 of the Act for assessment year 2019-20, respondent No. 2 granted the refund of Rs. 17,95,354 by way of TDS credit.

- D) On 17th March 2020, the Government of India promulgated the VSV Act for settlement of disputes between assesseees and the department. Assesseees were eligible under the VSV Act, initially, up to 31st March 2020 to apply for settlement of disputes. The applicability of the VSV Act, however, has been extended from time to time.
- E) On 25th November 2020, petitioner, made an application in Form No. 1, as prescribed under the VSV Act for settlement of its dispute with respect to assessment proceedings for assessment year 2015-16. Petitioner, computed the 'disputed tax' at Rs. 3,29,78,793 (i.e. revised tax liability of Rs. 6,13,35,450 minus tax liability as per the return of income of Rs. 2,83,56,658). On

1st December 2020, petitioner explained in detail the stand adopted by petitioner while filing Form No. 1 and the basis of computation of the amount refundable to Petitioner.

- F) Respondent No. 1 has thereafter, issued the impugned Form No.3 dated 11th December 2020 by uploading the same in the income tax portal but raised a demand of Rs. 42,72,203 for the assessment year 2015-16. The said amount has been computed by Respondent No. 1 on the alleged basis that the interest under section 244A of the Act, which was granted at the time of giving refund to petitioner, as per the assessment order under section 143(3) of the Act read with rectification order under section 154 of the Act, is no longer available to Petitioner and, hence, an additional amount to the extent of the said interest is liable to be paid by Petitioner. No reason has been given in the said form for taking the said stand by Respondent No. 1, except stating as under in the remarks column of Form No. 3.

“Refund claimed in the return is Rs 56713320 whereas refund released including 244A is Rs 28 006730 ,hence refund reduced is Rs 28706590. The same has been considered and allowed in form 3.”

3. Shri. Vyas submitted that as per the explanation to Section 7(a) of VSV Act where the amount paid before filing the declaration under Section 4 exceeds the disputed tax, the same shall be refunded but the assessee will not be entitled to any interest under Section 244A of the Act. According to Shri Vyas, on a combined reading of Section 3 and Section 7 of the VSV Act, the assessee is not entitled to any interest under Section 244A and therefore, the amount of interest which was paid on the undisputed component as per the revised assessment order dated 30th March 2018 is to be returned to respondent.

4. Shri Vyas further submitted that if the interest was allowed to be repaid by petitioner, it would amount to discrimination between assesseees who have been granted interest under Section 244A and other assesseees who have a net refund amount under the VSV Act without 244A interest. Mr. Vyas added that the Government forgoes interest and penalty and assessee pays tax and forgoes interest or forgoes amount equivalent to interest received under Section 244A.

5. Referring to Explanation to Section 7 of the VSV Act,

Shri. Pardiwalla submitted that the restriction on payment of interest under Section 244A of the Act is only when an assessee is eligible for a refund pursuant to making an application under the VSV Act, that is, when the tax paid by the assessee exceeds the amount payable under Section 3 the assessee would be entitled to refund, but without interest.

Shri. Pardiwalla submitted that in the present case interest under Section 244A of the Act of Rs. 42,72,210/- was not determined as payable under the VSV Act but was paid as per the assessment order passed for the said assessment year which was before making the application under the VSV Act. According to Shri. Pardiwalla, the explanation to Section 7 therefore is not applicable to the present case.

6. Shri. Vyas however, as an officer of the Court, admitted that under the VSV Act, Section 2(1)(j)(A), the term disputed tax is the amount of tax that is payable, if the Appeal was decided against the appellant. Shri Vyas also agreed that as per Section 3(a) of the VSV Act, amount payable under the VSV Act is the amount of the disputed tax.

