

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

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GADGIL

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WRIT PETITION NO.1025 OF 2021

Cooperative Rabobank U A,
20th Floor, Tower A,
Peninsula Business Park,
Senapati Bapat Marg,
Lower Parel (West),
Mumbai – 400 013.

... Petitioner

Versus

1. Commissioner of Income Tax (IT),
Mumbai-2, having his office at
17th Floor, Air India Building,
Nariman Point, Mumbai – 400 021.

2. Union of India
Through the Secretary,
Department of Finance,
Ministry of Finance,
Government of India,
North Block, New Delhi-110.

... Respondents

Mr. Percy Pardiwala, Senior Counsel a/w Mr. Atul Jasani for
Petitioner.

Mrs.S.V. Bharucha for Respondents.

CORAM : SUNIL P. DESHMUKH AND
ABHAY AHUJA, JJ.

RESERVED ON : 20TH JULY, 2021.

PRONOUNCED ON : 25th AUGUST, 2021.

JUDGMENT : (PER COURT)

1. By this Petition filed under Article 226 of the Constitution of India, 1950, Petitioner is challenging the validity of Form-3, dated 30th January, 2021 and 26th March, 2021 issued under Section 5 of the Direct Tax Vivad Se Vishwas Act, 2020 (the “DTVSV Act”) by the Designated Authority for Assessment Year 2003-2004.

2. Petitioner is a bank established in The Netherlands and is part of the Rabobank Group worldwide. It is submitted that Petitioner is a regular assessee under the Income Tax Act, 1961 (the “IT Act”).

3. A return of income dated 28th November, 2003 was filed declaring Nil income. On 7th March, 2006, an Assessment Order was passed assessing business profits attributable to permanent establishment (PE) at Rs.1,50,75,790/-. Aggrieved by the said order, assessee filed an Appeal on 19th April, 2006 before the Commissioner of Income Tax (Appeals) (“CIT(A)”). On 31st January, 2007, CIT(A) passed an order holding that Petitioner does not have

PE in India and deleted the addition made by the Assessing Officer. The order giving effect to the CIT(A) order was passed on 16th April, 2007 pursuant to which a sum of Rs.7,75,272/- was paid by the Revenue to Petitioner as interest under Section 244A of the IT Act on the refund due to the Petitioner. Aggrieved by the order of the CIT(A), the Department filed an Appeal before the Tribunal on 8th May, 2007. On 1st April, 2015, the Tribunal passed an order partly allowing Revenue's Appeal and restoring the issue whether Petitioner has a permanent establishment in India under certain provisions of the India-Netherlands double taxation avoidance agreement to the Assessing Officer.

4. Aggrieved by the order of the Tribunal, Petitioner filed an Appeal before this Court and also a miscellaneous application before the Tribunal. The Tribunal dismissed the miscellaneous application vide its order dated 21st August, 2018 against which also Petitioner was before this Court. By judgment dated 29th August, 2018, in Income Tax Appeal No.1198 of 2015 with Income Tax Appeal No.260 of 2016 with Income Tax Appeal No.264 of 2016, this Court set aside the orders dated 1st April, 2015 and 21st August, 2018 passed by the Tribunal and restored the Appeal to the file of

the Tribunal for a decision afresh on merits. The following paragraphs of the order of this Court are relevant and are quoted as under :-

“26 In the backdrop of all this, and further facts noted, a cryptic order has been passed by the Tribunal. In fact, in paragraph 5 of the order under challenge in reference to the Income Tax Appeal No. 4632/MUM/2006 for Assessment Year 2002-2003, the Tribunal says that the Indian company had made payment to the Assessee for providing the advisory services to it and under the Head “Guarantee Commission” and that the Indian company was paying the Assessee more than 30% of its income. That the basic issues are, as to whether the Assessee had permanent establishment in India or not and as to whether the services rendered by the Indian company could be treated as the activities carried out by the Assessee. Yet, it says that there is nothing on record to prove that the provisions of Article 5(1) of the Agreement are applicable. That stipulates that the permanent establishment for the purpose of convention meant a fixed business through which the business of the enterprise was wholly or partly carried on. The conclusion is that the Assessee was not having fixed place of business in India. Hence, the First Appellate Authority rightly held that the provisions of Article 5 (1) were inapplicable. It is in these circumstances we are surprised that the Tribunal still deems it fit and proper to remand the case. If there was indeed no material on record, then, the above conclusion was impossible to be reached.

27 *Be that as it may, we do not wish to express any opinion on the rival contentions for it may prejudice both sides. In fact, resorting to such shortcuts, results in wastage of precious judicial time of the Tribunal as also Higher courts and delaying the collection and recovery of Revenue, if any. It only enables the parties to postpone the inevitable. It also results in uncertainty and chaos. Judicial decisions have to be consistent and all the more there should be no confusion. There ought to be some predictability and when given facts and circumstances give rise to certain legal principles which parties assert are applicable, then, as a last fact finding authority, the Tribunal could have summoned all records and thereafter should have arrived at a categorical conclusion whether the First Appellate Authority was right or the Assessing Officer. This having admittedly not been done, we are of the firm opinion that the Tribunal failed to act as a last fact finding authority. It failed to discharge its duty and function expected of it by the law. We have no hesitation, therefore, in answering question nos.1 and 2 as reproduced above in favour of the Assessee and against the Revenue.*

28 *Having thus answered these substantial questions of law, we set aside the order of the Tribunal. We cause no prejudice to the parties but balance their rights and equities. We restore the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits and in accordance with law.*

29 *Needless to clarify therefore, that the initial order dated 1st April, 2015 and the order on the Miscellaneous Applications for rectification are quashed and set aside There shall be no order as to costs.*

30 All the three Appeals are disposed of accordingly.”

It is to be noted that the aforesaid order was with reference to three Income Tax Appeals in respect of Assessment Years 2002-03, 2003-04 and 2005-06. This Petition concerns Assessment Year 2003-04.

5. On 17th March, 2020, the DTVSV Act was enacted, pursuant to which Petitioner made declaration in Form-1 referring to Appeal Reference No. ITA/3633/Mum/2007 in respect of Assessment Year 2003-04 as pending alongwith undertaking in Form-2 on 29th December, 2020.

6. On 30th January, 2020, Form-3 was issued by Respondent No.1, wherein the amount payable under the DTVSV Act was determined at Rs.63,31,832/-, i.e., 100% of the tax arrears. The said Form-3 refers to the same Appeal Reference No. ITA/3633/Mum/2007, as was contained in Form-1. Even the corresponding column pertaining to schedule number referred to the pendency of Appeal of the Department before the Income Tax Appellate Tribunal

(the “ITAT”) as on 31st January, 2020, viz., the specified date under the DTVSV Act.

7. It is Petitioner’s case that this determination by Respondent No.1 was against Rs.31,65,916/-, i.e., 50% of the tax arrears as computed by Petitioner as the said Appeal was stated to be filed by the Department. Further, interest of Rs.7,75,272/- granted earlier under Section 244A of the IT Act was sought to be withdrawn.

8. It is submitted that to resolve this issue, Petitioner had a discussion with the office of Respondent No.1, however, Petitioner was informed that it is the Petitioner, and not the Respondent, that would be treated as the Appellant before the Tribunal and, therefore, the amount payable was correctly determined at 100% of the tax arrears.

