

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

WPA/18282/2021
ITA/2/2021
PRINCIPAL COMMISSIONER OF INCOME TAX-1, KOLKATA
VERSUS
ASISH KUMAR GHOSH

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 1st April, 2022

Appearance :-

Mr. Smarajit Roychowdhury, Adv.
Mr. Soumen Bhattacharya, Adv.
... For Appellant

Mr. Abhratosh Majumder, Sr. Adv.
Mr. Avra Majumder, Adv.
Mr. K. Roy, Adv.
Mr. B. Gupta, Adv.
... For Respondent

WPA/18282/2021

The Court : This writ petition has been filed by the assessee Asish Kumar Ghosh challenging the order passed by the Assistant Commissioner of Income Tax, Head Quarter 1, Kolkata for the Principal Commissioner of Income Tax, Kolkata dated 9th September, 2021. By the said order the request/representation made by the appellant to revive Form 3 declaration issued to the appellant under

the provisions of the Direct Tax Vivad Se Vishwas Act 2020 (VSV Act) was rejected. The petitioner/assessee was assessed under the provisions of the Income Tax Act, 1961 (the Act) for the assessment year 2014-15 by order dated 24th October, 2016 passed under Section 143(3) read with Section 115 WE(3). Aggrieved by such order, the assessee preferred appeal before the Commissioner of Income Tax (Appeal-VI), Kolkata (CIT). By order dated 10th April, 2019 the appeal was dismissed. Challenging the same the assessee filed appeal before the Income Tax Appellate Tribunal (Tribunal). The appeal was allowed by order dated 2nd August, 2019. Aggrieved by such order the revenue has filed appeal before this Court being ITAT 7 of 2021, which was admitted on 20th January, 2021 after condoning the delay of 400 days in filing the appeal. Before the Tribunal, the assessee had filed MA 224/Kolkata/2019 seeking certain clarification in the order passed by the Tribunal dated 2nd August, 2019 deleting the addition of unexplained cash credit under Section 68 of the Act. The said application was allowed as prayed for. Aggrieved by the same, the revenue has filed ITAT 73 of 2021, which is yet to be admitted.

As noted above, the assessee did not wish to contest the matter and precisely for such reason had filed a declaration under VSV Act on 30th October, 2020. The said declaration was processed and Form 3 was issued to the assessee on 27th January, 2021. The events which took place after the filing of the declaration and before issuance of Form 3 is the subject matter of controversy in the writ petition.

The order impugned in the writ petition dated 9th September, 2021 states that the revenue had filed appeal before this Court on 8th January, 2021 and the delay in filing the appeal was condoned and the appeal was admitted on 20th January, 2021 and the declaration filed by the assessee having been filed after the date of issue of the Circular dated 4th December, 2020 issued by the CBDT, the declaration filed under the VSV Act cannot be accepted and for such reason the Form 3, dated 27th January, 2021, which was issued, was stated to have been issued inadvertently and therefore cancelled. In the impugned order, the revenue refers to Question no.59 as contained in the Circular No.21/2020, dated 4th December, 2020, issued by the CBDT which, according to the revenue, is in the nature of a clarification with regard to the applicability of the provisions of the VSV Act. Question no.59 and answer given thereunder are quoted below :-

“Q. No.59. Whether the taxpayer in whose case the time limit for filing of appeal has expired before 31st January, 2020 but an application for condonation of delay has been filed is eligible?”

Answer : If the time limit for filing appeal expired during period from 1st April, 2019 to 31st January, 2020 (both dates included in the period) and the application for condonation is filed before the date of issue of this circular, and appeal is admitted by the appellate authority before the date of filing of the declaration, such appeal will be deemed to be pending as on 31st January, 2020.”

We have to test the correctness of the order passed by the revenue withdrawing the Form 3 declaration already issued in favour

of the assessee. At the outset we need to point out that the revenue while passing the order dated 9th September, 2021 has not traced its power to any statutory provision empowering them to withdraw a Form 3 declaration which has been admittedly issued in favour of the assessee on 20th January, 2021. Very often we come across cases where the assessee comes to the court stating that they have not been permitted to make alterations or amendments to the declaration which they have filed and very often such requests are declined on flimsy, frivolous and hypertechnical ground. When such cases come before the Court, the revenue would contend that they are guided and bound by the terms and conditions of the VSV Act and until and unless there is a specific provision provided for under the Act or the Rules framed thereunder, the assessee has no right to make any alteration. If the same stand is applied to the case of the revenue before us, the only answer which can be given is that once a declaration is issued in Form no.3, there appears to be no statutory provision which permits the Department to withdraw or cancel the Form 3. It may be a different aspect if there are reasons for either not fully accepting the Form 3 declaration while issuing Form 4 declaration or for any other reasons, which is not the case before us.