7. Petitioner, as stated earlier, had filed return of income for assessment year 2015-16 in which petitioner had computed income of Rs. 28,35,66,576/- and total tax payable of Rs. 2,83,56,658/- at 10% of the total income. Petitioner had TDS credit in the sum of Rs. 8,50,69,973/- and had claimed refund of Rs. 5,67,13,320/-. Petitioner had thereafter, revised its returns and as per the revised assessment order dated 30th March 2018, the Department held that the tax payable by petitioner was 20% of its total income amounting to Rs. 5,67,13,315/- and after adjusting the TDS of Rs. 8,50,69,973/- and adding Sur-charge of Rs. 28,35,666/- and Education cess of Rs. 17,86,469/-, concluded that the total tax and interest payable was Rs. 6,13,35,450/-. After adjusting the taxes paid, according to respondent, the amount refundable was only Rs. 2,37,34,523/- against what petitioner had claimed in its return of income of Rs. 5,67,13,315/-. On this amount of Rs. 2,37,34,523/- refundable interest of Rs. 42,72,210/- was also paid. Petitioner therefore, got refund of a net amount of Rs. 2,80,06,730/-. According to petitioner, as the department had wrongly charged to tax at sum of Rs. 3,29,78,793/- (Rs. 6,13,35,450/- Less Rs. 2,83,56,658/-), petitioner filed an appeal before the CIT(A) on 5th March 2018 under reference No. 423991101050318 which was pending.

8. The VSV Act was enacted to provide for resolution of disputed tax and for matters connected therewith or incidental thereto. The Government of India wanted to reduce the litigations pending and decided to resolve all disputed tax matters. When the VSV scheme was enacted, petitioner decided to take benefit of the scheme under the Act and filed a declaration and undertaking in Form No. 1 under the VSV Act read with relevant rules whereby petitioner decided to settle the appeal by paying the disputed tax of Rs. 3,29,78,793/-. When we say decided to pay, it does not mean that petitioner had to pay that additional amount, but this amount was already paid to the Government by way of TDS deducted and petitioner was seeking a refund. Petitioner decided to forego that refund claim of Rs. 3,29,78,793/-. After considering petitioner's declaration/application respondent issued Form No. 3 being form for certificate under Sub-Section (1) of Section 5 of the VSV Act read with VSV Rules, 2020, accepting that the tax arrear payable was Rs. 3,29,78,793/-. Respondents, however, sought return of the amount of Rs. 42,72,203/- being interest which it had granted on the undisputed amount of refund of Rs. 2,37,34,523/-.

9. The provisions of VSV Act relevant for this Petition,

Section 2(1)(j)(A), Section 2(1)(o), Section 3(a) and Section 7 read as under:-

“2. (1) In this Act, unless the context otherwise requires,—

(a)

(j) "disputed tax", in relation to an assessment year or financial year, as the case may be, means the income-tax, including surcharge and cess (hereafter in this clause referred to as the amount of tax) payable by the appellant under the provisions of the Income-tax Act, 1961, as computed hereunder:

(A) in a case where any appeal, writ petition or special leave petition is pending before the appellate forum as on the specified date, the amount of tax that is payable by the appellant if such appeal or writ petition or special leave petition was to be decided against him;

.....

(o) "tax arrear" means,

(i) the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax, and penalty leviable or levied on such disputed tax; or

(ii) disputed interest; or

(iii) disputed penalty; or

(iv) disputed fee,

as determined under the provisions of the Income-tax Act.

3. Subject to the provisions of this Act, where a declarant files 1[under the provisions of this Act on or before such date as may be notified], a declaration to the designated authority in accordance with the provisions of section 4 in respect of tax arrear, then, notwithstanding anything contained in the Income-tax Act or any other law for the time being in force, the amount payable by the declarant under this Act shall be as under, namely:—

<i>Sl.</i>	<i>Nature of tax</i>	<i>Amount payable</i>	<i>Amount payable under this</i>
<i>No.</i>	<i>arrear</i>	<i>under this Act</i>	<i>Act on or after the <u>3</u>[1st day</i>
		<i>on or before the</i>	<i>of January, 2021 or such</i>

2[31st day of later date as may be
December, 2020 notified] but on or before
or such later the last date
date as may be
notified]

- (a) where the tax amount of the the aggregate of the amount
arrear is the disputed tax. of disputed tax and ten per
aggregate cent. of disputed tax:
amount of
disputed tax,
interest
chargeable or
charged on
such disputed
tax and penalty
leviable or
levied on such
disputed tax. provided that where the ten
per cent. of disputed tax
exceeds the aggregate
amount of interest
chargeable or charged on
such disputed tax and
penalty leviable or levied on
such disputed tax, the
excess shall be ignored for
the purpose of computation
of amount payable under
this Act.

.....