9. It is further contended that though there is no provision under the DTVSV Act or the Rules for withdrawal of interest granted earlier under Section 244A of the DTVSV Act, Respondent No.1 has in the said Form-3 sought to withdraw the said interest by

adding the said amount of interest to the amount declared to be paid by Petitioner. It is submitted that, therefore, the amount payable under the DTVSV Act was determined as Rs.63,31,832/- being 100% of the tax arrears plus Rs.7,75,272/-, being the interest paid earlier under Section 244A of the IT Act, now sought to be withdrawn, totalling to Rs.71,07,104/-.

10. Petitioner filed a submission to this effect vide letter dated 19th March, 2021 before Respondent No.1 requesting for rectification of Form-3 in line with the aforesaid discussion. However, vide revised Form-3 dated 26th March, 2021, ITA No.3633/Mum/2007, which was in the earlier Form-3 stated to be filed by Revenue, was in the revised Form-3 stated to be filed by Petitioner and the amount payable under the DTVSV Act remained at Rs.71,07,104/- as apart from treating the appeal to be an Assessee Appeal, the interest of Rs.7,75,272/- was also not reversed. In the remarks column of the revised Form-3, the following reason was given :-

“The assessee is requested to pay the amount as per the DTVSV scheme. The revenue filed appeal before ITAT vide appeal no.3633/Mum/2007. The Hon’ble ITAT directed to restore back the issue to AO for fresh

adjudication. The revenue accepted the decision of the ITAT. The assessee filed appeal before the Hon'ble HC Bombay against the said order. The Hon'ble court has restored back the matter to ITAT for fresh order. Therefore, the ITA No 3633/Mum/2007 has been restored but on the assessee's appeal therefore the dispute pending before ITAT is assessee's appeal not of the revenue."

11. In addition to the abovesaid remark, which was absent in the earlier Form-3, in the revised Form-3, the corresponding column pertaining to schedule number referred to pendency of Appeal of the assessee before the ITAT as on 31st January, 2020.

12. Being aggrieved by the aforesaid action, Petitioner is before us seeking essentially the following reliefs :-

- "a. to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof, quash and set aside the Impugned Forms No.3 dated 30th January 2021 (Exhibit "K") and 26th March 2021 (Exhibit "M") issued by Respondent No.1 for the assessment year 2003-04;*
- b. to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the*

Constitution of India, ordering and directing Respondent No.1 to forthwith withdraw and cancel the Impugned Forms No.3 dated 30th January 2021 (Exhibit “K”) and 26th March 2021 (Exhibit “M”) issued by Respondent No.1 for the assessment year 2003-04 and further ordering and directing Respondent No.1 to issue Form No.3 treating the Petitioner as the Respondent and consequently determining the amount payable under the VSV Act at 50% of the tax arrears and further ordering and directing Respondent No.1 not to withdraw interest granted under section 244A of the Act;”

13. Respondent-Revenue has filed its affidavit in reply dated 11th June, 2021, additional affidavit in reply dated 3rd July, 2021 as well as common supplementary affidavit in reply dated 14th July, 2021.

14. It is submitted on behalf of the Revenue that the Revenue has filed an Appeal before the ITAT and the ITAT directed restoration of the issue back to the Assessing Officer for fresh adjudication. The Revenue accepted the said decision of the ITAT. Thereafter, assessee filed an Appeal before this Court against the order of the ITAT. This Court has restored the matter to the ITAT for fresh orders, i.e., ITA No.3633/Mum/2007 has been restored, but on

the assessee's Appeal, therefore, the dispute pending before the ITAT is the assessee Appeal and not of the Revenue; the Appeal currently in adjudication being assessee's appeal, levy of 100% tax as per the DTVSV Act is justified.

15. With respect to the issue regarding withdrawal of interest paid under Section 244A of the IT Act, it is submitted in the additional affidavit that the difference between the disputed tax and the amount payable in Form-3 is interest paid under Section 244A of the IT Act. It is submitted that assessee was already given a refund alongwith interest under Section 244A pursuant to the order giving effect to the order of CIT(A); the money was in possession of the assessee from the date of issue of refund and after assessee filed for the DTVSV, the total payable demand was raised. In this context, it has been stated in the affidavit that on the one hand, the assessee had taken refund from the Department and on the other hand he has also taken interest under Section 244A of the IT Act on the said refund and has been earning interest on interest during this period. It is submitted that the VSV Scheme is a beneficiary scheme by the Department, whereby the Department is waiving off the interest to be charged under Section 234A, 234B

and 234C alongwith penalties. Thus, on the one hand, the Department is waiving off interest liabilities and, on the other hand the Department had given interest to Petitioner under Section 244A, which means that assessee has been benefited from both ends as it has got its interest liability waived off and has also got interest on refund. It is submitted that this is not in the interest of the Revenue nor was it the intention of the law makers while drafting the DTVSV Scheme. Therefore, when the Department, on the one hand, waives off assessee's liabilities, on the other hand, it is imperative for the Department to take back the interest given to the assessee. Also, the Department will take back the interest from the date of issue of refund till the date of issue of Form-3 as this amount is public money, which cannot be forgone. It is stated that hence the Department has taken back its interest on refund given earlier to the assessee. In this view of the matter, it is submitted that the assessee be directed to pay disputed tax as per Form-3 issued to it.

16. Mr. Pardiwala, Learned Senior Counsel appearing on behalf of Petitioner submits that as regards the first issue, i.e., as to whether the Appeal pending before the ITAT is a departmental Appeal or an assessee Appeal, he submits that the said issue is

squarely covered by the decision of this Court in Writ Petition No.1028 of 2021 in the case of Petitioner for the Assessment Year 2002-03. In support of his contention, he draws our attention to the revised Form-3 issued on 26th March, 2021. He submits that for the year under consideration, viz., Assessment Year 2003-04, the schedule of the earlier Form-3 dated 30th January, 2020 clearly refers to the said ITA No.3633/Mum/2007 as schedule 'A' to be filled up in case Appeal of Department is pending before the ITAT on 31st January, 2020, whereas the revised Form-3 refers to the same to be filled in case Appeal of assessee is pending. He draws our attention to the oral judgment dated 29th August, 2018 of this Court, which is also in respect of Petitioner herein for Annual Year 2003-04 referred to earlier, to submit that there being categorical findings by this Court as contained in Paragraphs 26 to 30 (reproduced in Paragraph 4 above) that this Court had restored the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits and in accordance with law. He submits that in Writ Petition No.1028 of 2021 this Court has clearly held that having observed that pending appeal is a Revenue appeal, the first proviso to Section 3 of the DTVSV Act making 50% of the disputed tax would payable, would be applicable and submits that in view of the identical facts, similar

treatment be given in this matter as well and this Court direct the Respondents to accept 50% of the disputed tax.

