

Y. Venugopala Reddy Vs. Cit

Y. Venugopala Reddy Vs. Cit

SooperKanoon Citation : sooperkanoon.com/388017

Court : Karnataka

Decided On : May-26-2003

Reported in : [2003]130TAXMAN224(Kar)

Appeal No. : WA No. 5435 of 1999 (T.IT) 26 May 2003

Appellant : Y. Venugopala Reddy

Respondent : Cit

Advocate for Pet/Ap. : S. Ganesh Rao, *for the Assessee* E.R. Indrakumar, *for the Revenue*

Judgement :

S.R. Nayak, J.

The appellant is a regular income-tax assessee. His main business is that of manufacture and sale of bricks under the name and style of M/s. Nanjundeswara Bricks and Tiles, situated at Arakere Village, Bangalore. During the year relevant for the assessment year 1994-95, the appellant had constructed a choultry named as 'AGN Kalyana Mantapa' at Bannerghatta Road, Arakere Village. The construction period was from the middle of 1991 to the end of September 1994. The cost of construction according to the appellant's registered valuer was Rs. 60,68,000 but as per the Income Tax Departmental Valuer it was Rs. 1,03,96,000 as on 30-9-1994. The appellant estimated the cost of construction upto 31-3-1994

(previous year ending date for assessment year 1994-95), at Rs. 30,00,000 and after claiming the sources of funds to the extent of Rs. 10,25,000, he made voluntary disclosure of income at Rs. 19,57,000 under section 69B of the Income Tax Act (hereinafter referred to as 'the Act') plus the income from business at Rs. 90,000 and filed a return of income declaring a total income of Rs. 20,65,000 for the assessment year 1994-95.

2. The assessing officer adopted the valuation made by the Departmental Valuer at Rs. 1,03,96,936 and determined the total income at Rs. 45,54,965 in his assessment order dated 21-3-1997 passed under section 143(3) and demanded the following taxes and interests :

Rs.

Rs.

(a) Income-tax

18,00,98 6

(b) Surcharge

2,16,118

(c) Int. under section 234A

2,01,710

(d) Int. under section 234B

15,92,534

(e) Int. under section 234C

36,508

18,30,752

Total demand

38,47,156

Less : Self asst. tax paid under section 140A on 26-12-1994

3,00,000

Balance demanded

35,47,156

3. The appellant being aggrieved by the above order of the assessing officer preferred an appeal to the Commissioner (Appeals) by his order dated 28-4-1998 reduced the total income by Rs. 3,89,453 and demanded the net tax and interest at Rs. 26,86,152. The appellant not being satisfied with the order made by the Commissioner (Appeals) preferred further appeal to the Income Tax Appellate Tribunal and that appeal is pending.

4. When the matter stood thus, the Finance (No. 2) Act, 1998 (hereinafter referred to as 'Finance Act') introduced the Scheme called Kar Vivad Samadhan Scheme (hereinafter referred to as 'the Scheme'). The same scheme is contained in Chapter IV of the Finance Act and consisted of section 86-98 (both inclusive) as also a Schedule, by virtue of the provisions of the Scheme if an assessee undertakes to pay the 30 per cent of the disputed income as tax, interest and penalties would be waived and even intended prosecutions would be dropped. This scheme was effective from 1-9-1998 till 31-1-1999. The appellant in order to evaluate the benefits of the Scheme filed a declaration under section 88 of the Scheme on 3-12-1998 before the Commissioner Karnataka II, Bangalore, the first respondent herein who is the designated authority under the Scheme. The first respondent passed an order in Form No. 2A on 22-12-1998 under section 90(1) of the Scheme and determined the tax and the interest payable by the appellant as under:

Net arrears outstanding as on date of filing declaration under the scheme as per Commissioner

Net tax payable as per order of Commissioner

(a) Tax & surcharge:

Rs. 5,96,114

Rs. 3,99,184

(b) Interest under section 234A/B/C

13,32,524

nil

5. Since the first respondent set off the self assessment tax paid by the appellant under section 140A on 26-12-1994 against the interest demand of Rs. 16,32,514, the appellant being aggrieved by the said action of the first respondent, filed an application under section 96(2) of the Scheme on 1-1-1999 to the Central Board of Direct Taxes (hereinafter referred to as CBDT). Before the CBDT, the appellant contended, inter alia, that the scheme is independent of the Act and was intended to waive all interests and penalties when an assessee undertakes to pay 30 per cent of the disputed income, as tax, and therefore, the first respondent was not justified in setting off the self-assessment tax against the interests. The appellant contended that such prepaid or part-paid taxes should be adjusted against only the 'taxes' and not against the 'interests'. The appellant received an endorsement dated 18-1-1999 communicating the following interpretation of the CBDT: '... The Scheme is different from section 140A'. According to the appellant since the above interpretation of the CBDT was in his favour, he again approached the first respondent by an application dated 18-1-1999 and requested to set off the self-assessment tax against the interest (sic). The first respondent by his communication No. KVSS/47/98-99 CIT-II dated 10- 1 - 1999 rejected the claim of the appellant. The appellant therefore, being aggrieved by the orders of the first respondent filed Writ Petition No. 3088 of 1999 praying for the following reliefs :

'(a) Issue a writ of certiorari or directions in the nature of writ of certiorari quashing the order of Respondent-1 dated 19-1-1999 at Annexure 'H', herein, (Original enclosed).

(a) Issue a writ of mandamus or direction in the nature of writ of mandamus to the respondent 1 herein, to modify his order dated 22-12-1998 at Annexure 'D' herein by following the Board's directions and to allow the full benefit of waiver of entire interests of Rs. 16,32,524 by setting off the self-assessment tax of Rs. 3,00,000 against the taxes only and not against the interests levied under sections 234A, 234B and 234C.

(c) Since no refunds are permitted under the KVSS and since the petitioner has already paid the entire demand as per orders of the respondent 1 under protest a writ of mandamus or a direction in the nature of writ of mandamus may be issued to the respondent 1, herein, to adjust the excess payment of Rs. 2,00,000 made on 21-1-1999 made under 'protest' against the future tax liability of the petitioner for any assessment years.

(d) Pass any other writ or directions or orders as this Hon'ble court deems fit to confer the benefit of refund of excess payment of Rs. 2,00,000 made on 21-1-1999, out of the total payment of Rs. 3,00,184 and nullify the orders dated 22-12-1998 at Annexure 'D' and order dated 19-1-1999, at Annexure 'H' to the extent they are not in accordance with the Board's instructions.

(e) Direct the respondents to pay the costs of this writ petition.'

6. The learned Single Judge, having held that nowhere under the Scheme it is stated that where the assessment is already made and where the tax was paid under section 140A of the Act and same has been adjusted, even then, in terms of the Scheme readjustment has to be done, dismissed the writ petition. In other words, the learned Judge has held that the scheme does not contemplate adjustments of the amount paid by an assessment under section 140A of the Act. Hence this appeal by the aggrieved assessee.

7. We have heard Sri S. Ganesh Rao, learned counsel for the appellant and learned standing counsel for the Income Tax Department. Sri Ganesh Rao contended that it is quite apparent and clear from the statements made by the Finance Minister with regard to the scheme on the floor of the House in his Budget Speech to which reference is made by the learned Single Judge in the impugned

