

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6228 OF 2021

Oerlikon Balzers Coating India]
Private Limited]
A company registered under the Companies]
Act, 1956 and having its registered address]
at EL-22, J Block,]
MIDC Bhosari, Pune 411026]
Through its Authorized Signatory and]
Director,]
Mr. Vivek Shrikrishna Pandit] ...Petitioner

Versus

1. Union of India,]
Through the Ministry of]
Finance, Department of Revenue, Room]
No. 46, North Block,]
New Delhi - 110 001]

2. Principal Commissioner of Income]
Tax, Pune - 3]
Third floor Income Tax Office,]
PMT Building, Shankar sheth road,]
Pune, 411037]...Respondents

...

Mr. Sanket Bora a/w. Ms. Vidhi Punmiya i/by SPCM Legal for the
petitioner.

Mr. Suresh Kumar for the respondents.

...

**CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.**

PRONOUNCED ON : 27TH JUNE 2023.

J U D G M E N T

[PER: KAMAL KHATA, J.]

1. By this Petition under Article 226 of the Constitution, the Petitioner seeks quashing of the impugned rejection order dated 3rd August 2021 passed by Respondent no. 2 whereby the Miscellaneous Application ('MA') filed by the Petitioner under section ('u/s') 254 (2) of the Income Tax Act 1961 ('Act') was stated as not covered under the Direct Tax Vivad Se Viswas Act, 2020 ('DTVSV-A') as it was not filed in pursuance of an appeal 'dismissed *in limine*'. It also seeks a mandamus against the Respondent No. 2 to issue an acknowledgment in Form 3 against the application made by the Petitioner in Form 1 and Form 2 under section 4 of DTVSVA read with Rule 3 of the Direct Tax Vivad Se Viswas Rules 2020 ('DTVSV-R').

FACTS:

2. On 31st October 2009 the petitioner filed its original e-return of income for the assessment year ('AY') 2009-10 whereby it declared a total income of ₹16,27,70,190/-. On 11th August 2010 the petitioner revised its ITR, to declare an income of ₹ 16,15,96,380/-. On 29th March 2011 the revised ITR was processed u/s 143 (1) of the Act resulting in refund of ₹1,50,46,150/-. Its assessment was selected for scrutiny under

Computer Assisted Scrutiny Selection ('CASS'), notices were issued u/s 143(2) dated 16th August 2010, 11th July 2011 and 8th May 2012 which were responded to by the Petitioner. An assessment order dated 25th March 2013 was passed by the DCIT assessing Petitioner's income at ₹18,15,27,530/- on account of disallowing deductions of ₹ 1,99,31,152/- claimed by the Petitioner. A show cause notice dated 28th March 2013 came to be issued u/s 271 (1)(c) r.w.s. 274 whereby interest was charged u/s 234B, 234C and 234D of the Act. An appeal was preferred u/s 246A(1) of the Act r.w. rule 45 of the Income Tax Rules, 1962 against the order passed by the DCIT dated 25th March 2013. The appeal was dismissed on 20th August 2014, to which an appeal was preferred before the Income Tax Appellate Tribunal ('ITAT') u/s 253 of the ITA r.w Rule 47(1) on 30th September 2014.

3. The ITAT dismissed the appeal on 20th May 2016 u/s 254(1) of the Act. A Miscellaneous Application ('MA') dated 17th September 2016 ('MA-1' for short) was preferred by the Petitioner seeking adjudication of ground nos. 3 & 4 that remained undecided. By an order dated 14th May 2019, the ITAT modified its order thereby reducing the income of the Petitioner from ₹ 1,78,77,487/- to ₹ 50,58,159/-. The DCIT passed an order dated 27th September 2019 giving effect to the ITAT order dated 14th May 2019.

4. After receiving the DCIT's order (dated 27th September 2019) on 25th November 2019, the Petitioner sought an amendment in the order from the DCIT for considering the computation of tax on the profit embedded. The Petitioner also preferred an MA dated 6th August 2019 (MA-2 for short) u/s 254 (2) for adjudication of ground 4 which yet again remained undecided by the ITAT by its order dated 14th May 2019. This MA-2 which was pending adjudication on the date the Petition was filed.

5. On 17th March 2020 the DTVSV-A was introduced and on 30th January 2021 the Petitioner made an application to avail the benefit. This application was rejected by an order dated 3rd August 2021 on the basis of FAQ No. 61 of Circular No. 21 of 2020 stating that this case is not eligible under DTVSV-A.