17. With respect to the issue relating to withdrawal of interest granted earlier under Section 244A of the IT Act, Mr. Pardiwala submits that in Form-3 no reason has been given and there is no mention as to why the amount payable under the DTVSV Act is Rs.71,07,104/- and not Rs.63,31,832/- being the tax arrears determined by the income tax authority, although, the said amount is also erroneous, as the same should be Rs.31,65,916/- as the pending Appeal is a Revenue Appeal as demonstrated earlier. Mr. Pardiwala submits that the difference of Rs.7,75,272/- has not been specified and no reason has been furnished in the Form-3 to pay a higher amount. He submits that Exhibit 'L', to which is annexed the income tax computation form for giving effect to the CIT(A) order, the said amount of Rs.7,75,272/- is shown as interest payable under Section 244A. He submits that only the additional affidavit on behalf of the Revenue admits this amount as interest paid to Petitioner under Section 244A, which is now sought to be recovered by including the same in the disputed income for which there is no power under the scheme of the DTVSV Act. Mr. Pardiwala draws our

attention in this regard to the scheme of the DTVSV Act. He draws our attention to Section 2(1)(j) which defines disputed tax.

18. He thereafter takes us to Section 3 of the DTVSV Act as well as Sections 4 and 5 of the said Act. He submits that none of the sections of the Act permit addition of any amount to the amount of disputed tax as determined under Section 5 read with Section 3 of the DTVSV Act. Mr. Pardiwala submits that there is no statutory mandate for recovery or refund of this amount under the said Scheme referring to the submissions in Paragraph 2 of additional affidavit of the Revenue. He submits that without any statutory mandate to withdraw or recover interest paid, the Department cannot seek to withdraw/take back the interest given to the assessee. He submits that the Scheme of the DTVSV Act is to settle disputed tax and the same cannot be lost sight of. In support of his contention, he refers to a decision of Gujarat High Court in the case of **Commissioner of Income-Tax Vs. Vishwajit M. Mehta; 254 ITR 66** to submit that without any specific power/provision to withdraw interest, the said act of Respondents is untenable, there being no provision in the DTVSV Act permitting them to do so. He therefore urges this Court to intervene in the matter and direct the

Respondents to issue revised Form-3 for an amount of Rs.31,65,916/-.

19. On the other hand, Mrs. Bharucha, Learned Standing Counsel for the Revenue reiterates the submissions made in the affidavits. In particular, she refers to Paragraph 2 of the additional affidavit to submit that on the one hand, the Department is waiving off the interest liabilities under Sections 234A, 234B, 234C along with penalties but on the other hand the Department had also paid interest under Section 244A and Petitioner having received the amount of interest under Section 244A, the said amount, being public money, Petitioner cannot retain this additional amount, but the same ought to be returned by Petitioner.

20. With further reference to the issue relating to interest under Section 244A of the IT Act, Mrs. Bharucha, Learned Standing Counsel for the Revenue has filed a common supplementary affidavit in reply dated 14th July, 2021 on behalf of Respondents. She fairly points out the statement therein that the DTVSV Act is silent about the interest on refund issued to assessee under Section 244A of the IT Act. She submits that although the DTVSV Act

neither mentions treatment of interest under Section 244A granted to the assessee nor talks about waiver of interest received by the assessee on the refund of disputed tax, all the same, the Scheme does not offer any right to the competent authority to waive off the interest received by the assessee on refund on account of disputed tax to it. She submits that the disputed tax has to be computed as per the provisions and rates prescribed in the IT Act and, hence, liability under the VSV Scheme is to be ascertained on the basis of disputed tax only. She submits that the interest that was issued on the refund to the assessee under Section 244A was for the benefit to the assessee, but subject to the final decision in favour of either of the parties before superior forum. Therefore, the same amount of disputed tax exists prior to deletion by appellate authority. She submits that the interest received by the assessee under Section 244A is a liability of the assessee towards the Department and the Department is duty bound to recover the same as disputed tax that was refunded to the assessee alongwith the interest as per the IT Act. She submits that this is a rightful claim of the Department, which the Department is duty bound to consider as disputed tax. She submits that in this case disputed tax is the refund alongwith interest received by it in respect of the said disputed tax. Further,

that non-recovery of the same will be entirely contrary to the DTVSV Scheme and a great loss to the public exchequer and against the interest of Revenue and a loss to tax payers money/public money. Mrs. Bharucha relies on the following paragraphs of the supplementary affidavit, which are set forth as under :-

“5 ***Our Submission :*** *In this instant case, the amount payable under VSV Scheme as computed, the disputed tax includes the refund of tax on disputed income and also the interest on such refund received by the assessee. The VSV Act is quite silent about interest on refund issued to assessee u/s 244A. The VSV Act neither mentions treatment of Interest u/s 244A issued to the assessee nor talks about waiver off interest received by the assessee on the refund of disputed tax. It is true that the Scheme provides waiver of interest chargeable or charged under section 234A, 234B and 234C of the Act on such disputed tax. It is also true that the Scheme provides waiver of penalty chargeable or charged on such disputed tax and immunity from prosecution. It is obvious that the Scheme doesn't offer any right to the competent authority to waive off interest received by the assessee on refund on account of 'disputed tax' to him. The disputed tax is computed as per provisions and rates prescribed in Income Tax Act, 1961 and hence the liability under VsV Scheme to be ascertained on the basis of disputed tax only. It would be pertinent to mention here that there is no variance in the amount of disputed tax being considered for accepting under VSV with respect*

to the disputed tax arising out of Original Assessment Order against which appeal has been made by the assessee. Still the quantum of disputed tax is same which is expressly mentioned in VSV for determination of declaration under the scheme. Therefore, the same amount of disputed tax exists before ITAT as existing prior to deletion by appellate authority. The interest issued on refund u/s 244A was a benefit to the assessee subject to final decision in favour of either of the parties by Superior Courts.

6 *In view of the above, it is amount paid to the assessee over and above refund of tax on disputed income. Once the dispute is adjudicated by superior Court or under any Scheme brought through any legislation (If immunity is not provided under any relevant provisions) on disputed tax, the assessee is bound to return the interest. In this instant case, the assessee has declared the disputed tax under the scheme in its application and hence the tax liability would be determined as per VSV Scheme along with recovery of interest while considering assessee's application under VSV Scheme as these are all public monies.*

7 *In the instant case, consequent to appellate order of CIT(A), the assessee was issued refund on the entire disputed tax along with interest u/s 244A on refund of such disputed tax. The assessee was already given a refund of Rs.1,75,85,971 along with interest u/s 244A of Rs.62,42,923 on 17.3.2016. This money was in possession of the assessee from the date of issue of refund till the date of issue of form 3 under VsV. As per Income Tax Act, the refund given to the assessee is not*

absolute but subjected to certain terms and conditions. The major condition is that the refund is given subject to decision by superior courts. If in any subsequent year, the superior court reverses its decision, then the assessee is duty bound to return the refund along with the interest u/s 244A given to the assessee.

