



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.5956 OF 2021

Chandrakant Narayan Patkar .Petitioner
Charitable Trust, Through its
Trustee Vikas Patkar, having
office at 1st floor, Patkar Trust
Building, Narayan Patkar Road,
Dombivali (East)
Thane – 421 021.

Vs.

1. Union of India, Through The Secretary, .Respondents
Department of Revenue, Ministry of
Finance, Government of India,
North Block,
New Delhi – 110 001.
2. The Central Board of Direct Taxes,
Department of Revenue, Ministry of
Finance, Government of India,
North Block,
New Delhi – 110 001.
3. The Principal Commissioner of
Income Tax – Exemption, Designated
Authority, Piramal Chambers, Lower Parel,
Mumbai – 400 013.
4. The Income-Tax Officer (Exemption) – 1(2),
Piramal Chambers, Lower Parel,
Mumbai – 400 013.

Mr. Dharan V. Gandhi, Advocate, for Petitioner
Mr. Sham Walve, Advocate, for Respondents

**CORAM : SUNIL P. DESHMUKH &
ABHAY AHUJA, JJ.**

DATE : 22 JUNE, 2021

(THROUGH VIDEO CONFERENCING)

JUDGMENT (PER SUNIL P. DESHMUKH, J.)

1. Rule. Rule is made returnable forthwith. Heard learned Counsel appearing for the parties finally, by consent.

2. The petitioner-trust aggrieved by the communication on the website/portal of the Income Tax Department, rejecting declaration Form No.1 filed by the petitioner on 30/12/2020 under the Direct Tax Vivad Se Vishwas Act, 2020 (for short, hereinafter referred to as 'DTVSV Act') and the Direct Vivad Se Vishwas Rules, is before us.

3. The petitioner's case is that it is a registered charitable trust. It had filed return of income for financial year 2009-10 – assessment year 2010-11, belatedly disclosing income to be 'Nil'. Subsequently, an intimation/computation sheet purporting to be under section 143(1) of the Income Tax Act, 1961 (IT Act) had been received at its end on 22nd December, 2012, determining income of Rs.69,36,357/- and total tax liability to the tune of Rs.19,84,908/- with interest thereon totalling to Rs.31,83,240/-. It has been referred to by the petitioner that while preparing the return of income, audit report in Form No.10B was also prepared but the same remained to be filed

along with the return of income. According to petitioner, there have been no reasons coming forth as to why the exemption under section 11 of the Act was disallowed or the adjustments could not have been made in the intimation under section 143(1)(a) of the IT Act.

4. Against aforesaid intimation, the petitioner preferred an appeal with the Commissioner of Income Tax (Appeals)-1, Mumbai (CIT-A) in November, 2018.

5. The appeal was dismissed on 31st January, 2020 on the ground of filing of the return belatedly.

6. Mr. Dharan Gandhi, learned counsel for the Petitioner states that in the meanwhile, the Direct Tax Vivad Se Vishwas Act, 2020, had been enacted (hereinafter referred to as 'DTVSV' Act) and enforced for resolution of disputed tax and for the matters connected therewith or incidental thereto.

7. The learned counsel for Petitioner submits that against the CIT(A) decision dated 31.01.2020, time limit to file appeal is 60 days under Section 253(1)(a) of the Income Tax Act, 1961 ('IT Act'). A circular bearing No. 9 of 2020 dated 22.04.2020 had been issued by

the Respondent No. 2 – CBDT clarifying in answers to questions no.1, 20, 33 & 29 particularly that where an order has been passed by the CIT(A) and time limit to file appeal to the Income Tax Appellate Tribunal (ITAT) has not expired, the Petitioner / Appellant is eligible to opt for DTVSV Scheme. He submits that time limit to file an appeal before ITAT had not expired on the specified date under DTVSV Act viz; 31.01.2020. The Petitioner, as such, was eligible to file a declaration as referred to under DTVSV Act and have resolution and settlement of the matter.

