**THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**

**AND**

**THE HON'BLE SRI JUSTICE N. TUKARAMJI**

**WRIT PETITION No.17116 of 2008**

**ORDER:** *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. P.Venkata Rama Sarma, learned counsel for the petitioner and Mr. J.V.Prasad, learned Standing Counsel, Income Tax Department for the respondents.

2. Though by filing this petition under Article 226 of the Constitution of India, petitioner has assailed legality and validity of the order dated 18.01.2006 passed by the 1st respondent under Section 264 of the Income Tax Act, 1961 (briefly referred to hereinafter as 'the Act') as well as the assessment order dated 09.10.2003 passed by the 2nd respondent under Section 143(3) read with Section 147 of the Act for the assessment year 2001-02, the substantive issue is whether petitioner is entitled to the benefit of Section 89(1) of the Act.

3. A brief recital of the relevant facts would be in order.

4. Petitioner is an assessee under the Act within the jurisdiction of the 2nd respondent having the status of an individual. For the assessment year 2001-02, petitioner filed his return of income showing income of Rs.6,86,360.00.

5. Petitioner was an employee of State Bank of Hyderabad. He had opted for voluntary retirement under the voluntary retirement scheme framed by the State Bank of Hyderabad. Following his retirement, petitioner received compensation in the form of *ex-gratia* in Form No.16 issued by the employer amounting to Rs.9,62,722.00. Out of the *ex-gratia* received, petitioner claimed an amount of Rs.5 lakhs as exempt in terms of Section 10(10C) of the Act. Admitting the balance amount of Rs.4,62,722.00 as part of his taxable salary, petitioner however treated this amount as salary received in advance and claimed relief under Section 89 of the Act.

6. It may be mentioned that on the ground of taxable income escaping assessment, 2nd respondent had issued notice under Section 148 of the Act. Following assessment proceedings, 2nd respondent passed the assessment order dated 09.10.2003. While allowing the claim of the petitioner to exemption under Section 10(10C) of the Act, the 2nd respondent referred to the second proviso to Sub-Section (10C) of Section 10 of the Act and thereafter posed the question as to whether having been granted relief under Section 10(10C) of the Act, whether petitioner would be entitled to further relief under Section 89 of the Act. After an elaborate discussion, such claim of the petitioner was declined.

7. Aggrieved by the aforesaid order of assessment, petitioner filed an application before the 1st respondent under Section 264 of the Act. 1st respondent noticed that the said application was filed much beyond the limitation period of one year. Therefore, 1st respondent rejected the application of the petitioner on the ground of delay.

However, even on merit, 1st respondent held that assessment order passed by the 2nd respondent was a well reasoned one wherein 2nd respondent had given good reasons as to why benefit of Section 89 of the Act should not be extended to the petitioner. Even if two views are possible in this regard, the same would not render the view of the assessing officer illegal.

8. In view of above, both on delay as well as on merit, application filed by the petitioner under Section 264 of the Act was dismissed by the 1st respondent *vide* the order dated 18.01.2006. It was thereafter that the present writ petition came to be filed.

9. In the course of the hearing, learned counsel for the petitioner has drawn the attention of the Court to the letter of Directorate of Income Tax, Legal and Research, Government of India dated 23.08.2006 addressed to the Commissioner of Income Tax, Chennai-II stating that issue of admissibility of relief under Section 89(1) of the Act on payment received under voluntary retirement scheme had

been examined by the Central Board of Direct Taxes (briefly referred to hereinafter as 'CBDT') whereafter CBDT took the view that under the existing law, relief under Section 89 of the Act would be available to an assessee on payment received under voluntary retirement scheme. Commissioner of Income Tax was informed that this issue need not be further contested before the Income Tax Appellate Tribunal and the High Court.

10. From the materials on record, we find that this issue had cropped up in a bunch of income tax appeals and writ petitions filed before this Court being **M.V.Chinna Rao v. Deputy Commissioner of Income Tax** (W.P.Nos.20173 of 2004 & batch and I.T.T.A.Nos.47 of 2003 & batch, decided on 24.10.2006). Question considered by this Court in the aforesaid bunch of appeals and petitions was whether once relief was granted under Section 10(10C) of the Act, further relief under Section 89 of the Act would be available to an assessee or not. After referring to various provisions of the Act including Sections

10(10C) and 89 as well as Rule 21A of the Income Tax Rules, 1962, this Court answered the question in favour of the assessee and against the Revenue.

11. Mr. Prasad, learned Standing Counsel, Income Tax Department fairly submits that the issue raised in this writ petition is now well settled. However, he would contend that the assessment order had attained finality following rejection of the revision application filed by the petitioner under Section 264 of the Act, that too, on the ground of delay.

12. We have considered the submissions made at the Bar as well as perused the materials on record. When the 1st respondent had rejected the revision application of the petitioner, the decision of the CBDT was not yet made. That apart, the decision of this Court in **M.V.Chinna Rao** (supra) also came subsequently on 24.10.2006. It is true that the revision application filed by the petitioner against the assessment order was rejected by the 1st respondent both on the point of delay as well as on merit but the fact

remains that the core issue raised by the petitioner is now well settled and accepted by the Department itself. Submission of Mr. Prasad that the assessment order has become final cannot be accepted in as much as on filing of the writ petition and admission thereof, the assessment order became subject to outcome of the writ petition.

13. In view of the decision of the CBDT as well as of this Court in **M.V.Chinna Rao** (supra), we have no hesitation in holding that petitioner is also entitled to the benefit of Section 89 of the Act. Consequently, the order dated 18.01.2006 passed by the 1st respondent as well as the assessment order dated 09.10.2003 passed by the 2nd respondent to the extent of denial of benefit to the petitioner under Section 89 of the Act are hereby set aside and quashed.

14. Since we have allowed the writ petition, necessary refund shall be made by the respondents to the petitioner within three (03) months from today. We are consciously not directing payment of interest because at

the relevant point of time, the law on this point was not settled.

15. Writ Petition is accordingly allowed. No costs.

16. Miscellaneous applications pending, if any, in this Writ Petition shall stand closed.

**UJJAL BHUYAN, CJ**

**N.TUKARAMJI, J**

Date: 25.01.2023
KL