- 9 *For better understanding of the issue at hand, it is submitted that the situation may be considered alternatively for a while. A situation may kindly be considered where the assessee would have contested the disputed tax before the Superior Appellate Authorities, High Court (if required) and the Supreme Court (if required). Let us consider that the Superior Appellate Authorities, the High Court and the Supreme Court had decided the matter against the assessee, in that case the department, in order to give effect to the Appellate order would have collected the refund earlier issued to the assessee including the interest already issued to the assessee u/s 244A on the said refund. Apart from this, the department would have charged interest u/s 234A, 234B and 234C of the Act. Further the department would have levied penalty on the disputed tax. Now coming back to the assessee opting for settling the dispute under Vivaad Se Vishvas Scheme, it is nothing but an implication that the assessee wants to settle the dispute. The assessee confirms the disputed tax. In such a case, the department is duty bound to waive off interest u/s 234A, 234B and 234C chargeable under the Act on the said disputed income. The department is also duty bound to waive off penalty chargeable or charged on such disputed income as per VsV. However, the department is*

duty bound to recover the disputed tax that was refunded to the assessee along with the interest issued to the assessee on such refund as per IT Act.

- 11 *It is submitted that in determination of demand payable under the VSV Scheme, the Department was duty bound to waive off interest u/s 234A, 234B and 234C of the Act. The Department was also duty bound to waive off penalty chargeable on the disputed tax. But the Department was duty bound to consider the refund and interest on the said refund issued to the assessee while determining demand payable under VSV. Non-recovery of the said refund and interest on the said refund will be entirely contrary to the VSV Scheme. Such an action of not recovering of interest received by the assessee on refund – as requested by the assessee – will be contrary to the VSV Scheme and great loss to the public exchequer and against the interest of revenue and a loss of the taxpayer's money/public money for the unreasonable plea made by the assessee.*
- 12 *In view of what is stated above the respondents humbly pray that the assessee may be directed to pay the disputed tax as per form 3 issued by the CIT-IT-2, Mumbai for all the assessment years in dispute which the Petitioner desires to settle through VsV.”*

She submits that therefore the act of the Department is legitimate and Petitioner be directed to pay the amount as per Form-3 issued.

21. In rejoinder, Mr. Pardiwala, Learned Senior Counsel draws the attention of this Court to Paragraphs 5 and 12 of the common supplementary affidavit of the Respondents to reiterate that the DTVSV Scheme envisages payment with respect to the disputed tax alone. He once again takes us through the definition of the disputed tax as contained in Section 2(1)(j) of the DTVSV Act to reiterate that the said definition includes only surcharge and cess, but not interest or penalty.

22. He also once again refers to the provisions of Section 3 of the DTVSV Act to submit that the plain language of the said Section clearly indicates that the reference to the amount payable is in the context of disputed tax alone and that the non-obstante language therein conclusively suggests that irrespective of anything contained in the IT Act or any other law, where a declarant files a declaration to the Designated Authority in accordance with the provisions of Section 4 in respect of the tax arrears on or before the last date, the amount payable under the Act in the case where an appeal is filed by the Income-tax authority, shall be one half of the amount of the disputed tax. He also once again draws the attention of this Court to Form-3 issued by the Designated Authority to

reiterate that despite the above provisions, the Designated Authority has increased the amount of disputed tax without any authority and determined the amount payable as Rs.71,07,104/- instead of Rs.31,65,916/-.

23. He also draws the attention of this Court to Section 6 of the DTVSV Act to submit that even under the provisions of the said Section, the Designated Authority is prohibited from charging any interest under the IT Act in respect of the tax arrears. In support of his contention that “tax” does not include interest, Learned Senior Counsel draws our attention to the decision of the Hon’ble Supreme Court in the case of **Harshad Shantilal Mehta Vs. Custodian; [1998] 99 Taxman 216 (SC)** to submit that the definition of tax under Section 2(43) referred to therein does not include interest. He refers to Paragraph 33 of the said decision, which is quoted as under:-

“Question No.5

33. *One other connected question remains : Whether ‘taxes’ under section 11(2)(a) would include interest or penalty as well? We are concerned in the present case with penalty and interest under the Act. Tax, penalty and interest are different concepts under the Act. The definition of ‘tax’ under section 2(43) does not include*

penalty or interest. Similarly, under section 157, it is provided that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. Provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. Learned Special Court Judge, after examining various authorities in paragraphs 51 to 70 of his Judgment, has come to the conclusion that neither penalty nor interest can be considered as tax under section 11(2)(a). We agree with the reasoning and conclusion drawn by the Special Court in this connection”.

24. Learned Senior Counsel submits that the above finding of the Hon’ble Supreme Court has been usefully referred to by this Court in the decision of this Court in the case of **Arthur Anderson & Co. Vs. Assistant Commissioner of Income-tax [2010] 190 Taxman 279 (Bombay)**, wherein it was observed that the definition of tax under Section 2(43) of the IT Act does not include penalty or interest and that concepts of tax, penalty and interest are different concepts under the IT Act. Paragraphs 9 and 10 of the said decision are quoted as under :-

“9. Apart from the fact that there has been no failure on the part of the assessee to make a full and true disclosure of all material facts, it will be

necessary to advert to the decision of the Supreme Court in Harshad Shantilal Mehta v. Custodian [1998] 231 ITR 871. The Supreme Court, in the course of its judgment observed that under the Income-tax Act, 1961 the definition of tax under section 2(43) does not include penalty or interest and that the concepts of tax, penalty and interest are different concepts under the Act. Justice Sujata Manohar speaking for a Bench of three Learned Judges of the Supreme Court observed thus :

"We are concerned in the present case with penalty and interest under the Income-tax Act. Tax, penalty and interest are different concepts under the Income-tax Act. The definition of "tax" under section 2(43) does not include penalty or interest. Similarly, under section 156 , it is provided that when any tax, interest, penalty, fine or any of other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. The provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax."

10. The decision of the Supreme Court was delivered in an appeal which arose out of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992. The interpretation which has been placed on the provisions of section 2(43) and the observations of the Supreme Court noted earlier, however, bind this Court as regards the ground on which the reopening of the assessment has been sought in this case."

25. Mr. Pardiwala also submits that nowhere in the DTVSV Act there is a specific reference to the waiver of interest only under Sections 234A, 234B and 234C of the IT Act, though the same is repeatedly being stated in the affidavits filed on behalf of the Revenue as the Scheme of the DTVSV Act envisages complete waiver of interest as can be gathered from the provisions thereof.

26. We have heard Mr. Pardiwala, Learned Senior Counsel, on behalf of Petitioner and Mrs. Bharucha, Learned Standing Counsel for Respondents and with their able assistance, we have perused the papers and proceedings in the matter.

27. This Petition raises two issues for our consideration. The first is whether the Appeal, that is pending before the ITAT is an assessee Appeal or a Revenue Appeal. The second issue is whether an interest of Rs.7,75,272/- granted under Section 244A of the IT Act to Petitioner earlier can be recovered by the Respondents by adding the same to the amount of disputed tax otherwise payable by Petitioner under the DTVSV Act.

28. Coming to the first issue, we observe that in this case, Assessing Officer had made addition with respect to permanent establishment in the case of Petitioner and consequently denied it benefit of the double taxation avoidance agreement. The entire income was taxed at 40% instead of 10% as declared by Petitioner. Then the matter was appealed to CIT(A). The additions were deleted. Against the said deletions, the Department filed an Appeal before the ITAT being ITA No. 3633/Mum/2007 against the order of CIT(A). The Tribunal restored the matter back to the Assessing Officer for fresh examination. It is stated that the Department had accepted this order of the ITAT. However, Petitioner challenged this order before this Court by way of an Appeal raising the following two questions :-

“(i): Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in not concluding that the Appellant does not have a Permanent Establishment in India and instead setting aside the order of the CIT (A)?