order, under the scheme in prepaid or part paid taxes are required to be adjusted only against the interests. Sri Ganesh Rao would submit that that is the only reasonable fair way of interpreting the provisions of the scheme, if one were to keep in mind the very objectives of the scheme. Sri Ganesh Rao, also contended that since the provisions of the scheme have overriding effects from the provisions of the Act, the department cannot place reliance on the Explanation to sub-section (1) of section 140A. Sri Ganesh Rao contended that since the scheme is a special enactment, it should prevail over the provisions of the Act which includes section 140A. Sri Ganesh Rao would also point out that even the CBDT itself had issued clarification that the scheme is different from section 140A of the Act and, therefore, the first respondent ought to have granted the claim made by the appellant-assesses. On the other hand, learned standing counsel for the Income Tax Department would support the judgment of the learned Single Judge and would maintain that a sum of Rs. 3,00,000 paid by the appellant-assesses on admitted income is not liable to be adjusted towards the tax. According to the learned standing counsel, section 88 of the scheme has no application to any payment made by the assessee before the assessment was made on the basis of admitted income. The learned standing counsel would also maintain that the appellant-assesses cannot be regarded as a person who was litigating on the date of declaration with regard to a sum of Rs. 3,00,000 paid by him.

8. In view of the rival contentions of the learned counsel for the parties, the only question that arises for consideration and decision is whether the sum of money paid by the appellant under section 140A of the Act towards the tax arrears (which includes the income-tax and interest payable) should be taken as payment towards tax or towards interest, for the purpose of the scheme? In order to find an answer to the above question it will be profitable to notice first the relevant provisions of the scheme contained in the Finance Act, as also the clarification given by the CBDT.

9. The relevant portion of section 88 of the Finance Act relating to settlement of tax payable reads as follows :

'88. Settlement of tax payable. Subject to the provisions of this Scheme, where any person makes, on or after the 1-9-1998 but on or before the 31-12-1998, a declaration to the designated authority in accordance with the provisions of section 89 in respect of tax arrear, then, notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under this scheme by the declarant shall be determined at the rates specified hereunder, namely:

- (a) Where the tax arrear is payable under the Income Tax Act, 1961 (43 of 1961),
 - (i) in the case of a declarant, being a company or a firm, at the rate of thirty five per cent of the disputed income;
 - (ii) in the case of a declarant, being a person other than a company or a firm, at the rate of thirty per cent of the disputed income;
 - (iii) in the case where tax arrear includes income-tax, interest payable or penalty levied, at the rate of thirty-five per cent of the disputed income for the persons referred to in clause (i) or thirty per cent of the disputed income for the persons referred to in clause (ii);
 - (iv) in the case where tax arrear comprises only interest payable or penalty levied, at the rate of fifty per cent of the tax arrear.'

10. The last date for making a declaration under the scheme was extended from 31-12-1998 to 31-1-1999. The effect of section 88(a)(iii) of Finance Act is that notwithstanding anything contained in the Act, the amount payable under the scheme by a declarant (other than companies and firms), who files declaration between 1-9-1998 and 31-1-1999 shall be 30 per cent of disputed income, in case where the tax arrears includes income tax as also interest or penalty. Therefore, it becomes necessary for us to decide what was the 'disputed income' when the declaration was filed by the appellant.

11. 'Disputed income' in relation to an assessment year, is defined in clause (e) of section 87 of the Finance Act as 'whole or so much of the total income as is relatable to the disputed tax.' 'Disputed tax' is defined by clause (p) of section 87,

as the 'total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under section 88.'

12. As noticed above, the contention of the appellant-assesses is that, if the court were to keep in mind the objectives behind the scheme is prepaid and/or part-paid taxes are required to be adjusted only against the interests and such an interpretation would be in accordance with the objective of the scheme as reflected by the Budget Speech of the Finance Minister. The Income Tax Department, on the other hand, contends that the self-assessment tax paid under section 140A of the Act before filing the declaration under the scheme cannot be treated as a payment towards tax as the said sum of money will have to be deemed to have adjusted towards interest due which forms part of tax arrears, having regard to the Explanation to sub-section (1) of section 140A of the Act. Explanation to section 140A reads as follows :

'ExplanationWhere the amount paid by the assessee under this subsection falls short of the aggregate of the tax and interest as aforesaid, the amount so paid shall first be adjusted towards the interest payable as aforesaid and the balance, if any, shall be adjusted towards the tax payable.'

