

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.12.2016

DELIVERED ON : 07.03.2017

Coram

The Honourable Mr. Justice RAJIV SHAKDHER

Writ Petition No.10791 of 2014

& M.P.No.2 of 2014

S.Narayanan

.. Petitioner

Vs.

1.The Commissioner of Income-tax Central - II
No.108 Uthamar Gandhi Salai,
Nungambakkam, Chennai - 600 34.

2.Assistant Commissioner of Income-tax
(Now) Deputy Commissioner of Income-tax
Central Circle-II(4), No.108, Uthamar Gandhi Salai,
Nungambakkam, Chennai - 600 034.

.. Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus calling for the records of the 2nd respondent in GIR No.24701-N dated 25.06.1998 and quash the penalty order under section 271 (1)(c) Consequential Interest Under Section 220(2) and further direct the 2nd respondent to refund the amount of Rs.50,78,928/- in pursuance of the order passed under Section 154 of the assessment year 1994-95 dated 22.10.2012.

For Petitioner : Mr.J.Naresh Kumar

For Respondents : Mr.T.Pramod Kumar Chopda

O R D E R

1. This Writ Petition is directed against the order dated 25.06.1998, whereby, penalty is levied under Section 271(1)(c) of the Income Tax Act, 1961, (in short the 1961 Act), in respect of the Assessment Year (AY) 1994-95 and qua notice of demand issued, thereupon, under Section 156 of the 1961 Act. Furthermore, a challenge is also made to the consequential interest, levied under Section 220(2) of the 1961 Act. In addition to this, and as a necessary concomitant, refund is

sought, in the a sum of Rs.50,78,928/-, pursuant to an order dated 22.10.2012, passed by respondent No.2 under Section 154 of the 1961 Act.

1.1. As would be evident from the cause title and the number of the writ petition that the petition was filed only in 2014 - to be more precise, was presented in this Court on 10.04.2014.

1.2. Given the aforesaid facts, the immediate instigation, for moving this Court via the captioned Writ Petition appears to be, the communication/order dated 21.12.2012, whereby, the refund, in the sum of Rs.50,78,928/-, granted to the petitioner vide order dated 22.10.2012, passed under Section 154 of the 1961 Act, as indicated above, was sought to be adjusted towards penalty and interest, by respondent No.2.

Prefatory facts:

2. In order to adjudicate upon this Writ Petition and, in a sense, to untangle the web of circumstances obtaining in the case as well as the prayers made in the Writ Petition, the following brief facts are required to be noticed.

2.1. The petitioner, who, evidently, at the relevant point in time, was an employee of Arignar Anna Sugar Mills, a unit of Tamil Nadu Sugar Corporation Limited, was assessed to tax, on a protective basis, vide order dated 10.03.1997.

2.2. Upon search being conducted under Section 132 of the 1961 Act, in respect of a person, by the name, Sri.A.N.Dyaneswaran, Fixed Deposit Receipts (in short FDRs) of a cumulative value of Rs.17.97 lakhs, albeit, in the name of the petitioner, were discovered. Consequently, the FDRs were seized and, on protective basis, the said FDRs and the interest accrued thereon, was assessed, as indicated above, protectively, in the hands of the petitioner, under the head "other sources", as unaccounted investments of the petitioner, under Section 69 of the 1961 Act. The said assessment order was passed on 10.03.1997.

2.3. The respondents/Revenue claim that vide order dated 25.06.1998, penalty was levied, equivalent to a sum of Rs.16,51,046/-

2.4. It appears that the Government of India had floated a Karvivad Samadhan Scheme (in short 'the Scheme'), under Chapter IV of Finance (No.2) Act, 1998. The said Scheme came into force on 01.09.1998. This Scheme was floated by the Government of India (GOI) to settle tax arrears of those, locked in litigation, albeit, at a substantial discount.