(ii): Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in remanding the matter back to Assessing officer for fresh consideration when the Assessing officer has not discharged the burden of proving that the Appellant had a PE in India?”

29. This Court by its order dated 29th August, 2018, in Income Tax Appeal No.1198 of 2015 with Income Tax Appeal No.260 of 2016 with Income Tax Appeal No.264 of 2016, answered the substantial questions of law in favour of the assessee and against the Revenue and set aside the order of the Tribunal, restoring the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits and in accordance with law.

30. The matter is, therefore, pending before the ITAT for fresh adjudication and this is the dispute, which Petitioner is desirous of settling under the DTVSV Act. Relevant factual aspects are not in dispute. Against order of departmental assessing officer, appeal under Section 246 of the IT Act had been preferred by the assessee/petitioner to the CIT(A) and the same was decided in its favour. Aggrieved by the decision of CIT(A), the Revenue-Respondent preferred an Appeal bearing No. 3633/Mum/2007 before ITAT as provided under Section 253 of the IT Act, which remanded the matter back to the Assessing Officer. Against order of remand passed by ITAT, Petitioner preferred appeal before this Court under Section 260A of the IT Act. The substantial questions of law in appeal before this Court were tested and the matter resulted

in setting aside order of ITAT, restoring the Appeal No. 3633/Mum/2007 before ITAT for decision pursuant to aforementioned orders of this Court. The Appeal before ITAT was not filed by the assessee against order of CIT(A), but by the Revenue which went to ITAT against order of CIT(A). This Court had sent back the matter to ITAT and what was before ITAT is a matter by Revenue. Factually as well as in law it was Revenue's matter which is revived. It is also not the Revenue's case that they have not accepted the said decision of this Court. This Court has in Writ Petition No.1028 of 2021 considered an identical issue with respect to Assessment Year 2002-03 in the case of the same Petitioner and held that the pending appeal is a Revenue Appeal and the first proviso to Section 3 of the DTVSV Act would be applicable and only 50% of the disputed tax could be payable. The following paragraphs are relevant and are quoted as under :-

“10. Plain reading of the table in the above Section of the DTVSV Act suggests that in the case of an eligible Appellant, if it is a non search case, then the amount, that is payable would be 100% of the disputed tax, if it is a search case, then it would be 125% of the disputed tax. However, in a case where the Appeal is filed by the Income Tax authority, the amount payable shall be one-half of the amount calculated. The question is whether

Petitioner is eligible for payment of 50% of disputed tax or 100%.

11. *In this case, assessing officer had made addition with respect to permanent establishment in the case of Petitioner and consequently denied it benefits of the double taxation avoidance agreement. The entire income was taxed at 40% instead of 10% as declared by Petitioner. Then the matter was appealed to CIT(A). The additions were deleted. Against the said deletions, the Department filed an Appeal before the ITAT being ITA No.4632/MUM/2006 against the order of CIT(A). The Tribunal restored the matter back to the assessing officer for fresh examination. It is stated that the Department had accepted this order of the ITAT. However, Petitioner challenged this order before this Court by way of an Appeal raising the following two questions :-*

“(i): Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in not concluding that the Appellant does not have a Permanent Establishment in India and instead setting aside the order of the CIT (A)?

(ii): Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in remanding the matter back to Assessing officer for fresh consideration when the Assessing officer has not discharged the burden of proving that the Appellant had a PE in India?”

12. *This Court, by its order dated 29th August, 2018, answered the substantial questions of law in favour of the assessee and against the*

Revenue and set aside the order of the Tribunal. This Court restored the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits and in accordance with law.

13. *The matter is, therefore, pending before the ITAT for fresh adjudication and this is the dispute, which Petitioner is desirous of settling under the DTVSV Act. Relevant factual aspects are not in dispute. Against order of departmental assessing officer at first rung, appeal under Section 246 of the IT Act had been preferred by the assessee/petitioner to the CIT(A) and the same was decided in its favour. Aggrieved by the decision of CIT(A), the Revenue-Respondent preferred an Appeal bearing No. 4632/MUM/2006 before ITAT as provided under Section 253 of the IT Act. Against order of remand passed by ITAT, Petitioner preferred appeal before this Court under Section 260A of the IT Act. The substantial questions of law in appeal before this Court were tested and the matter resulted in setting aside order of ITAT, restoring the Appeal No.4632/MUM/2006 before ITAT for decision pursuant to aforementioned orders of this Court. What had been revived in the process, is the matter before ITAT which was preferred by the Revenue. The Appeal before ITAT was not filed by the assessee against order of CIT(A). Here it is the Revenue which went to ITAT against order of CIT(A). This Court had sent back the matter to ITAT and what was before ITAT is a matter by Revenue. Factually as well as in law it was Revenue's matter which stands revived. It is also not the Revenue's case that they have not accepted the said decision of this*

Court. Going by the above discussion, to our mind, there is no doubt that Appeal No.4632/MUM/2006, which is pending, is Revenue's Appeal, which has also all along in Form-1 as well as in Form-3 been referred to as an Appeal by the department. Moreover, this fact is also clearly borne out by the oral judgment of this Court dated 29th August, 2018. This would leave nothing more for us to say except that the Revenue has completely misunderstood the facts. In the whole process, what is resurrected under orders of High Court is not the proceeding in ITAT by Petitioner, but of the Revenue preferred under Section 253 of the IT Act bearing No. 4632/MUM/2006, where the Revenue is Appellant. May be the Appeal by the Revenue is revived at the instance of Petitioner because of its proceedings in the High Court, but that would by no stretch of imagination make the appeal bearing No. 4632/MUM/2006 before ITAT, an appeal by Petitioner under Section 253 of the IT Act. Setting aside of order of the ITAT in the Appeal by Revenue and remand to ITAT postulates revival of appeal by the Revenue. It would therefore not be correct to say that the matter bearing Appeal No.4632/MUM/2006 under Section 253 of the IT Act before the ITAT in the present case becomes an Appeal by Petitioner, as ITA No. 4632/MUM/2006 has been restored to the ITAT on the Assessee's Appeal to High Court and not of the Revenue. Considering that the objective of the Scheme is to not only benefit the tax payer, but also the Revenue's collection, we do not wish to say any further.

14. *Having observed that the pending Appeal No. 4632/MUM/2006 is a Revenue Appeal, the first proviso of Section 3 of the DTVSV Act would become applicable and, accordingly, the amount payable by the Petitioner would be 50% of the amount, viz., 50% of the disputed tax.*

15. *Accordingly, we quash and set aside Form-3 dated 26th March, 2021 issued by Respondent No.1 for Assessment Year 2002-2003. We, further direct Respondent No.1 to issue fresh Form-3 in accordance with our above discussion within two weeks from the date of pronouncement of this judgment.”*

31. In the light of the above discussion and following our decision in Writ Petition No.1028 of 2021, we have no doubt in arriving at the conclusion that pending Appeal No.3633/Mum/2007 is a Revenue Appeal and the first proviso to Section 3 of the DTVSV Act would become applicable and, accordingly, the amount payable by Petitioner would be 50% of the disputed tax.