13. The Income Tax Department contends that section 88 of the Scheme has no application to any payment made by the assessee before the assessment was made on the basis of the admitted income. It is also the contention of the department that with regard to payment made by the assessee under section 140A of the Act, the assessee cannot be regarded as a person who was litigating with regard to tax paid by him under section 140A of the Act on the date of declaration under section 89 of the Act. According to the department, the assessee would be entitled to the benefit under the scheme only if lie was litigating with regard to disputed tax as from the date of declaration and not otherwise.

14. The appellant in support of his contention places reliance on the judgment of a Division Bench of this court in Mangilal S. Jain v. CIT : [2002]257ITR31(KAR) . In that case the assessee, the declarant under the Scheme, computed his tax arrear for the assessment year 1995-96 at Rs. 8,886 but the Commissioner did not

accept that computation and issued a certificate of information where it showed the tax arrear as Rs. 89,028. The assessee sent a representation and requested the Commissioner to verify the certificate. The Commissioner rejected the representation stating that there was no error in the certificate. On a writ petition to quash the certificate and direct the Commissioner to grant relief, the learned Single Judge of this court dismissed the writ petition. On appeal, the Division Bench, while setting aside the order of the learned Single Judge held that the claim of interest as also the claim in regard to tax were in dispute as on the date of declaration and they were not admitted or undisputed tax arrears. The Division Bench ruled that any payment made towards tax arrears after the date of assessment and before the date of declaration filed under the Scheme would have to be taken as part payment towards tax in regard to declarations validly falling under the Scheme. The court also held that the rule that payments would first be adjusted towards interest and then towards principal (income-tax) based on the Explanation to section 140A(1) of the Act and general law would be inapplicable to matters covered by the Scheme. In that case, the assessee had paid Rs. 5,800 as advance tax and Rs. 60,000 towards tax after the date of assessment and before the date of declaration. The sum and substance of the ratio of the above judgment of the Division Bench is that if the amount in respect of which the benefit is claimed under the scheme should be a 'disputed tax' and the assessee was litigating as on the date of declaration, the assessee is entitled to the benefits of the Scheme and, on the other hand, if the sum of money in respect of which the benefit is claimed under the scheme could not be regarded as 'disputed tax' within the meaning of that phrase, the assessee is not entitled to claim benefit under the Scheme with regard to such undisputed tax. Therefore, we are at a loss to understand how the above judgment of the Division Bench would come to the aid of the appellant in supporting his claim.

15. Section 140A of the Act contemplates payment of tax on the admitted income furnished by an assessee in the self-assessment and the payment of tax on such income before furnishing the return. In this case, the appellant-assesses had paid Rs. 3,00,000 under section 140A of the Act. Merely, because the regular assessment made by the assessing officer subsequently has been in litigation, it cannot be said that the self-assessment made by the appellant and tax paid under

section 140A has to be ignored for the purpose of the scheme. It is relevant to notice that even if the regular assessment is declared to be illegal, it will not have any effect on the self-assessment made and tax paid under section 140A of the Act. Be that as it may, even according to the judgment of this court in Mangilal S. Jain's case (supra), a sum of money in respect of which benefit is claimed under the scheme is admitted or undisputed, then, the applicant will not be entitled to the benefit under the scheme. The scheme clearly contemplates that the benefit of the scheme could be claimed with regard to disputed tax arrears only and not with regard to admitted tax.

16. In forming above opinion, we are fortified by a judgment of the Kerala High Court in E Philip Joseph v. ITO : [1998]234ITR846(Ker) with which, we are in respectable agreement. In that case, the petitioner-firm had filed returns for the assessment years 1975-76 and 1976-77 declaring income of Rs. 78,010 and Rs. 76,190, respectively under section 140A of the Act and paid tax in respect of the income. The Income Tax Officer determined the income of the petitioner-firm of Rs. 1,26,360 for the assessment year 1975-76 and Rs. 1,04,838 for the assessment year 1976-77. The Commissioner set aside the additions made by the Income Tax Officer. Since fresh assessments were not made pursuant to the order of the Commissioner the petitioner filed representation before the Commissioner. Thereafter, the Income Tax Officer passed an order on the basis of the direction issued by the Commissioner. Against the order of the Income Tax Officer, the petitioner filed a revision petition before the Commissioner and the Commissioner finally passed the order under section 264 of the Act. On a writ petition filed by the petitioner to quash the order of the Commissioner and also for a direction to refund the amount paid for the assessment years 1975-76 and 1976-77, the Kerala High Court held thus :