Therefore, we are of the prima facie view that the Form 3 declaration once having been issued can be processed and taken to its logical end either may be fully in favour of the assessee or otherwise but there appears to be no provision to withdraw Form 3 declaration

which was admittedly issued in favour of the assessee on 27th January, 2021.

The second issue would be whether the revenue can now contend that Circular dated 4th December, 2020 covers cases only when the appeals are filed with an application for condonation of delay between 1st April, 2019 and 31st January, 2020 and the appeal in the assessee's case was filed before this Court on 8th January, 2021 and therefore in terms of the Circular, an application under the VSV Act is not maintainable.

One important issue which the revenue has lost sight of is that the appeal which is filed before this Court on 8th January, 2021 was time barred and there was a delay of 400 days in filing the appeal. Even prior to filing the appeal the assessee had filed the declaration under the VSV Act on 30th December, 2020. This appears to have been done by abundant caution mentioning the cut off date as 31st January, 2020 in column B of the Declaration. The assessee was put on notice and the affidavit and the application for condonation of delay along with the memorandum of grounds were served on the assessee and soon after receipt of the same on 12th January, 2021 a revised declaration under the VSV was filed mentioning the relevant details. On 21st January, 2021 delay in filing the appeal was condoned and the appeal was also admitted. The question would be as to what is the effect of the condonation of the delay in filing the appeal. The last date for filing the appeal was 13th December, 2019 but the appeal

was filed only on 8th January, 2021. Consequently, there was a delay of 400 days. By virtue of the order passed by this Court on 20th January, 2021 condoning the delay, it is deemed that the appeal filed by the revenue for all purposes was within time, that is, as if the appeal had been presented not later than 13th December, 2019. This would be the correct interpretation of the legal provisions and the effect of an order of a court condoning the delay. This is as a result of deeming fiction which is created by condoning the delay committed by the revenue and treating the appeal as if it had been presented within time. Our view is also supported by the decision of the Division Bench of the High Court of Kerala in the case of S.V. Suhasini Devi & Anr. vs. Padmanabhan Madhavan, reported in AIR 1989 Kerala 314, wherein the Court had observed that the delay having been condoned by the Court, the appeal should therefore be deemed to have been filed within the time allowed by law. Thus, by applying the deeming fiction to the facts of the case, we have to necessarily hold that the appeal filed by the revenue before this Court for all purposes should be treated to have been an appeal filed not later than 13th December, 2019.

In such circumstances, the petitioner/assessee was well within his right to have chosen to avail the benefit of the VSV Act and the declaration filed by the assessee has to be treated to be a valid declaration and has to be processed in accordance with the provisions of the VSV Act. The other aspect would be whether the revenue can

take advantage of its wrong. In other words, the revenue now seeks to contend that the assessee cannot avail the benefit of the Scheme on the ground that the appeal was filed by them much after 31st January, 2020, that is, on 8th January, 2021 alone and therefore, in terms of the clarification issued by the CBDT the declaration cannot be entertained.

The Hon'ble Supreme Court in Superintendent of Taxes, Dhubri & Ors. vs. M/s. Onkarmal Nathmal Trust, reported in (1976)1 SCC 766 held that the State cannot take advantage of its own wrong and lack of diligence. This principle would apply with full force to the case on hand.

Thus, in the light of the above discussion, we are of the clear view that the order passed by the revenue dated 9th September, 2021 is not sustainable and not in accordance with law.

In the result, the writ petition is allowed. The order dated 9th September, 2021 as well as the earlier reply as given by the revenue to the assessee namely, letter dated 15th July, 2021, are held to be bad in law and accordingly quashed.

The learned Standing Counsel appearing for the revenue would contend that the Scheme has come to an end and at this juncture the question of processing the declaration of the assessee does not arise.