6. This Petition filed on 17th September 2021 seeks to challenge the impugned order of rejection dated 3rd August 2021.

7. Mr. Sanket Bora learned counsel for the Petitioner submitted that the MA-2 ought to be construed as a pending appeal until adjudication of the MA-2 and consequently the Petitioner ought to be entitled for obtaining benefit under the DTVSV-A more particularly when the MA-2 was pending prior to

the introduction of DTVSV-A. He urged that the impugned rejection was against the object of the DTVSV-A as provided in Circular No. 21 of 2020 which is extracted for ease of reference hereunder:

“To reduce pending income tax litigation, generate timely revenue for the Government and benefit tax payers by providing them peace of mind, certainty and savings on account of time and resources that would otherwise be spent on the long-drawn and vexatious litigation process, the Direct Tax Vivad se Vishwas Act, 2020 (here in after referred to as “Vivad se Vishwas”) was enacted on 17th March 2020.”

8. The learned counsel urged that section 2(j) (F) of the DTVSV-A *inter alia* envisages pendency of application for revision u/s 264 of the Act on the specified date. It was submitted that the Respondent could not have rejected the application on the ground that the MA-2 was not maintainable on any basis whatsoever and consequently declare the appeal being ineffective or infructuous. It was further submitted that the Petitioner ought not to be deprived of DTVSV-A a beneficial legislation inasmuch as the Petitioner was admittedly in litigation prior to the specified date as envisaged by it.

9. The learned counsel would further argue that the FAQ No. 61 contemplated a general situation and could not be read down to exclude, but ought to be read broadly to include cases as that of

the Petitioner. It was urged that although the Appeal was dismissed on 20th May 2016, there were two grounds viz. nos. 3 & 4 that were not adjudicated upon by the ITAT. He further submitted that both MAs were sought for adjudication of those two grounds only. It was stated that although a review was sought on both grounds viz. 3 & 4 in MA-1, ground 4 remained to be adjudicated and therefore caused filing of MA-2 for review. He therefore urged that the filing of MA-2 in the given circumstances could not be construed or held not maintainable on the grounds of *res judicata* or infructuous at the threshold. It was submitted that if MA-1 was permissible for want of adjudication of the grounds then MA-2 could not have been said to be impermissible as admittedly though one ground was adjudicated upon the other was not.

10. Another contention advanced was that the Order dated 14th May 2019 on MA-1 merged with the Order dated 20th May 2016 and was appealable u/s 260A of the Act. Consequently, would fall under the category envisaged by DTVSV-A.

11. Per Contra, Mr. Kumar for the Respondent contented that the Appeal was dismissed on merits on 20th May 2016 and in law the MA-2 as filed was not permissible and though pending was liable be rejected. He further argued that the FAQ No. 61 was applicable for Appeals dismissed *in limine* only. He further contended

that such classification is not disadvantageous to other classes of taxpayers and there is no unjust or arbitrary discrimination. He submitted that the circular has a rational nexus and did not want the beneficial legislation to be misused by those whose appeals were adjudicated. Consequently the case of the Petitioner was beyond the purview of the DTVSV-A.

CONCLUSION:

12. We heard both counsel. The Order dated 3rd August 2021 rejecting the application is as under:

“04. The assessee has applied for DTVSV scheme 2020 against the 2nd MA filed against the dismissed appeal. On perusal of the Order of the honourable ITAT, it is seen that the appeal is not dismissed in limine as Hon'ble ITAT discussed the issues under dispute. Therefore, this case is not eligible under DTVSV Act 2020 and hence rejected.”

13. A perusal of the proceedings indicate that the Order of rejection of the MA-2 is on an incorrect basis in as much as, one of the grounds' was not adjudicated upon. It is not in dispute that MA-1 was preferred to adjudicate on two grounds viz. 3 & 4 one of which was decided in favour of the Assessee. The MA-2 was preferred only because the ITAT had not adjudicated ground no. 4, which the Petitioner sought adjudication for by MA-1. Be that as it may, the MA-2 is pending adjudication as a matter of record. This Court cannot on the basis of a presumption that the outcome of the MA-2 may be negative, decide this Petition. This Court cannot

also ignore that MA-1 was decided in favour of the Petitioner and consequently the subsequent order merged with the previous order. We therefore accept the contention of the Petitioner that the MA-2 simply is a pending application for adjudication of the ground that remained to be decided in the disposed appeal.

14. It is not in dispute that the DTVSV-A was enacted with the objective of, *inter alia*, reducing pending income tax disputes, generate timely revenue for the Government and benefit taxpayer by providing them peace of mind, certainty and savings on account of time and resources that would otherwise be spent on the long-drawn and vexatious litigation process to resolve the disputes. Such disputes emanate from appeals filed by the taxpayer against the orders passed by the Income Tax Authorities and result in tax arrears consisting of disputed tax, disputed penalty, disputed interest or disputed fees. It is also admitted by the Respondents that the objective of the DTVSV is to reduce litigation. It is further admitted that Circular No. 21/2020 was issued u/s 10 & 11 of the DTVSV-A to remove difficulty.