8. He submits as the scheme of the DTVSV Act covers the Petitioner's case and the Petitioner had accordingly applied pursuant to the provisions of the DTVSV Act and the rules and submitted Form No.1, giving requisite details referring to that time limit to file appeal before ITAT had not expired and also referring to amount payable under the scheme was Rs. 17,55,984/- and out of which, an amount of Rs. 16,79,770/- had already been paid and as such, net amount payable under the scheme of the DTVSV Act is Rs. 76,240/-.

9. The Petitioner became aware on 29.01.2021 that its declaration in Form No. 1 under the DTVSV Act and the rules has been rejected with following remarks which are re-produced hereinbelow :

“As per the CBDT circular no.21/2020 dated 04/12/2020 clarification given vide question no.71 it is seen that appeals filed against intimation u/s. 143(1) of the Act are eligible under Vivad Se Vishwas if adjustment has been made under sub-clauses (iii) to (vi) of clause (a) of section 143(1) of the Act. In the case of the assessee the adjustment has been made by CPC under sub-clause (ii) of clause (a) of section 143(1) read with explanation (a)(ii) to section 143(1). The application of the assessee therefore is not eligible under the scheme hence, the application is rejected.”

10. Mr. Gandhi vehemently submits that rejection of declaration for the reason adjustment has been made U/s. 143(a)(ii) is absolutely digressed from the intention and the purpose underlying bringing in enactment DTVSV Act and its object. Learned counsel particularly emphasizes that scheme of the DTVSV Act does not make any distinction in adjustments under the clauses or sub clauses of section 143 of the IT Act. There is no such reference in the enactment. However, such a distinction is sought to be carved out under the circular No. 21 of 2020 dated 04.12.2020 issued with an answer given to a question which goes beyond the provisions of the DTVSV Act. He submits that, answer to question no.71 does not have any rationale much less any plausible basis. The answer to question No.71 under the clarification, having regard to the provisions of the DTVSV Act, as a matter of fact, intercepts its underlying purpose and object and purports to bring in classification in appeals which is not intended

under the enactment. He submits that the Petitioner's case squarely falls within the four corners of the DTVSV scheme and the Petitioner is eligible to have its benefit. The learned counsel refers to affidavit-in-reply of the revenue and submits that none of the facts are in dispute nor the provisions of the enactments. As a matter of fact, it can be said that there is tacit endorsement to the Petitioner's case.

11. Learned counsel for the Respondents takes us through provisions of section 143 (1)(a)(i) and (ii) of the IT Act and submits that while clauses (a)(i) to (a)(ii) relate to obvious errors in the returns, and for correction of such errors the scheme may not be necessary to be resorted to.

12. Learned Counsel for respondents contends that CBDT circular no.21/2020 dated 04/12/2020 is binding on respondent no.3. He submits that it is not the case that petitioner's appeal meets with the criterion referred to in the answer to question no.71 as petitioner's appeal against intimation under Section 143(1)(a)(i) or (ii) is not contemplated under the scheme. Thus, as per answer to question no.71 in the circular, the petitioner would not be eligible to avail of benefit, as DTVSV scheme would not apply. He contends that the circular is issued in exercise of powers pursuant to Sections 10 and 11

of the DTVSV Act and thus, it would not be said that the circular is *ultra-vires* the Act. The order rejecting form no.1 is legal and proper. He, thus, purports to oppose the petition.

13. We deem it appropriate to refer to that the DTVSV enactment has been brought in, to provide for resolution of disputed tax and the matters connected therewith and incidental thereto.

