

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6964 OF 2022

Smita Rohit Gupta,
aged 41 years, residing at 3301,
"C" Lodha Bellissimo, Apollo Mill
Compound, N.M. Joshi Marg,
Mahalaxmi, Mumbai 400011.
PAN: ADMPPA1996Q

... Petitioner

Versus

1. Principal Commissioner of Income Tax-1,
Thane, having office at B Wing, Ashar IT
Park, 6th Floor, Road No.16Z, Wagle
Industrial Estate, Thane (West), Thane -
400064.
 - 2 Assistant Commissioner of Income-tax
Circle 3, Thane,
having office at B Wing, Ashar IT Park, 6th
Floor, Road No.16Z, Wagle Industrial
Estate, Thane (West), Thane-400064.
 - 3 The Union of India, Through
the Secretary, Ministry of Finance,
Government of India, North Block,
New Delhi - 110 001
- _____ ... Respondents

Mr. Dharan Gandhi with Ms Aanchal Vyas for Petitioner.
Mr. Ajeet Manwani with Ms. Samiksha Kanani for Respondent

**CORAM K. R. SHRIRAM &
 DR. N. K. GOKHALE, JJ.
DATED: 28th August 2023**

(ORAL JUDGMENT PER K .R. SHRIRAM J.) :

1. Petitioner is an individual who had filed a declaration under the Income Declaration Scheme, 2016 ("IDS"). Under the Scheme the entire payment of tax was to be made in three instalments: 25% taxes, surcharge and penalty in first instalment; for an amount not less than 50% of such tax, surcharge and penalty as reduced by the amount paid in the second instalment; and for the whole amount to be paid as reduced by the amounts earlier paid in the third instalment. Admittedly, Petitioner made payment of the first instalment but defaulted the remaining two instalments. In view of the default, as provided under Clause 3 of Section 187 of the IDS, the declaration filed by Petitioner was deemed to have never been made under the IDS and as provided under Section 197(b) of the Finance Act, 2016 the undisclosed income shall be chargeable to tax under the Income-tax Act, 1961 ("**Act**") in the previous year in which the declaration was made.

In view thereof, Petitioner filed revised return of income.

2. Subsequently vide Finance (No.2) Act, 2019, a proviso was inserted in Section 187(1) of the Finance Act, 2016 which provided that where the amount of tax, surcharge and penalty, has

not been paid within the due date notified under this sub-section, the Central Government may, by Notification in the Official Gazette, specify class of persons, who may, make the payment of such amounts on or before such date as may be notified by the Central Government, along with the interest on such amount @ 1% for every month or part of a month comprised in the period commencing on the date immediately following the due date and ending on the date of such payment. Using the said power, the Central Government issued Notification bearing number 103 of 2019 dated 13th December 2019 wherein the Central Government allowed every person who did not pay tax earlier under the Scheme, to pay the tax upto 31st January 2020 along with the interest. Petitioner was covered by the said Notification. Petitioner made use of the opportunity to revive the declaration under the Scheme. Accordingly, Petitioner made an application vide letter dated 13th January 2020 showing her intention to pay balance instalments along with interest under the Scheme and requested withdrawal of the order dated 24th May 2018 that been passed under Section 187(3) of the IDS. Petitioner was permitted to pay balance amount along with interest under the Scheme. Petitioner, on 18th January 2020, paid a sum of Rs.37,71,800/-. On payment

of the amount, Respondent No.1 also issued Form No.4 on 22nd January 2020. Form No.4, copy whereof is at Exhibit 'O' to the Petition, also mentions that declaration made on 30th September 2016 has been accepted and that Petitioner has paid entire tax due under the Scheme. In the impugned order dated 20th March 2021, these facts are not disputed. In fact they have been accepted as reflecting the true facts.

3. As a result of the said acceptance of the declaration of Petitioner under the IDS, amount of undisclosed income of Rs.85,96,886/- could not have been taxed under the Act as per Section 188 of the IDS Finance Act, 2016. The time limit, however, to file revised return had expired. Left with no option, Petitioner, therefore, moved an application under Section 264 of the Act before Respondent No.1. Respondent No.1 provided an opportunity to Petitioner to explain her case and also asked Assessing Officer to submit a report after ascertaining correctness of the contentions of Petitioner. The Assessing Officer submitted detailed report dated 8th March 2021 wherein the Assessing Officer submitted that assessee should file revision petition within one year from the date of the order sought to be revised but the

application has not been made in time. At the same time, the Assessing Officer also submitted that considering the circumstances of the case, delay may be condoned. Impugned order does not reflect anything contrary to what Petitioner submitted regarding the payment under the IDS.

4. Respondent No.1 condoned the delay but refused to grant relief to Petitioner on the merits of the case. Paragraph 5 of the impugned order dated 26th March 2021 reads as under:

“5. Coming to merit of the case, as the assessee has filed his revised return of income voluntarily on 2.11.2017 by disclosing the return income at Rs.9419001, which has been processed under Section 143(1) of the Act on 19.9.2018. Since revised return was processed on the basis of details filed by the assessee and therefore there is no error in order of processing passed on 19.9.2018. Thus, the application does not come under preview of 264 of the Act.”