'. . . What is contemplated under section 140A is payment of tax on the admitted income furnished in the self -assessment and the payment of tax on such income before furnishing the return. As aforesaid, the petitioner had paid the tax before submitting the return under section 140A. That the setting aside of the regular assessment does not mean that the self-assessment made under section 140A has been set aside. Even if the regular assessment is declared to be void, it has

no effect on the self-assessment made under section 140A. The direction to refund the tax paid on regular assessment does not mean that the tax paid along with the return under section 140A shall be refunded, because the payment of tax under self-assessment is on the admitted income, returned by the assessee. When tax has been paid on the admitted income, even if the income added by the Income Tax Officer by way of addition in the regular assessment has been set aside in appeal or revision, the assessee has no legal right to claim refund of the tax so paid because what has been set aside is not the self-assessment but the regular assessment. Both the assessments are separate and distinct and there is no question of merger of self-assessment with regular assessment

17. We may also usefully refer to a Division Bench judgment of Andhra Pradesh High Court in CIL Securities Ltd. v. CIT : [2000]242ITR472(AP) . In that case, the petitioner-company was carrying on the business of stock broking, merchant banking, registrars and share transfer agents and investment banking. The petitioner-company contended that it was not liable to interest-tax, and, therefore, no returns of income were filed for the assessment years 1994-95 and 1995-96. But, the assessing officer held that the Interest Tax Act was applicable and, accordingly, the assessments were completed vide his order dated 19-3-1998, assessing the total amount payable for 1994-95 as Rs. 93,032 and for 1995-96 as Rs. 51,458. The assessing officer simultaneously initiated penal proceedings under section 13 of the Interest Tax Act. The petitioner filed appeals before the Commissioner (Appeals) and the said appeals were pending. The petitioner filed a declaration on 29-12-1998, under section 89 of the Finance (No. 2) Act, 1998, to avail of the benefit of the Scheme in respect of the interest-tax determined for the assessment years 1994-95 and 1995-96. But, the declaration filed by the petitioner was lodged on the ground that there were no tax arrears remaining unpaid on the date of declaration. The refund due under the Income Tax Act to the tune of Rs. 2,59,445 was already adjusted before 31-3-1998, against the interest-tax due and the said adjustment was never challenged. On a writ petition to declare that the petitioner was entitled to the benefit of the scheme, the Division Bench of the Andhra Pradesh High Court, while dismissing the writ petition, held that since the demand under the Interest Tax Act was adjusted while finalising the assessment therein under section 143(1)(a) of the Act and the said intimation under section

143(1)(a) had become final and the petitioner had not challenged the same, there is no provision in the scheme empowering the designated authority to go into the legality of the adjustment made or sit in judgment over the intimation order made under section 143(1)(a) of the Act. As there were no tax arrears remaining unpaid on the date of declaration as required under section 87(m) of the Finance (No. 2) Act, 1998, the petitioner was not entitled to the benefit under the scheme. P. Venkatarama Reddi, J., as he then was, in his separate, but concurring judgment held thus :

'...the designated authority (hereinafter referred to as 'the Commissioner) under the Kar Vivad Sarnadhan scheme cannot sit in judgment over the legality of the adjustment of tax. The Commissioner can only go by the factual position existing as on 31-3-1998, and on the date of filing the declaration in order to ascertain whether there was 'tax arrear'. He can do so by scrutinizing the return and perusing the departmental records relating to assessment and recovery. He cannot embark upon an enquiry on the question whether the adjustment of tax for the payment of which the declaration is filed, is legally valid. No such power is conceded to him either expressly or by necessary implication. The propriety of adjustment is a collateral issue which the Commissioner is not called upon to decide nor is he invested with power to do so. The Commissioner acting under the scheme must have regard to the factual position as it was vis-a-vis the tax arrear on the crucial dates. The Commissioner cannot go behind the adjustment done by the assessing officer. He must accept the same as a 'fait accompli` and proceed to consider the question whether the assessee can invoke the scheme.