7. Any amount paid in pursuance of a declaration made under section 4 shall not be refundable under any circumstances

Explanation.—For the removal of doubts, it is hereby clarified that where the declarant had, before filing the declaration under sub-section (1) of section 4, paid any amount under the Income-tax Act in respect of his tax arrear which exceeds the amount payable under section 3, he shall be entitled to a refund of such excess amount, but shall not be entitled to interest on such excess amount under section 244A of the Income-tax Act.”

10. Under the VSV Act, Section 3(a) provides that where a declarant files a declaration to the designated authority in accordance with the provisions of Section 4 in respect of ‘tax arrear’, the amount payable by the declarant shall be, where the ‘tax arrear’

is the aggregate amount of disputed tax, the amount of the disputed tax, if it is paid before the date mentioned or extended and if it is paid beyond such a date, the amount of disputed tax plus 10% of the disputed tax. In the case at hand, the question of interest chargeable or charged on disputed tax or penalty does not arise because the disputed tax relates to the excess TDS deducted or paid on behalf of petitioner. Tax arrear is defined to mean the aggregate amount of 'disputed tax', interest chargeable or charged on such 'disputed tax', and penalty leviable or levied on such 'disputed tax'. 'Disputed tax' as defined and applicable to the present case is the amount of tax that is payable by appellant if such appeal was to be decided against him. Therefore, if the appeal which had been filed by petitioner challenging the revised assessment order dated 30th March 2018 was dismissed by the CIT appeal, the disputed tax would be Rs. 3,29,78,793/- and not a penny more. Therefore, as per the scheme and the provisions of the Act, the amount that will be payable under the VSV Act will be the amount of Rs. 3,29,78,793/- which is the disputed tax and nothing more. The amount of Rs. 42,72,203/- as determined to be payable as per Form No. 3, is not payable by petitioner because that is not part of the disputed tax which was the subject matter of the appeal.

11. Shri Vyas's reliance on explanation to Section 7 of the VSV Act is misplaced in as much as the restriction on payment on interest under Section 244A of the Act is only when an assessee is eligible for a refund pursuant to making an application under the VSV Act, i.e., when the tax paid by the assessee exceeds the amount payable under Section 3. In such a case, the assessee would be entitled to refund but without interest. In the case at hand, interest of Rs.42,72,210/- paid under Section 244A of the Act was not determined as payable under the VSV Act but was paid as per the assessment order passed for the Assessment Year which was more than 2 1/2 years before the declaration under the VSV Act was filed by petitioner. Therefore, the explanation is not applicable to the case at hand. Petitioner has not asked for interest under Section 244A of the Act on the amount of refund claimed in form no.1. In the explanation to Section 7 of the VSV Act, the term specifically used is any amount paid "in respect of" tax arrear. The term "tax arrear", is defined to mean aggregate amount of disputed tax and the term "disputed tax" is defined to mean the tax payable by petitioner as if the appeal is decided against petitioner. So, the explanation only refers to the amount paid in respect of tax arrear which is refunded under the VSV Act and not any other refund amount. This implies

that the reference in which the restriction of interest under section 244A of the Act is made is towards any excess payment of tax in respect of the tax arrears which is the disputed tax. Therefore, the VSV Act clearly envisages that no interest under section 244A of the Act is payable on the amount of tax paid towards the disputed tax which is in excess of the amount determined payable as per Section 3 of the VSV Act. The amount payable towards disputed tax will only arise post the assessment order is passed. In the case at hand, petitioner has not made any payment post the assessment order, in fact, respondent no.2 has determined a refund to petitioner in the revised assessment order after adjusting all the disputed tax. The refund determined by respondent no.2 in the assessment order is out of tax deducted at source and taxes paid prior to filing of the return of income and not on account of any amount paid towards tax arrear prior to applying under the VSV Act which has resulted in excess payment of the tax arrear (disputed tax) determined as per Section 3 of the VSV Act. The interest on refund that was paid was on the undisputed part of the excess tax paid and not on the disputed tax.

12. In the circumstances, Form - 3 dated 11th December 2020 issued by respondent No. 1 is hereby set aside.

Respondent No. 1 is directed to issue revised Form -3/fresh Form No. 3 in terms of the order mentioned above.

13. Mr. Pardiwalla states that the scheme has now been extended only upto 30th September 2021. Therefore, revised Form - 3 to be issued within a period of one week of the order being uploaded.

14. Petition disposed.

[R.I. CHAGLA J.]

[K.R. SHRIRAM, J.]