

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3622 OF 2019

Kamla Chandrasingh Kabali)
PAN: AAMPK9951A, an individual)
residing at 402, Spectrum, MP Vaidya Marg,)
Near Balaji Temple, Ghatkopar (E),)
Mumbai - 400 077.) ... Petitioner

Vs.

1. Principal Commissioner of Income Tax-27)
4th Floor, Tower No.6, Vashi Railway Station)
Commercial Complex, Vashi, Navi Mumbai.)
2. Central Board of Direct Taxes)
North Block, New Delhi - 110 001.)
3. Union of India)
Through the Secretary, Ministry of Finance,)
Government of India,)
North Block, New Delhi - 110 001.) ... Respondents

Mr. Devendra H. Jain for Petitioner.
Mr. Arvind Pinto for Respondents - Revenue.

**CORAM : K. R. SHRIRAM &
N. J. JAMADAR, JJ.**
DATE : FEBRUARY 02, 2022

JUDGMENT :- (Per N. J. Jamadar, J.)

Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. By this petition under Article 226 of the Constitution of India, the petitioner - an individual, seeks a direction to the Principal Commissioner of Income Tax - respondent No.1 to issue the certificate in Form 4 as required by Rule 4(5) of the Income Declaration Scheme Rules, 2016 (“*Rules 2016*”) in respect of the income declared by the

petitioner under the said scheme in Form 1 under Section 183 of the Finance Act, 2016 (“*the Act, 2016*”) , after accepting the declaration so made by the petitioner.

3. The petition arises in the backdrop of the following facts:-

- (a) The petitioner is a spinster. On account of certain unfavourable familial circumstances, the petitioner could not file returns for the assessment years 2011-12 to 2014-15.
- (b) The Parliament introduced a scheme titled “Income Declaration Scheme, 2016” (“*Scheme, 2016*”) under Section 183 of the Act, 2016, with a view to provide opportunity to the assesseees to make declarations of undisclosed income.
- (c) Availing the benefit of the said Scheme, 2016, the petitioner filed a declaration in the prescribed Form 1 thereunder on 30th December 2016, declaring total undisclosed income of Rs.2,39,08,854/-, which comprised undisclosed income of Rs.52,74,620/- for the assessment year 2011-12; Rs.69,14,678/- for the assessment year 2012-13; Rs.62,87,925/- for the assessment year 2013-14; and Rs.54,31,631/- for the assessment year 2014-15.
- (d) In accordance with the provisions of the Act, 2016, the said undisclosed income entailed total tax, surcharge and penalty to the tune of Rs.1,07,58,986/-.
- (e) It transpired that the said Form was not acted upon by the respondent No.1 as there were certain mistakes.
- (f) After a notice under Section 147 of the Income Tax Act, 1961 (“*the Act, 1961*”) was received, the petitioner submitted a revised Form on 18th January 2019.
- (g) The respondent No.1, despite the petitioner having complied with all the requirements to be eligible to get the benefit of the Scheme 2016, including the payment of the aforesaid

amount of Rs.1,07,58,986/-, did not issue the certificate in Form 4.

- (h) The petitioner claimed that she had paid advance tax and thus entitled to credit for the same against the aforesaid liability of Rs.1,07,58,986/-.
- (i) The respondent No.1 took a stand that the petitioner was not entitled to credit of the amount, which was paid by way of advance tax.

Hence, this petition.

4. An affidavit in reply is filed by Mr. Jagdish Babu Malempati, Principal Commissioner of Income Tax. The claim of the petitioner that despite the petitioner having complied with all the requirements under the Scheme 2016, the respondent No.1 had not issued the certificate in Form No.4, was contested. It was contended that as against the amount of Rs.1,07,58,986/- payable in respect of the undisclosed income under the Scheme, 2016, the petitioner had paid only a sum of Rs.40,03,031/- towards the tax, and thus until full and final payment of tax, surcharge and penalty, as applicable under the Scheme, 2016 was made, the petitioner was not entitled for the grant of certificate in Form No.4. Consequently, no case for grant of mandamus was made out. As regards the claim of the petitioner for adjustment of pre-deposited tax, such as advance tax and self-assessment tax, the respondent No.1 contended that there was no provision under the Scheme, 2016 to give credit for such payment.