We do not agree to the said contention for more than one reason. Firstly, the provisions of VSV Act and the Scheme availed thereunder had a cut off date which cut off date was extended and the

last of such extension was till 31st October, 2021. Therefore, it may be true that as on date the Scheme is no longer in vogue but it is incorrect to state that the Department will not act on declarations which have been filed by the assessee or in cases where the assessee had approached the court and courts grant certain reliefs directing the Department to process the declaration form. Therefore, the officers of the Department which have been entrusted with the assignment of considering the declaration filed under the Scheme do not become functus officio and would continue to exercise their power. That apart, the scheme had been periodically extended and one has to look to the object for such extension and one of the objects was to augment the revenue and if that was the object of the scheme then liberal interpretation requires to be given, however, not to the extent of reviving the scheme but to consider the declaration filed under the scheme will before the closure of the scheme and to direct them to be processed in accordance with law.

In the light of the above, we direct the concerned respondent to restore the Form 3 declaration dated 27th January, 2021 which was withdrawn/deleted from the server of the Department and process the Form 3 declaration in accordance with law.

This direction be complied with by the appropriate respondent within a period of eight weeks from the date of receipt of the server copy of this order.

The Registrar, IT, is directed to take note of the factum of disposal of WPA 18282 of 2021 in Appellate Side cause list along with the ledger maintained by the department.

ITA/2/2021

This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 is directed against the order dated 2nd August, 2019 passed by the Income Tax Appellate Tribunal “B” Bench, Kolkata in ITA No. 1164/Kol/2019 for the assessment year 2014-15. The revenue has suggested following substantial questions of law for consideration.

- a) Whether the assessee is entitled to tax exemption u/s. 10(38) when the records and material indicates that the alleged income shown as Long Term Capital Gain is result of manipulated practice of an organized tax evasion ?
- b) Whether the order of the Income Tax Appellate Tribunal was erroneous in law in deleting the addition of Rs. 24,28,532/- (Rs. 23,72,470/- + Rs. 56,062/-) ignoring the large scam of tax evasion by way of bogus capital gain generated in penny stock ?
- c) Whether the Income Tax Appellate Tribunal was justified in granting relief to the assessee on account of addition made u/s. 68 by the Assessing Officer of Rs. 24,28,532/- (Rs. 23,72,470/- + Rs.56,062/-) by dismissing the appeal of the revenue on monetary criteria only ?

- d) Whether the Income Tax Appellate Tribunal was justified in granting relief to the assessee on account of addition made u/s. 68 of the Income Tax Act, 1961 ignoring the fact that the assessee could not substantiate the genuineness of the transactions or prove that it had not indulged in dubious share transactions in a penny stock, meant to account for its undisclosed income in the garb of Long Term Capital Gain ?
- e) Whether the Income Tax Appellate Tribunal order was erroneous in law in accepting the transactions in purchase/sale of shares as genuine, merely on the basis of documents supplied by the assessee, without piercing the veil of the manipulative and fraudulent transactions entered by assessee in collusion with a cabal of share brokers and entry operators for the purpose of tax evasion ?

We have heard Mr. Smarajit Roychowdhury, learned Standing Counsel, assisted by Mr. Soumen Bhattacharya, learned Advocate appearing for the revenue and Mr. Abhratosh Majumder, learned Senior Counsel, assisted by Mr. Avra Majumder.

In this appeal we may not be required to answer the substantial questions of law in the light of the fact that the respondent/assessee had filed declaration under the provisions of the Vivad Se Viswas Act (VSV Act) and though the declaration was processed and Form 3 was issued on 27th January, 2021, subsequently it was withdrawn from the server of the Department. This compelled the assessee to submit

representation to the Department and the representation was rejected by order dated 9th September, 2021. The said order was put to challenge in WPA/18282 of 2021, which was allowed by us by order dated 1st April, 2022 with a direction to the concerned authority to restore the Form 3 which was originally issued and process the same in accordance with law.

In the light of the said direction, this appeal filed by the revenue stands closed and the substantial questions of law are left open.

In the event, the assessee is not successful in obtaining a relief under the provisions of the VSV Act and for any valid reason the declaration is rejected, we grant liberty to the appellant/revenue to restore the appeal to the file of this case and file an application and such application shall be entertained by the Registry without insisting upon an application under Section 5 of the Limitation Act.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)