(i) In aforesaid enactment, the term “appellant” has been defined under section 2(1)(a) as under :-

“(a) “appellant” means –

(i) a person in whose case an appeal or a writ petition or special leave petition has been filed either by him or by the income-tax authority or by both, before an appellate forum and such appeal or petition is pending as on the specified date;

(ii) a person in whose case an order has been passed by the Assessing Officer, or an order has been passed by the Commissioner (Appeals) or the Income Tax Appellate Tribunal in an appeal, or by the High Court in a writ petition, on or before the specified date, and the time for filing any appeal or special leave petition against such order by that person has not expired as on that date;

(iii) a person who has filed his objections before the Dispute Resolution Panel under section 144C of the Income-tax Act, 1961 and the Dispute Resolution Panel has not issued any direction on or before the specified date;

(iv) a person in whose case the Dispute Resolution Panel has issued direction under

sub-section (5) of section 144C of the Income-tax Act and the Assessing Officer has not passed any order under sub-section (13) of that section on or before the specified date;

(v) a person who has filed an application for revision under section 264 of the Income Tax Act and such application is pending as on the specified date;”

(ii) It is also pertinent to refer to section 2(1)(j) defining the term “disputed tax”, reading, thus : -

“(j) “disputed tax”, in relation to an assessment year or financial year, as the case may be, means the income-tax, including surcharge and cess (hereafter in this clause referred as to the amount of tax) payable by the appellant under the provisions of the Income-tax Act, 1961, as computed hereunder :-

(A) in a case where any appeal, writ petition or special leave petition is pending before the appellate forum as on the specified date, the amount of tax that is payable by the appellant if such appeal or writ petition or special leave petition was to be decided against him;

(B) in a case where an order in appeal or in writ petition has been passed by the appellate forum on or before the specified date, and the time for filing appeal or special leave petition against such order has not expired as on that date, the amount of tax payable by the appellant after giving effect to the order so passed;

(C) in a case where the order has been passed by the Assessing Officer on or before the specified date, and the time for filing appeal against such order has not expired as on that date, the amount of tax payable by the appellant in accordance with such order;

(D) in a case where objection filed by the appellant is pending before the Disputed Resolution Panel under section 144C of the Income-tax Act as on the specified date, the amount of tax payable by the appellant if the Dispute Resolution Panel was to confirm the variation proposed in the draft order;

(E) in a case where Dispute Resolution Panel has issued any direction under sub-section (5) of section 144C of the Income - tax Act and the Assessing Officer has not passed the order under sub-section (13) of that section on or before the specified date, the amount of tax payable by the appellant as per the assessment order to be passed by the Assessing Officer under sub-section (13) thereof;

(F) in a case where an application for revision under section 264 of the Income -tax Act is pending as on the specified date, the amount of tax payable by the appellant if such application for revision was not to be accepted”

(iii) Section 9 appears to be an exclusionary provision reading, thus :-

*“9. The provisions of this Act shall not apply –
(a) in respect of tax arrear –*

(i) relating to an assessment year in respect of which an assessment has been made under sub-section (3) of section 143 or section 144 or section 153A or section 153C of the Income-tax Act on the basis of search initiated under section 132 or section 132A of the Income -tax Act, if the amount of disputed tax exceeds five crores rupees;

(ii) relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration;

(iii) relating to any undisclosed income from a source located outside India or undisclosed asset located outside India:

(iv) relating to an assessment or reassessment made on the basis of information received under an agreement referred to in section 90 or section 90A of the Income -tax Act, if it relates to any tax arrear;

(b)

(c)

(d)

(e)"

14. There is no dispute on factual aspects and the reasons for rejection of Petitioner's Form No. 1 are with reference to answer to question No.71. Question No.71 and answer thereto, under CBDT circular bearing no.21/2020 dated 04/12/2020 read, thus :

“Q.71 Vivad se Vishwas forms do not contain a specific option to settle appeal filed against intimation u/s. 143(1) of the Act. Accordingly, please clarify how to settle such appeal, which is pending as on 31st Jan.2020 (or time to file appeal has not expired on 31st Jan. 2020).

Answer : Appeal filed against intimation u/s. 143(1) of the Act is eligible under Vivad se Vishwas if adjustment has been made under sub-clauses (iii) to (vi) of clause (a) of section 143(1) of the Act.”