32. We now come to the second issue arising in this Petition as to whether the Designated Authority was competent to withdraw the interest granted to the assessee under Section 244A of the IT Act by adding such amount to the amount as disputed tax payable under Section 3 of the DTVSV Act.

33. Let us first understand what is Section 244A interest. For this purpose, it would be useful to quote Section 244A of the IT Act as under :-

“Interest on refunds.

244A. (1) Where refund of any amount becomes due to the assessee under this Act, he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the following manner, namely:—

(a) where the refund is out of any tax collected at source under section 206C or paid by way of advance tax or treated as paid under section 199, during the financial year immediately preceding the assessment year, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period,—

(i) from the 1st day of April of the assessment year to the date on which the refund is granted, if the return of income has been furnished on or before the due date specified under sub-section (1) of section 139; or

(ii) from the date of furnishing of return of income to the date on which the refund is granted, in a case not covered under sub-clause (i);

(aa) where the refund is out of any tax paid under section 140A, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period, from the date of furnishing of return of income or payment of tax, whichever is later, to the date on which the refund is granted:

Provided that no interest under clause (a) or clause (aa) shall be payable, if the amount of refund is less than ten per cent of the tax as determined under sub-section (1) of section 143 or on regular assessment;

(b) in any other case, such interest shall be calculated at the rate of [one-half per cent] for every month or part of a month comprised in the period or periods from the date or, as the case may be, dates of payment of the tax or penalty to the date on which the refund is granted.

Explanation.—For the purposes of this clause, “date of payment of tax or penalty” means the date on and from which the amount of tax or penalty specified in the notice of demand issued under section 156 is paid in excess of such demand.

(1A) In a case where a refund arises as a result of giving effect to an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264, wholly or partly, otherwise than by making a fresh assessment or reassessment, the assessee shall be entitled to receive, in addition to the interest payable under sub-section (1), an additional interest on such amount of refund calculated at the rate of three per cent per annum, for the period beginning from the date following the date of expiry of the time allowed under sub-section (5) of section 153 to the date on which the refund is granted.

(1B) Where refund of any amount becomes due to the deductor in respect of any amount paid to the credit of the Central Government under Chapter XVII-B, such deductor shall be entitled to receive, in addition to the said amount, simple interest thereon

calculated at the rate of one-half per cent for every month or part of a month comprised in the period, from the date on which—

(a) claim for refund is made in the prescribed form; or

(b) tax is paid, where refund arises on account of giving effect to an order under section 250 or section 254 or section 260 or section 262, to the date on which the refund is granted.

(2) If the proceedings resulting in the refund are delayed for reasons attributable to the assessee or the deductor, as the case may be, whether wholly or in part, the period of the delay so attributable to him shall be excluded from the period for which interest is payable under sub-section (1) or (1A) or (1B), and where any question arises as to the period to be excluded, it shall be decided by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner whose decision thereon shall be final.

(3) Where, as a result of an order under sub-section (3) of section 115WE or section 115WF or section 115WG or sub-section (3) of section 143 or section 144 or section 147 or section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under sub-section (1) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and in a case where the interest is reduced, the Assessing Officer shall serve on the assessee a notice of demand in

the prescribed form specifying the amount of the excess interest paid and requiring him to pay such amount; and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly.

(4) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989, and subsequent assessment years:

Provided *that in respect of assessment of fringe benefits, the provisions of this sub-section shall have effect as if for the figures “1989”, the figures “2006” had been substituted.*

It is clear from the above provision that Section 244A interest is granted on any refund that may be due to an assessee.

34. It would now be pertinent to appreciate the undisputed facts of this case relevant to the issue at hand. This is a case where pursuant to Nil return of income filed by Petitioner, on scrutiny, an assessment order was passed assessing business profits attributable to PE at Rs.1,50,75,790/-, aggrieved by which, Petitioner had filed Appeal before CIT(A). The CIT(A) deleted the said addition made by the Assessing Officer holding that Petitioner does not have PE in India. The order giving effect to the order of CIT(A) for the Assessment Year 2003-04 added an amount of Rs.7,75,272/- being

the interest under Section 244A of the IT Act as quoted above on the refund of Rs.73,83,538/-. Being aggrieved by order of the CIT(A), the Department had filed an Appeal before the Tribunal, which Appeal had been restored back to the Assessing Officer by the Tribunal. Against the order of the Tribunal, Petitioner had filed Appeal before this Court as well as a miscellaneous application before the Tribunal, which miscellaneous application came to be dismissed. Against the same also, Petitioner was before this Court. By a judgment dated 29th August, 2018, this Court set aside the orders dated 1st April, 2015 and 21st August, 2018 passed by the Tribunal and restored the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits. In the meanwhile, the DTVSV Act was enacted. Petitioner filed declaration in Form-1 and an undertaking in Form-2 offering an amount of Rs.31,65,916/- being 50% of the tax arrears. On 30th January, 2020, Form-3 was issued by Respondent No.1, where an amount of Rs.63,31,832/- being 100% of the disputed tax in addition to an amount of Rs.7,75,272/- was determined as payable. A submission was filed by Petitioner to issue a revised Form-3 in accordance with Form-1, where once again an amount of Rs.31,65,916/- being 50% of the tax arrears less amount of Rs.7,75,272/- was sought to be offered.

Having already held that the Appeal pending before the ITAT is a Revenue Appeal inviting the first proviso to Section 3 making Petitioner eligible to pay 50% of the disputed tax, we now have to consider whether the interest amount of Rs.7,75,272/- under Section 244A of the IT Act granted earlier to Petitioner can be recovered by the Revenue by adding the same as disputed tax as sought to be done under the impugned Form-3.

35. Before we deal with the rival contentions on the issue, it would appropriate to set forth the following provisions of the DTVSV Act :-

Section 2(1)(j) reads as follows :-

"2(1)(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 to as 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 an 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 Dispute 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:

Provided that in a case where Commissioner (Appeals) has issued notice of enhancement under section 251 of the Income-tax Act on or before the specified date, the disputed tax shall be increased

by the amount of tax pertaining to issues for which notice of enhancement has been issued:

Provided further that in a case where the dispute in relation to an assessment year relates to reduction of tax credit under section 115JAA or section 115D of the Income-tax Act or any loss or depreciation computed thereunder, the appellant shall have an option either to include the amount of tax related to such tax credit or loss or depreciation in the amount of disputed tax, or to carry forward the reduced tax credit or loss or depreciation, in such manner as may be prescribed."

Section 2(1)(o) of the DTVSV Act is quoted as under :-

(o) "tax arrear" means,--

(i) the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax, and penalty leviable or levied on such disputed tax; or

(ii) disputed interest; or

(iii) disputed penalty; or

(iv) disputed fee,

as determined under the provisions of the Income-tax Act.

Explanation.-For the removal of doubts, it is hereby clarified that the expression tax arrear shall not include and shall be deemed never to have been included any sum payable either by way of tax, penalty or interest pursuant to an order passed by the Settlement Commission under Chapter XIX-A of the Income-tax Act.

(2) The words and expressions used herein and not defined but defined in the Income-tax Act shall have the meanings respectively assigned to

them in that Act.