2.5. Pertinently, the Scheme was portrayed as a recovery Scheme, and not as a litigation settlement scheme.

2.6. The Scheme, broadly, provided that any tax arrear under direct or indirect laws, could be settled by declaring the same and, upon payment of the prescribed amount in respect of the arrears towards tax. The Scheme, inter alia, offered immunity from penalty and prosecution.

2.7. The petitioner, evidently, attempted to avail of the benefits of the Scheme, by filing a declaration under the prescribed Form IA. This declaration was filed, in consonance with Section 89 of Finance (No.2) Act, 1998, on 30.11.1998.

2.8. Notably, the petitioner filed the declaration under the Scheme, not only for the Assessment Year in issue, i.e., AY 1994-95, but also for AYS 1993-94 and 1995-96. Consequently, the petitioner, who had an outstanding demand of Rs.17,67,808/-, against his name (which included tax equivalent to Rs.8,25,523/- on the value of FDRs and interest accrued thereon as also interest charged, under Section 234A, 234B and 234C of the 1961 Act, amounting to Rs.9,42,285/-) - by virtue of the order dated 10.03.1997 (after availing the benefits of the Scheme), obtained a waiver of Rs.12,09,016/-.

2.9. Resultantly, the petitioner was called upon to pay towards tax only a sum of Rs.5,58,792/-. This amount was paid by the petitioner, on 22.02.1999, along with a sum of Rs.5,992/-, albeit, for the AY 1993-94.

3. Consequently, a certificate was issued by the respondents/Revenue in favour of the petitioner, on 01.06.1999. Pertinently, the certificate issued to the petitioner carried the following endorsement:

".... It has already been made clear to you that your declaration was entertained at your risk. However, this Form No.3 is issued without prejudice to the department's findings in Shri.A.N.Dyaneswaran's case and the acceptance of the declaration in your case does not vest any right in you to advance your case vis-a-vis "substantive assessment". In other words, this cannot be cited before the Hon'ble ITAT in the pending appeal against the assessment made in the case of Shri A.N.Dyaneswaran."

3.1. The record shows that Sri.A.N.Dyaneswaran challenged the substantive assessment made in his hands, which was sustained, right till the Supreme Court. Consequently, necessary deletion was made qua the FDRs and the interest accrued thereon, in the hands of A.N.Dyaneswaran. This order was passed, evidently, on 29.12.2007.

4. Resultantly, on an application being made by the petitioner to respondent No.2 with regard to refund of fixed deposit amount and the interest accrued thereon, as indicated above, the order dated 22.10.2012, was passed under Section 154 of the 1961 Act. Respondent No.2, thus, directed that a sum of Rs.50,78,928/-, which included the principal fixed deposit amount and the interest accrued thereon, be refunded to the petitioner.

4.1. However, the refund ordered in favour of the petitioner could not see the light of the day, in view of another order passed by respondent No.2 on the very same day, i.e., 22.10.2012, under Section 220(2) of the 1961 Act.

4.2. Via this order, respondent No.2 attempted to bring to the notice of the petitioner that a demand qua penalty in the sum of Rs.16,51,046/- was raised vide order dated 25.6.1998 and that the said notice was served on the petitioner on 30.06.1998. It was further asserted via the said order that, since, the said demand had not been liquidated, interest, under Section 220(2) of the 1961 Act, for the period, spanning between 29.07.1998 and 28.10.2012, had been imposed. Thus, towards interest, apart from penalty, a demand, in the sum of Rs.32,15,323/- was raised on the petitioner.

4.3. In effect, the penalty and interest demanded for AY 1994-95, substantially, effaced the refund, which was ordered in favour of the petitioner, by respondent No.2 vide order dated 22.10.2012.

5. As a matter of fact, respondent No.2 vide communication/order dated 21.12.2012; a fact, to which, I have made a reference above, indicated to the petitioner, the manner in which the refund had been adjusted.