15. For ready reference, the provisions of Section 143 (1) (a) (i) to (vi) of the IT Act are quoted below:-

“ Section 143. (1) Where a return has been made under [section 139](#), or in response to a notice under sub-section (1) of [section 142](#), such return shall be processed in the following manner, namely:—

(a) the total income or loss shall be computed after making the following adjustments, namely:—

*(i) any arithmetical error in the return;
[***]*

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

[iii] disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of [section 139](#);

(iv) disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return;

(v) disallowance of deduction claimed under [sections 10AA](#), [80-IA](#), [80-IAB](#), [80-IB](#), [80-IC](#), [80-ID](#) or [section 80-IE](#), if the return is furnished beyond the due date specified under sub-section (1) of [section 139](#); or

(vi) addition of income appearing in Form 26AS or Form 16A or Form 16

which has not been included in computing the total income in the return:

Provided that no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode:

Provided further that the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made:][***Provided also*** that no adjustment shall be made under sub-clause (vi) in relation to a return furnished for the assessment year commencing on or after the 1st day of April, 2018;]

(b)

(c)

(d)

(e)

Provided

Provided further

Explanation

(a)

(b)

Plain reading of the aforesaid provisions of Section 143(1) (a)(i) to (vi), would clearly show that total income or loss is to be computed

after making the adjustments referred to thereunder. These adjustments in computing total income appear to be clerical adjustments hardly calling for judicial adjudication of real sort, albeit the proviso does require adherence to the principles of natural justice. The sub-clauses refer to (i) arithmetical error in the return, (ii) an incorrect claim apparent from return, (iii) disallowance of loss claimed beyond the due date, (iv) disallowance of expenditure or increase in income not taken into account in the computation, (v) disallowance of deduction(s) claimed if return is furnished beyond the due date, and (vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in the computation.

16. During the course of hearing, learned Counsel for petitioner has referred to and relied on a decision of this court in the case of *Macrotech Developers Ltd. Vs. Principal Commissioner of Income Tax*, reported in [2021] 126 taxmann.com 1 (Bombay), wherein it has been observed to the effect that clarifications / answers given by CBDT in response to certain questions not aligning with the legislative intent and doing violence to plain language of the statute and cannot be accepted. He has further relied on the Supreme Court judgment in the case of *Keshavji Ravji & Co. Etc. Etc. Vs. Commissioner of Income Tax*, reported in 1990 (82) CTR 0123 wherein it has been

considered that the Tribunals and Courts are not supposed to interpret law in the light of circular. The Supreme Court, in the case of *Uco Bank Vs. Commissioner of Income Tax, reported in (1999) 154 CTR 0088* has observed that CBDT circulars may tone down the rigour of the law and ensure a fair enforcement of its provisions, however those cannot be adverse to the assessee. The power is for just, proper and efficient management of the work and are meant to mitigate the rigour application of provisions.

17. It may have to be referred to that circulars cannot be issued adverse to the interest of assessee nor those can be issued contradicting and nullifying the provisions of the enactment.

18. It would be pertinent to refer to that underneath the answer to question no.71, the circular No. 21 of 2020 purports to segregate and classify the appeals against the orders passed under Section 143(1)(a)(i) or (ii) as a separate category from the appeals from Clauses (iii) to (vi) of 143(1)(a) of the IT Act.

19. The DTVSV enactment does not provide for classification in appeals with reference to the orders passed by the authority under different provisions. The preamble of the enactment refers to that it

proposes to provide for resolution of disputed tax and the matters connected therewith and incidental thereto and defines the term 'appellant' as aforesaid which embraces the Petitioner and covers the case the case under clause (ii), *inter alia*, 'disputed tax' where an order in appeal has been passed by the appellate forum and the time limit to file further appeal / writ petition for filing has not expired as referred to under clause (B) of section 2(1)(j). Further, it would be pertinent to refer to that it is not the case of respondents that petitioner's case falls in the excluded categories referred to under the provisions of section 9 viz; clauses (a) to (e) nor such a case has been made out in the affidavit or during submissions. It is also not the case of the respondents that the rules refer to or create classification and categories in the appeals based on the orders passed with reference to sub-clauses under provisions of 143(1)(a) of the IT Act.