5. A copy of the communication dated 14th January 2020 spelling out the reasons for non-issue of Form No.4, is annexed to the affidavit in reply.

6. Since the controversy revolves around the justifiability of the

reasons ascribed by respondent No.1 for non-issue of Form No.4, it may be apposite to extract the relevant part of the said communication, which reads as under:-

2. *On perusal of the IDS portal, it is seen that you have paid total tax of Rs.40,03,031/- and TDS of Rs.24,75,135/- towards consolidate declaration made of Rs.2,39,08,850/- under the IDS 2016 relevant to the Ays.2011-12, 2012-13, 2013-14 and 2014-15 which is 60.21% of total tax payable (Rs.1,07,58,986/-).*

2.1. *However, your representative vide their letters dated 21.01.2019 & 13.02.2019 has requested to allow credit for pre-deposited taxes i.e. Self Assessment Tax and Advance Tax.*

3. *As per IDS 2016 there is no provision for adjustment of any of the pre-deposited tax, such as Advance Tax and Self Assessment Tax. The relevant issue is covered by the decision passed by Hon'ble Bombay High Court in the case of Umesh D. Ganore Vs. PCIT vide order dated 08.03.2019 against Writ Petition No.14709 of 2018.*

4. *In view of the above facts and circumstances, your request for adjustment of Self Assessment Tax and Advance Tax into IDS 2016 is not acceptable as per Notification No.103/2019 dated 13.12.2019, you may deposit balance tax along with interest @ 1% p.m. on or before 31.01.2020 and Form No.4 will be issued immediate to making of balance tax liabilities payable by you towards IDS 2016."*

7. From the aforesaid communication, it becomes evident that there is no controversy over material facts. Firstly, the petitioner had disclosed Rs.2,39,08,850/- under the Scheme, 2016; secondly, the petitioner was required to pay a sum of Rs.1,07,58,986/- towards the tax, surcharge and penalty; thirdly, the petitioner paid a sum of Rs.40,03,031/- towards the tax and fourthly, a sum of Rs.24,75,135/- was adjusted towards the TDS.

8. The Revenue thus claimed that only 60.21% of the total amount due under the Scheme, 2016 was received. The Revenue took a stand that the request of the petitioner to adjust pre-deposited tax such as, advance tax and self-assessment tax, cannot be acceded to as under the Scheme, 2016, there was no provision for such adjustment. The Revenue sought to draw support from a judgment of this Court in the case of

Umesh D. Ganore Vs. Principal Commissioner of Income Tax¹.

9. In the light of the aforesaid assertions of the petitioner and the contentions of respondent No.1, we have heard Mr. Devendra H. Jain, the learned counsel for the petitioner and Mr. Arvind Pinto, the learned counsel for the respondents.

10. Mr. Jain would urge that the stand of the respondents that the advance tax paid by the petitioner cannot be adjusted against the liability under the Scheme, 2016 is not in consonance with law. A two-fold submission was canvassed by Mr. Jain. Firstly, in the Circular No.25 of 2016 dated 30th June 2016, the Central Board of Direct Taxes (CBDT) has clarified that the credit for tax deducted at source (TDS) shall be allowed in those cases where the related income is declared under the scheme and the credit for the tax has not already been claimed in the return of income filed for any assessment year. Mr. Jain would thus urge that if credit can be given in respect of the TDS, there is no reason not to grant the same dispensation in respect of the advance tax.