5. Mr. Manwani relying upon judgment of the Hon'ble Apex Court in ***ACIT v Rajesh Jhaveri Stock Brokers (P) Ltd.***¹ submitted that since Petitioner had filed returns under Section 139 and that was processed under Section 143(1) of the Act, that processing order will not be an order and, therefore, Respondent No.1 was

¹ 161 taxmann 316 (SC)

justified in not entertaining application under Section 264 of the Act.

6. In our view, judgment of the Hon'ble Apex Court in ***Rajesh Jhaveri (Supra)*** will not be applicable to the facts and circumstances of the case because that was a case where the Court was considering the provisions of Section 147 for re-opening the assessment. The Court was considering whether the question of change of opinion would arise when an order under Section 143(1)(a) of the Act had been passed.

7. The provisions of Section 264 and the power available to the Commissioner to exercise under Section 264 of the Act came up for consideration before the Division Bench of this Court in ***Hindustan Diamond Company Pvt. Ltd. v. CIT***². The Division Bench was pleased to observe that exercise of power under Section 264 was not subject to the power of the Assessing Officer to make adjustment under Section 143(1) of the Act. The Court held that power of the Commissioner under Section 264 is rather wide and

² (2003) 175 Taxation 91 (Bom)

even the errors committed could be rectified. Paragraph 6 of the

Hindustan Diamond Company Pvt. Ltd. (Supra) reads as under:

“6. Having heard the Counsel on both sides, we are of the opinion that the Commissioner was not justified in rejecting the revision application of the assessee. As rightly contended by Mr. Inamdar, Section 264 confers wide jurisdiction on the Commissioner. Proceedings under Section 264 are intended to meet the situation faced by an aggrieved assessee who is unable to approach the appellate authority for relief and has no other alternate remedy available under the Act. In the light of the decision of the Apex Court in the case of *Bharat Earth Movers (supra)*, the provision for Leave Encashment being a current liability the assessee is entitled for deduction of that amount. The Assessing Officer had accepted the return, ignoring the request of the assessee for deduction of the above amount. Therefore, the relief which was not granted by the Assessing Officer could be granted by the Commissioner under Section 264. Before allowing such deduction if any further enquiry was required to be done, the Commissioner could have either himself enquired or directed the Assessing Officer to do the needful. However, the Commissioner has declined to exercise power under Section 264 because of amendment to Section 143(1) by Finance Act, 1999. Powers of the Assessing Officer to make *prima facie* adjustments under Section 143(1), done away with by Finance Act, 1999 (with effect from 1st June, 1999) does not in any way effect the right of the Commissioner under Section 265 of the Act to grant relief to the assessee if available to the assessee as per the decision of the Apex Court. Exercise of powers under Section 264 is not subject to the power of the Assessing Officer to make adjustments under Section 143(1) of the Income-tax Act. Therefore, relief can be granted to the assessee under Section 264 even if the power of adjustment under Section 143(1) is taken away from the Assessing Officer.” (emphasis supplied)

8. Section 264 of the Act also came up for consideration before the Hon'ble Delhi High Court in *Vijay Gupta v CIT Delhi-III*³ where paragraph 35 reads as under:

“35. From the various judicial pronouncements, it is settled that the powers conferred under Section 264 of the Act are very wide. The Commissioner is bound to apply his mind to the question whether the petitioner was taxable on that income. Since Section 264 uses the expression “any order”, it would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by assessees. It would even cover situations where the assessee because of an error has not put forth a legitimate claim at the time of filing the return and the error is subsequently discovered and is raised for the first time in an application under Section 264.” (emphasis supplied)

9. In the circumstances, it is well settled that powers conferred under Section 264 of the Act are very wide. Commissioner is bound to apply his mind to the question whether Petitioner's income was taxable and to what extent. Admittedly, amount payable under the IDS has been paid. Section 188 of the IDS provides that the amount of undisclosed income declared in accordance with 183 shall not be included in total income of the declarant for any assessment year for the Income-tax Act, if the declarant makes the payment of tax and surcharge referred to in Section 184 and the penalty referred to in Section 185, by the date

3 [2016] 68 taxmann.com 131 (Delhi)

specified under Sub-section 1 of Section 187. Petitioner having paid the tax and surcharge and the penalty with interest, amount of undisclosed income cannot be included in the income of the declarant/petitioner. Therefore, in our view, Commissioner should have exercised his power under Section 264 of the Act and decide the matter on merits.

10. We hereby quash and set aside the impugned order dated 26th March, 2021 and remand the matter to Respondent No.1 to decide the matter on merits.

Before passing any order, Respondent No.1 shall give personal hearing to Petitioner notice whereof shall be communicated at least five working days in advance. Order passed should be reasoned order dealing with all the submissions of Petitioner.

Application shall be disposed within eight weeks.

(DR. N. K. GOKHALE, J.)

(K. R. SHRIRAM, J.)