Section 3 reads as follows :-

“3. Subject to the provisions of this Act, where a declarant files under the provisions of this Act on or before the last date, a declaration to the designated authority in accordance with the provisions of section 4 in respect of tax arrear, then, notwithstanding anything contained in the Income-tax Act or any other law for the time being in force, the amount payable by the declarant under this Act shall be as under, namely:—

<i>Sl. No.</i>	<i>Nature of tax arrear.</i>	<i>Amount payable under this Act on or before the 31st day of March, 2020.</i>	<i>Amount payable under this Act on or after the 1st day of April, 2020 but on or before the last date.</i>
<i>(a)</i>	<i><u>where the tax arrear is the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax.</u></i>	<i><u>amount of the disputed tax.</u></i>	<i>the aggregate of the amount of disputed tax and ten per cent. of disputed tax:</i> <i>Provided that where the ten per cent. of disputed tax exceeds the aggregate amount of interest</i>

(b)	where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search under section 132 or section 132A of the Income-tax Act.	the aggregate of the amount of disputed tax and twenty-five per cent. of the disputed tax: provided that where the twenty-five per cent. of disputed tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty	the aggregate of the amount of disputed tax and thirty-five per cent. of dispute tax: provided that where the thirty-five per cent. of dispute tax exceeds the amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be
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*leviable or ignored for the
levied on such purpose of
disputed tax, computation of
the excess amount payable.
shall be
ignored for the
purpose of
computation
of amount
payable under
this Act.*

- (C) *where the tax arrear twenty-five thirty per cent. of
relates to disputed per cent. of disputed
interest or disputed disputed interested or
penalty or disputed interest or disputed penalty
fee. disputed or disputed fee:*

Provided that in a case where an appeal or writ petition or special leave petition is filed by the income-tax authority on any issue before the appellate forum, the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided further that in a case where an appeal is filed before the Commissioner (Appeals) or objections is filed before the Dispute Resolution Panel by the appellant on any issue on which he has already got a decision in his favour from the Income Tax Appellate Tribunal (where the decision on such issue is not reversed by the High Court or the

Supreme Court) or the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided also that in a case where an appeal is filed by the appellant on any issue before the Income Tax Appellate Tribunal on which he has already got a decision in his favour from the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed.”

Section 6 reads as follows :-

“6. Subject to the provisions of section 5, the designated authority shall not institute any proceeding in respect of an offence; or impose or levy any penalty; or charge any interest under the Income-tax Act in respect of tax arrear.”

36. From a bare reading of the aforesaid provisions, it emerges that once a declarant has filed a declaration to the Designated Authority in respect of the tax arrears, which declaration is in accordance with Section 4, then notwithstanding anything contained in the IT Act or any other law, the amount payable shall be as set out in the Table in Section 3. In the case of Petitioner, Section 3(a) read with the first proviso would be

applicable which would be 50% of the amount of disputed tax. Disputed tax in accordance with the definition set forth above would mean the income tax including surcharge and cess, referred therein as the amount of tax payable by the Appellant, computed as contained in Clause (A) therein. Sub-clause (A) of Clause (j) of Section 2(1) of the DTVSV Act refers to that the amount of tax payable by Petitioner would be the amount, if such Appeal was to be decided against Petitioner. There is no dispute about the tax that would be payable but the question is whether any interest can be included as disputed tax? Learned Senior Counsel for Petitioner has vehemently argued that there is no provision in the DTVSV Act, which authorises or empowers the Designated Authority to add any amount to the disputed amount, whether by way of interest already received or otherwise and has also referred to various decisions in support of his contentions.

37. On the other hand, Mrs. Bharucha, Learned Standing Counsel for the Revenue has sought to argue that the definition of disputed tax would include the amount of interest under Section 244A or any other such interest already paid to Petitioner since the refund that had been granted to Petitioner was at the stage of the

order giving effect to the order of the CIT(A) and that the said refund alongwith interest was subject to the decision of the superior courts. Drawing our attention to the language of Section 2(1)(j)(A) of the IT Act, she sought to submit that if the decision in the Appeal was to be decided against the eligible appellant, then the interest that has been paid to Petitioner under Section 244A of the IT Act would obviously have to be recovered alongwith further interest, though by virtue of the DTVSV Scheme further interest would be waived.

38. It is also undisputed fact that interest under Section 244A has been received by Petitioner as that is the amount of interest which was levied on the refund granted to Petitioner, pursuant to order giving effect to the order of CIT(A) pending the proceedings before the ITAT. It is also not in dispute that ordinarily if the Appeal before the ITAT is decided against Petitioner, the said amount already paid to Petitioner, would be recovered in the order giving effect to the order of the ITAT, as interest or as an amount is due from Petitioner to the Department.

39. Upon a query from the Court, as to how the Department would recover the interest paid under Section 244A, in the absence of the DTVSV Act, if the Tribunal order was decided against the assessee, it is being clarified on behalf of Revenue that such interest granted earlier under Section 244A of the IT Act would be recovered from the assessee by charging interest under Section 234D of the IT Act at the rate stated therein on the whole of the excess amount refunded and not separately, as the rate at which Section 234D interest would be levied is higher than the rate which is given to assessee under Section 244A of the IT Act. For the sake of ready reference, Section 234D(1) of the IT Act is reproduced as under :-

“Interest on excess refund.

234D. (1) *Subject to the other provisions of this Act, where any refund is granted to the assessee under sub-section (1) of section 143, and—*

(a) no refund is due on regular assessment; or

(b) the amount refunded under sub-section (1) of section 143 exceeds the amount refundable on regular assessment,

the assessee shall be liable to pay simple interest at the rate of one-half per cent on the whole or the excess amount so refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular

assessment.

(2) Where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount of refund granted under sub-section (1) of section 143 is held to be correctly allowed, either in whole or in part, as the case may be, then, the interest chargeable, if any, under sub-section (1) shall be reduced accordingly.

Explanation 1.—Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 2.—For the removal of doubts, it is hereby declared that the provisions of this section shall also apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date.

40. In response, Mr. Pardiwala, Learned Senior Counsel referring to sub-section (2) of Section 234D of the IT Act submits that if as a result of an order under Section 254 of the IT Act (ITAT order, as in this case), an amount of refund is held to be correctly allowed, then the interest chargeable under Section 234D(1) is only to be reduced accordingly. He submits that there is no power to

enhance the interest, but is only to reduce the interest. Further, Section 234D(1) only refers to regular assessment, whereas, this is not a case of regular assessment, but it would be an assessment as a result of an order under Section 254 of the IT Act. To elucidate his point, he submits that Section 234B(4) in contradistinction to Section 234D(2) expressly allows both increase or reduction, as a result of order under Section 254. For the sake of convenience Section 234B is extracted as under :-

“Interest for defaults in payment of advance tax.

234B. (1)

(2)

(2A)

(3) where, as a result of an order of reassessment or recomputation under section 147 or section 153A, the amount on which interest was payable in respect of shortfall in payment of advance tax for any financial year under sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April next following such financial year and ending on the date of the reassessment or recomputation under section 147 or section 153A, on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the regular

assessment as referred to in sub-section (1), as the case may be;

(4) where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264, the amount on which interest was payable under sub-section (1) or sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and—

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded;

(5)”

He, therefore, submits that when there is no specific power under Section 234B(2) to increase, but only reduce, then there can be no question of the Department taking recourse to Section 234D to recover the interest paid under Section 244A to the assessee.