11. Secondly, Mr. Jain would urge that in the case of **Umesh D. Ganore** (*supra*), this Court has not considered a Constitution Bench judgment of the Supreme Court in the case of **Brij Lal Vs. Commissioner of Income Tax, Jalandhar**². Moreover, the judgment of the Delhi High Court in the case of **Kumudam Publications Private Limited Vs. Central Board of Direct Taxes**³ in which the Delhi High Court held that advance tax could be adjusted against the liabilities under the Scheme 2016, and with which this Court differed in the case of **Umesh D. Ganore** (*supra*), was upheld by the Supreme Court in as much as the Special Leave Petition (Civil) Diary No.33000 of 2017 preferred by the Revenue thereagainst came to be dismissed. In contrast,

1 [2019] 104 taxmann.com 209 (Bombay)

2 [2010] 194 Taxman 566 (SC)

3 [2017] 79 taxmann.com 466 (Delhi)

the Special Leave Petition preferred by the assessee against the decision of this Court in the case of **Umesh Ganore** (*supra*) is sub-judice before the Supreme Court as notice has been issued on 26th July 2019.

12. *Per contra*, Mr. Pinto, the learned counsel for the Revenue would submit that the issue sought to be raised by the petitioner is settled by the decision of this Court in the case of **Umesh Ganore** (*supra*) and, thus, the respondent No.1 was well within his rights in declining to issue the certificate in Form 4. Mr. Pinto further submitted that in the case of **Umesh Ganore** (*supra*), this Court considered the judgment of Delhi High Court in the case of **Kumudam Publications Private Limited** (*supra*) as well as the circular dated 30th June 2016 issued by the CBDT and yet disagreed with the views expressed therein for reasons which are based on the construction of the Scheme, 2016. Therefore, the petition does not deserve to be entertained.

13. In the case of **Umesh Ganore** (*supra*), a Division Bench of this Court considered the question as to whether advance tax, self-assessed tax and TDS paid by the assessee prior to filing of declaration should be adjusted towards the discharge of the assessee's liability to pay tax, surcharge and penalty under the said scheme. After advertng to the provisions of the Scheme, 2016, this Court recorded that the assessment proceedings under the Act, 1961 and declaration of undisclosed income under the Scheme, 2016 are required to be considered in two separate compartments. The self-assessed tax and advance tax could be adjusted against the assessee's liability arising in the assessment under the Act, 1961. However, the same cannot be transposed for the purpose of discharging the liability to pay tax, surcharge or penalty by declarant of the undisclosed income under the Scheme, 2016. The Court was of the view that the Scheme, 2016 is a complete Code in itself.

14. As indicated above, pursuant to the Circular of CBDT, the respondent No.1 has given credit for the TDS. The controversy, thus,

revolves around the claim for credit in respect of advance tax paid by a declarant under the Scheme, 2016. The question that essentially arises for consideration is the character of the advance tax. Is advance tax entitled to the same dispensation as is given to the TDS?

15. The Constitution Bench judgment in the case of **Brij Lal** (*supra*) illuminates the path. While expounding the nature of the levy of interest under Section 234B of the Act, 1961, in the context of the proceedings of the Settlement Commission under Chapter XIX-A of the said Act, the Supreme Court analyzed the provisions of the Act, 1961, which bear upon the advance tax as well. The object behind introduction of the measure of advance tax and the character of such impost was explained by the Supreme Court, in the following words:-

“7. Liability to pay advance tax arises under section 207. The said section is based on the principle "pay as you earn". It requires tax to be paid during the financial year. It has to be in respect of the total income of the assessee which would be chargeable to tax under the Act. The said total income is not as understood in section 2(45) but it is equated to "current income" for the purposes of Chapter XVII. After the Amending Act of 1987, advance tax is to be paid on the current income which would be chargeable to tax for the assessment year immediately following the financial year. Section 210 casts the responsibility of payment of advance tax on the assessee without requiring the assessee to submit his estimate of advance tax payable. Provision for payment of advance tax is mode of quick collection of tax. Thus, section 207 defines liability to pay advance tax in respect of incomes referred to in section 208. However, advance tax paid is adjustable towards the tax due. Advance tax is collected even before the income tax becomes due and payable. By its very nature, advance tax is pre-assessment collection of taxes either by deduction of tax at source or by payment of advance tax which has to be adjusted towards income tax levied on the total income. The above two methods of realization even before any assessment is authorized by section 4(2) are incorporated in Chapter XVII which deals with "collection and recovery". In fact, section 190(1) clarifies that this method of payment of tax will not prejudice the charge of tax under section 4(1) nor will it modify the liability of the assessee to pay income tax pursuant to an assessment order. [See Modi Industries Limited v. CIT, [1995] 216 ITR 759 (SC)].