Secondly, the proceeding relating to adjustment cannot in the instant case be ignored by the Commissioner treating it as a nullity and non est in the eye of law. There is unmistakable indication in the present case that the assessee acquiesced in if not consented to such adjustment. The adjustment of interest-tax against the refund due under the Income Tax Act was never questioned by the petitioner as pointed out by my learned Brother, obviously because he did not find it detrimental to his interest. It cannot be said that the impugned 'adjustment', even if it is vitiated by procedural irregularity or failure in putting the petitioner on prior notice, effaces itself out of existence and remains a dead letter. I am inclined to think that the

adjustment is not beyond the apparent authority of the assessing officer nor does it lack the sanction of law, taking an overall view. The same officer is the assessing authority under the Income Tax Act as well as the Interest Tax Act. Though he acts in different capacities, he is empowered to recover the tax falling due under either of the enactments. It would have been open to him to attach the refundable amount due under the Income Tax Act for the purpose of recovering the outstanding interest-tax. Instead of doing that, he has resorted to the mode of recovery by way of adjustment which did not evoke any sort of protest from the assessee. At best, it is a procedural irregularity. In fact, there is every reason to think that the adjustment was done with the implied consent of the assessee. The long silence of the assessee coupled with the fact that learned counsel for the assessee made it clear that the assessee did not have any grievance against the adjustment till the scheme came into existence, reasonably gives rise to an inference that the adjustment made by the assessing officer had the nod from the petitioner. The adjustment suited both the parties. In this situation, it cannot be contended that the adjustment must be ignored by treating it as an act of nullity. If at all, it was voidable, but the assessee having consented or at any rate acquiesced in the act of adjustment, it is not open to the petitioner to question the same in a collateral proceeding. At any rate, he cannot request the designated authority to reopen the issue of adjustment at the stage of processing his declaration. I am unable to agree with the view expressed by the learned Single Judge of the Calcutta High Court in *M. Industries Ltd. v. CIT* : [1999]238ITR820(Cal) , that the validity of adjustment (in that case it was under section 245) could be raised before the designated authority under the scheme at any time and such authority should ignore the adjustment if it was in violation of the prescribed procedure or principles of natural justice. That would amount to unsettling the settled facts and unduly stretching the provisions of the scheme. Even if there was violation of the principles of natural justice while effecting the adjustment, the court can well refuse to exercise its discretion to invalidate such adjustment having regard to the facts and circumstances of the case, vide observations in *M. C. Metha v. Union of India* : [1999]3SCR1173 . . '

18. Although non obstante clause 'notwithstanding' is used in section 88 of the Scheme, from that non obstante clause, it cannot be said that even settled matters

have to be reopened and benefit under the Scheme should be extended to an assessee even with regard to the admitted income. It needs to be noticed that nowhere under the Scheme, it is stated that where the assessments have already been made and tax paid and where the amount paid under section 140A of the Act has been adjusted towards tax liability, even then, readjustment has to be done in terms of the provisions of section 88. Since the scheme does not contemplate adjustment of amount paid under section 140A towards tax, the argument raised by the learned counsel for the appellant cannot be accepted. Further, the clarification issued by the CBDT on Question No. 4 dated 3-9-1998 on which learned counsel for the appellant placed reliance is also not helpful to the appellant's case, because, it refers to the payments made after the assessment and before filing of the declaration. That is not the situation in this case.

In conclusion, we do not find any merit in this writ appeal. It is accordingly dismissed with no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com