5.1. For the sake of convenience, the adjustment made by respondent No.2, in its communication/order dated 21.12.2012, is set forth below:

".....The refund of Rs.50,78,928 quantified for AY 94-95 vide order cited above is adjusted towards the arrears as under:

AY	ORDER U/S	ORDER DT.	AMOUNT
94-95	271(1)(c)	25.06.1998	16,51,046
94-95	220(1)on penalty	22.10.2012	32,15,323
96-97	143(3)	10.03.1997	85,606
96-97	220(2)	22.10.2012	1,26,953 (partly)

AY	ORDER U/S	ORDER DT.	AMOUNT
		TOTAL	50,78,928

5.2. It is, this adjustment, which, according to the petitioner, is contrary to the terms of the Scheme - that has brought the petitioner to this Court.

Submissions of Counsels:

6. In the background of the aforesaid facts, submissions have been advanced by Mr.J.Naresh Kumar, on behalf of the petitioner, while the respondents/Revenue are represented by Mr.T.Pramod Kumar Chopda.

7. Broadly, Mr.J.Naresh Kumar, submitted as follows :

i) Once, the petitioner, had availed of the Scheme and paid the requisite tax, then, the respondents/Revenue could not have sought to recover penalty, vis-a-vis, a transaction, which was, subject matter of the Scheme.

ii) The penalty order dated 25.06.1998, which was stated to have been delivered on 30.06.1998, was not received by the petitioner. Furthermore, no document has been filed by the respondents /Revenue, except for a bare assertion in the affidavit, that the order, was sent by a recorded delivery and served on the petitioner.

iii) The adjustment of the amounts, which were to be refunded to the petitioner, was made without any opportunity being given to the petitioner to articulate his stand in the matter. In sum, the adjustment carried out was not in accordance with law.

iv) The communication/order dated 21.12.2012, was only an intimation of the factum of adjustment, which did not provide an opportunity to the petitioner to object to the adjustment of refund granted by the very same respondent (i.e., respondent No.2), albeit, by a separate order of even date, i.e., 22.10.2012.

v) Since, the fixed deposit amount and the interest accrued thereon were included on a protective basis in the hands of the assessee, in law, no penalty order on protective basis could have been passed.

vi) Once, a certificate is issued under the Scheme, the proceedings cannot be reopened, save and except, where a false declaration has been made.

vii) Since, it is not even the case of the respondents/Revenue that a false declaration had been made, a circuitous route could not have been used to reopen the proceedings, which had attained finality under the Scheme.

viii) The Scheme, in any event, offers immunity from prosecution and imposition of penalty.

ix) The stand of the respondents/Revenue taken in the counter affidavit that, since, the penalty order was passed after 31.03.1998 (which is the date relevant for determination of arrears of tax), and, therefore, no immunity was available, is untenable, in view of the directions issued by the Central Board of Direct Taxes (in short the Board), vide circular bearing number, F.No.149/145/98-TPL, dated 03.09.1998 (in short 'the Circular').

7.1. In this behalf, reliance was placed by the counsel for the petitioner on the answers given to Question Nos.5, 7 and 9 in the Board's Circular.

7.2. In support of the aforesaid submissions, reliance was placed on the following judgments:

i) Metal Stores V. Commissioner of Income Tax, [1990] 186 ITR 612 (Gau)

ii) Commissioner of Income Tax V. Super Steel (Sales) Co., [1989] 178 ITR 451 (cal)

iii) Commissioner of Income Tax, Pattiala - II V. Behari Lal Pyare Lal, [1983] 141 ITR 32 (P&H)

iv) Smt.Susila Rani V. Commissioner of Income Tax and another, [2002] 253 ITR 775 (SC)

8. On the other hand, Mr.Chopda, learned counsel appearing on behalf of the Revenue, submitted that, after a search was conducted at the premises of Sri.A.N.Dyaneswaran, FDRs were recovered, which were found to be in the name of the petitioner, which led to issuance of notice under Section 148 of the 1961 Act.

8.1. The petitioner, it is stated, filed a return of income on 19.03.1996 for AY 1994-95, admitting therein, that he had a total income of Rs.1,10,240/- and agricultural income of Rs.1,42,000/-.