(emphasis supplied)”

16. The Supreme Court has, in terms, observed that the advance tax paid is adjustable towards the tax due. Advance tax is essentially a pre-assessment collection of taxes either by deduction of tax at source or by payment of advance tax which has to be adjusted towards income tax levied on the total income. The advance collection, however, does not denude the said payment the character of “tax”.

17. Mr. Jain was justified in canvassing a submission that the aforesaid aspect of the matter was not considered in the case of **Umesh Ganore** (*supra*). Whereas, the Delhi High Court decision in the case of **Kumudam Publications Private Limited** (*supra*), which considered the effect of CBDT Circular dated 30th June 2016 as regards credit for TDS and its applicability to the advance tax as well, was not disturbed by the Supreme Court in Special Leave Petition (Civil) Diary No.33000 of 2017 at the instance of Revenue.

18. The matter can be looked at from a slightly different perspective. Can a legally sustainable distinction be made between ‘TDS’ and ‘Advance Tax’ in the matter of credit to be given against the liability under the Scheme, 2016? Section 190(1) of the 1961 Act provides that notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction or collection at source or by advance payment. It thus becomes evident that both TDS or advance payment of tax are the methods of collection of tax in advance.

19. Section 199 of the Act, 1961 provides for credit for tax deducted. Sub-section (1) of Section 199 declares, *inter alia*, that any deduction made in accordance with the provisions of Chapter XVIII of the Act 1961 and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made.

20. Section 219 of the Act, 1961 provides for credit for advance tax. It reads as under:-

“219. Any sum, other than a penalty or interest, paid by or recovered from an assessee as advance tax in pursuance of this Chapter shall be treated as a payment of tax in respect of the income of the period which would be the previous year for an assessment for the assessment year next following the financial year in which it was payable, and credit therefor shall be given to the assessee in the regular assessment.”

21. Section 219 provides in clear and explicit terms that an assessee who pays advance tax shall be entitled to credit therefor in the regular assessment. From a conjoint reading of Sections 199 and 219, it becomes clear that in the matter of credit, the TDS and advance tax stand on the same footing. As there is no sustainable ground to make a distinction between ‘TDS’ and ‘Advance Tax’ for the purpose of credit, we do not find any reason not to equate an advance tax with TDS for the purpose of the Scheme, 2016. If a TDS is entitled to credit, a *fortiori* advance tax must get the same dispensation.

22. It is true that the provisions of Chapter XVII primarily deal with regular assessment in respect of the liability to pay income tax founded in Sections 4 and 5 of the Act, 1961, which are the charging sections. It is also true that the provisions of Sections 184 and 185 of the Act, 2016 incorporating the Scheme, 2016, begin with a *non obstante* clause. However, the overriding effect of Sections 184 and 185 is confined to the rate at which the tax is to be imposed on the undisclosed income, surcharge to be paid thereon and the penalty. The substance of the matter, especially the fact that the advance payment made by the declarant retains the character of tax, however, cannot be lost sight of.

23. In the case at hand, it is not the case of respondent No.1 that the advance tax paid by the petitioner was not relatable to the income for the relevant assessment years, which petitioner disclosed. If the said payment is not apportionable towards any other liability, there is no

justifiable reason to deprive the declarant from getting the credit for the same against the liability under the Scheme, 2016.

24. For the foregoing reasons, we are persuaded to allow the petition by setting aside the communication dated 14th January, 2020. Hence, the following order:-

: ORDER :

- (i) The petition stands allowed;
- (ii) Respondent No.1 shall issue certificate in Form 4 as required by Rule 4(5) of Income Declaration Scheme Rules, 2016, upon the petitioner complying with all the requirements under the said Scheme, 2016.

However, the petitioner shall be entitled to and given credit for the advance tax already paid by the petitioner and the respondent No.1 shall not refuse to issue Form No.4 on the said count.

Rule made absolute in aforesaid terms.

No costs.

(N. J. JAMADAR, J.)

(K. R. SHRIRAM, J.)

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