15. The FAQ 61 under consideration is extracted hereunder for reference:

“61. Whether Miscellaneous Application (MA) pending as on 31st January 2020 will also be covered by the Scheme?”

Ans. If the MA pending on 31st January 2020 is in respect of an appeal which was dismissed in limine (before 31st January 2020) such MA is eligible. Disputed tax will be computed with reference to the appeal which was dismissed.

16. With regard to the condition in answer to FAQ 61, viz. ‘Appeal dismissed in limine’ we are of the view that the qualifying words ‘in limine’ that apparently restrict the eligible assesseees for availing settlement under the DTVSV, are contrary to its object and reasons. The Apex Court in the case of ***UCO Bank, Calcutta vs. Commissioner of Income Tax, W. B.***,¹ has held while interpreting Section 119 of the Act, as under:-

“9. Xxx xxx xxx

Under sub-section (2) of Section 119, without prejudice to the generality of the Board’s power set out in sub-section (1), specific power is given to the board for the purpose of proper and efficient management of the work of assessment and collection of revenue to issue from time to time general for special orders in respect of any class of incomes or class of cases setting forth directions or instructions not being prejudicial to the assesseees as the guidelines, principles procedures to be followed in the work relating to assessment. Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board thus has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under section 119 of the Income Tax Act which are binding on the authorities in the administration of the Act. Under section 119(2)(a), however the circulars as contemplated therein cannot be adverse to the assessee. Thus, the authority which wields the power for its own advantage under the Act is given the right to forego the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manner as laid down in section 119. The power is given for the purpose of just, proper and

1 1999 4 SCC 599

efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorized as belonging to a class can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities.”

17. In another decision the Apex Court in the case of ***Commissioner of Central Excise, Bolpur vs Ratan Melting & Wire Industries²*** has held as under:

“7 Circulars and instructions issued by the board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for the Court to declare what the particular provision of the statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

18. In view of the ratio in the above two judgments, we are of the view that the additional qualification viz. “*in limine*” added to the word Appeal is adverse to the assessee, against the mandate of DTVSV-A and thus contrary to law.

19. The decision of the Privy Council in ***Sayad Mir Ujmuddin Khan v. Ziaulnisa Begum,³*** the Hon'ble Justice Sir James Colville

² (2008) 13 SCC 1

³ 1879 ILR 3 Bom 422

has stated as to how in construing a remedial statute, a Court ought to give to it “*the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied and falls within the language of the enactment.*” Again in, ***Gover's Re, Coal Economising Gas Co., 1875 (1) Ch D 182***, it was held that— “*the words of such a statute must be so construed as to give the most complete remedy which the phraseology will permit*”. The said ratio was followed by the Hon'ble Supreme Court also in the Judgment ***International Ore and Fertilizers (India) Pvt. Ltd. v. Employees' State Insurance Corporation, 1987 (4) SCC 203***, by stating that— “*in the field of labour and welfare legislation, the provisions have to be broadly and liberally construed*”.

20. In our view, it would be appropriate that the ratio laid down in the above cases with regard to ‘construing a remedial statute’ be followed in the present case in as much as DTVSV-A is a beneficial statute.

21. Furthermore, the Delhi High Court in the case of ***Medeor Hospital Limited v Principal Commissioner of Income Tax***⁴ and the Gujarat High Court in the case of ***Tushar Agro Chemical vs Pr CIT***⁵ have held that CBDT cannot issue circulars adverse to the

4 [2022] 145 taxmann.com 548

5 [2021] 130 taxmann.com 432

assessee. For the reasons aforesaid we hold that the FAQ 61 of the circular 21/2020 dated 4th December 2020 issued by the CBDT to the extent that it restricts appeals to the ones '*dismissed in limine*' are not only adverse to the interest of the assessee but also contrary to the object and reasons of DTVSV-A.

22. In view thereof, we pass the following order-

- i.* The FAQ No. 61 of the Circular 21 of 2020 issued by the Respondent no. 1 is struck down.
- ii.* The impugned rejection order dated 3rd August 2021 passed by Respondent No. 2 is quashed and set aside;
- iii.* The Respondent No. 2 is directed to issue acknowledgment in Form 3 against the application made by the Petitioner in Form 1 and Form 2.
- iv.* Rule made absolute in above terms. No costs.
- v.* All parties to act on the authenticated copy of this Order.

[KAMAL KHATA, J.]

[DHIRAJ SINGH THAKUR, J.]