20. All the adjustments referred to under sub-clauses (i) to (vi) of clause (a) of Section 143(1) are indication of forming one category and as such are grouped under sub-clause (a) of Section 141(1). Classifying the adjustments in (iii) to (vi) of Clause(a) of Section 143(1) to be eligible under the DTVSV Scheme and excluding the adjustments referred to in (i) and (ii) under the circular No. 21 of 2020 without substantiating the same with any rationale or plausible basis or

material therefor, would be arbitrary, unreasonable and discriminatory. The same would be in breach of Article 14 of Constitution of India and be liable to be set aside as such. Such a classification sought to be made would not be fitting into the requirements of intelligible differentia having nexus to the object to be achieved. Despite a query from the Court as to the purpose of this classification, there was no answer forthcoming from the Revenue. There does not appear to be any object to be achieved by such an unreasonable and arbitrary classification leading to discrimination among tax payers whose cases are falling in Clauses (i) or (ii) on one hand and those whose cases fall under Clauses (iii) to (vi) of Section 143(1)(a) of the IT Act.

21. It is queer on which basis circular purports to exclude appeals arising from the orders passed under section 143(1)(a)(i) or (ii). Neither there is reference to any basis for the same in the circular nor there is any provided in the affidavit-in-reply. Having regard to the provisions of the enactments and the rules thereunder, in the absence of any material, we are not in a position to appreciate that there is exclusion of appeals arising from orders passed under section 143(1)(a)(i) or (ii) of the IT Act. It is not the case that there is any particular object sought to be achieved by such exclusion of the appeals arising from the orders passed under section 143(1)(a)(i) or (ii).

22. In the scenario, when the circulars are issued exercising powers under sections 10 and 11 of DTVSV Act, directions are supposed to aid and smoothen bringing into operation provisions and execution of the actions based thereon. The directions, circulars would not be issued under such provisions digressing or deviating from the object and purpose under the scheme of the enactment.

23. The situation thus emerges that answer to question No. 71 in the circular No. 21 of 2020 tends overreach the purpose and intendment underlying the provisions of the Act and the Rules and purports to exclude an otherwise eligible assessee on a ground and reason neither contained in nor reflected from the scheme. The circular is manifestly divorced from the object and purpose of DTVSV scheme.

24. The answer to question no.71 purporting to exclude appeals against the orders under section 143(1)(a)(i) or (ii) is unsustainable and unacceptable. In the circumstances, emerging exclusion from the answer to question No. 71 of the circular No. 21 of 2020 dated 04.12.2020 is untenable and deserves to be set aside. We, therefore, set aside Answer to Question No. 71 of Circular No. 21 of

2020 dated 04.12.2020. In view of the same, the Petition is allowed in terms of prayer clauses (i) and (ii) which read, thus :-

“(i) That this Hon’ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or direction, calling for the records of the Petitioner’s case and after going into the legality and propriety thereof, to quash and set aside the action/order of the Respondent No. 3 in rejecting the Application of the Petitioner in Form No. 1 and 2 of the VSV Act and direct the Respondent No. 3 to issue Form No. 3 accepting the said application of the Petitioner under the said Act and Rules thereunder;

(ii) That this Hon’ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or direction, calling for the records of the Petitioner’s case and after going into the legality and propriety thereof, to quash the reply of the Respondent No. 2 to Q. 71 of the Circular No.21/2020 dated 04.12.2020.”

Rule made absolute in aforesaid terms. No order as to costs.

(ABHAY AHUJA, J.)

(SUNIL P. DESHMUKH, J.)