41. In response to this rejoinder, Mrs. Bharucha, Learned Standing Counsel for the Revenue, upon instructions, submits that

the reference to Section 234D is only being made to explain the principle for recovery of excess interest though she admits that there is no power or provision to do so under the DTVSV Act. To this, Mr. Pardiwala fairly points out that the Department ought to have taken recourse not to Section 234B, but to the provisions of Section 244A(3), where he submits there is a power to increase or reduce interest after giving notice to assessee. He, however, submits that the Revenue having failed to avail of this provision cannot now take recourse to the IT Act or the DTVSV Act to include this amount without any authority or power.

42. We will leave this discussion here for the time being and will come back to it later as let us continue our discussion on the powers of the Designated Authority under the DTVSV Act to recover the interest that has been received by Petitioner under Section 244A of the IT Act in the manner it is sought to be done.

43. In pursuance of the Scheme under the DTVSV Act, a declaration is filed in respect of the tax arrears (which is defined in Section 2(1)(o) of the DTVSV Act), but the determination of the amount payable would be in accordance with Section 3 which refers

to the amount of the disputed tax. Disputed tax is defined in Section 2(1)(j) of the DTVSV Act. With respect to the case at hand, the computation would be with reference to Section 2(1)(j)(A) of the DTVSV Act where disputed tax means the income tax including surcharge and cess, which is referred to as an amount of tax that would become payable by Petitioner, if the Appeal is decided against Petitioner. We are of the view that disputed tax as clearly defined in Section 2(1)(j)(A) of the DTVSV Act only refers to income-tax including surcharge and cess, but not interest or penalty. The eligible assessee who files a declaration of tax arrears (which includes interest and penalty), but the determination by the Designated Authority is of disputed tax (which does not include interest or penalty). Therefore, the amount payable by a declarant would not include interest or penalty in the disputed tax. In fact, Section 6 of the DTVSV Act also does not permit charging of interest in respect of tax arrears. In our view the term “in respect of” would not only refer to interest contained in the definition of tax arrears, but also to any interest over and above the tax arrears.

44. From a conjoint reading of Section 2(1)(j)(A), Section 2(1)(o)(i), Section 3, Section 5 and Section 6 of the DTVSV Act, it is

clear that there is no provision in the DTVSV Act, which authorises recovery of interest paid earlier by the Department under Section 244A as disputed tax, there being no statutory mandate for the Designated Authority to recover interest as disputed tax in the manner sought to be done in this case.

45. Coming to the decisions in the case of **Harshad Shantilal Mehta Vs. Custodian (supra)** as well as in the case of **Arthur Anderson & Co. Vs. Assistant Commissioner of Income-tax (supra)** relied upon on behalf of Petitioner to submit that the definition of “tax” under Section 2 (43) does not include interest, having perused the aforesaid decisions, we find that the said decisions though rendered in different contexts would lend support to the view expressed by us that the amount of disputed tax as per the definition of “disputed tax” would not include interest. Both the decisions very categorically hold that definition of “tax” under Section 2(43) of the IT Act does not include penalty or interest. Since we are concerned with the “disputed tax” under the DTVSV Act, the definition of the “tax” under Section 2 (43) of the IT Act, would also be relevant for the purposes of interpretation, as the word “tax” is not defined in the DTVSV Act, although disputed tax,

amount of tax, tax arrears have all been defined therein.

46. Mr. Pardiwala, Learned Senior Counsel also referred to the decision of the Gujarat High Court in the case of **Commissioner of Income-Tax Vs. Vishwajit M. Mehta (supra)**, to submit that unless there is a provision to withdraw the interest or power to recover the interest, the action of the Designated Authority is not justified. It was a case where the Court was called upon to decide whether for Assessment Year 1979-1980, the assessee could have been made liable to pay additional interest under the provisions of Section 215(3), as a result of the order passed under Section 155 read with Section 154 of the IT Act. The Assessing Officer had passed an order whereby income of the assessee had been increased and, therefore, interest under Section 215(3) had been levied. The Commissioner of Income-Tax Appeal had quashed the order on the ground of violation of principles of natural justice. Upon an appeal by the Revenue to the Tribunal, the Tribunal had held that at the relevant time, Section 215(3) did not permit increase in the interest. While coming to the conclusion that the Assessing Officer at the relevant time was not empowered to levy or increase the amount of interest under Section 215(3) of the IT Act, the Gujarat High Court

interpreted the provisions of Section 215(3) for the Assessment Year 1979-1980 to conclude that the Assessing Officer has no power to levy further interest under Section 215(3) of the Act. This decision, in our view, supports the case of Petitioner. In the case at hand also, there is neither any provision nor any power under the DTVSV Act, which authorises the Designated Authority to recover interest paid earlier to Petitioner under Section 244A as disputed tax in the manner sought to be done.

47. The above discussion leads to that there is no provision in the DTVSV Act which authorises recovery of interest paid earlier by the Department under Section 244A of the IT Act by adding the same to the amount of disputed tax in the manner sought to be done. In this view of the matter, the addition of Rs.7,75,272/- to the disputed tax in the impugned Form-3 is bad in law.

48. Before we close, we summarise our conclusions as under :-

(i) pending Appeal ITA No.3633/Mum/2007 is a Revenue Appeal and the first proviso to Section 3 of the DTVSV Act would become applicable and, accordingly, the amount payable by Petitioner would be 50% of the amount, viz., 50% of the

disputed tax,

(ii) there is no provision in the DTVSV Act which authorises recovery of interest paid earlier by the Department under Section 244A of the IT Act by adding the same to the amount of disputed tax in the manner sought to be done, thereby making the addition of Rs.7,75,272/- to disputed tax in Form-3 bad in law.

49. We, therefore, quash and set aside Form-3 dated 26th March, 2021 issued by Respondent No.1 for Assessment Year 2003-04. We direct Respondent No.1 to issue fresh Form-3 to Petitioner determining the amount of disputed tax in accordance with our above discussion within three weeks from the date of pronouncement of this judgment and thereafter Petitioner to make payment of the disputed tax so determined within a period of two weeks of the issuance of revised Form -3.

50. Having observed as above, we now come back to the discussion on the recovery of the excess interest and the argument of Mr. Pardiwala that even Section 6 of the DTVSV Act prohibits the Department from recovering any interest. While we have already considered that Section 6 of the DTVSV Act does not permit Designated Authority to charge interest on tax arrear defined under the DTVSV Act, however to say that there is a complete prohibition

from recovery, may not be correct as the restraint to institute proceedings is only in respect of an offence but not for recovery of interest on refund concerned in the present matter. It is also not necessary for us to dwell into whether the Revenue can take recourse to Section 244A(3) of the IT Act as suggested by Learned Senior Counsel Mr. Pardiwala or take recourse to Section 234D of the IT Act as suggested on behalf of the Revenue, as it is always open for the Revenue to take steps as per law.

51. Petition is allowed in the above terms. There shall be no order as to costs.

(ABHAY AHUJA, J.)

(SUNIL P. DESHMUKH, J.)