8.2. It was stated that upon the case being transferred to respondent No.2, the return of the petitioner was processed, and after the petitioner had been given due opportunity, his total

income was assessed at Rs.19,07,241/-, albeit, on protective basis, in respect of AY 1994-95 on 10.03.1997.

8.3. According to the learned counsel, while passing the said order on 10.03.1997, it was specifically noted, that penalty action under Section 271(1)(c) of the 1961 Act should be initiated separately. Therefore, it was the submission of the learned counsel for the respondents/Revenue that upon notice being issued and reply being received, the order dated 25.06.1998 came to be passed, whereby, penalty in the sum of Rs.16,51,046/- was levied on the petitioner.

8.4. Learned counsel further submitted that as against the protective assessment order dated 10.03.1997, the petitioner had preferred an appeal to the Commissioner of Income Tax (Appeals) [in short CIT (A)] and that, while the appeal was pending, the petitioner applied under the Scheme, which was floated by GOI, in 1998.

8.5. It was, thus, the contention of the learned counsel that the Scheme was available to the assessee, only in respect of arrears of tax, which had accrued, or/were due, as on 31.03.1998. In other words, the submission of the learned counsel was that, since, penalty was imposed after the due date, i.e., 31.3.1998, by virtue of the order dated 25.06.1998, the immunity claimed by the petitioner qua payment of penalty was not available to him.

8.6. In support of this submission, learned counsel relied upon the conditions mentioned in the certificate dated 01.06.1999, issued to the petitioner. Learned counsel, thus, justified the adjustment of the amount reflected in the refund order dated 22.10.2012, on the ground that, the penalty imposed was not covered under the Scheme and since, it remained unsatisfied, the petitioner was rightly called upon to pay the interest on the unliquidated amount, claimed towards penalty.

8.7. Furthermore, learned counsel also drew my attention to paragraph 5 of the counter affidavit in support of his submission that the penalty order dated 25.06.1998 was, apparently, dispatched to the petitioner via RPAD and that, it was, consequently, served on him on 30.06.1998. Based on the assertions made in the same paragraph, learned counsel also submitted that the petitioner was, once again, at his request, served with a copy of the penalty order on 31.12.2012. In sum, Mr.Chopda submitted that there was no merit in the Writ Petition and that the same ought to be dismissed.

Reasons:

9. Having heard the learned counsel for the parties and perused the record, what clearly emerges is as follows:

9.1. That, upon a search being conducted at the premises of Sri.A.N.Dyaneswaran, FDRs, amounting to Rs.21.00 lakhs, in the name of the petitioner, were discovered, out of which, FDRs, in the sum of Rs.17.97 lakhs pertained to AY 1994-95.

9.2. The petitioner was, resultantly, issued a notice under Section 148 of the Act, whereupon, a return was filed. Upon the return being processed, the fixed deposits along with accrued interest, were added, albeit, on a protective basis, to the income of the petitioner. That is, a substantive assessment was made by the Revenue, for the relevant block assessment years, which led to the amount reflected in the very same FDRs along with interest accrued thereon being added to the income of Sri.A.N.Dyneswaran.

9.3. Sri.A.N.Dyneswaran challenged the aforementioned additions made to his income. The challenge made by Sri.A.N.Dyaneswaran was successful, which was sustained right till the Supreme Court. Consequent thereto, the income from FDRs and interest accrued thereon, was deleted in the hands of Sri.A.N.Dyaneswaran.

9.4. The petitioner, had also raised a challenge to the assessment order dated 10.03.1997, passed under Section 143(3) read with Section 147 of the 1961 Act, before the CIT(A). The appeal, was disposed by CIT(A) vide order dated 28.11.1997. While disposing of the appeal, CIT(A), indicated that the amount was being assessed in the hands of the petitioner, albeit, on a protective basis. A specific observation was made by CIT(A) that, if, substantive addition was made in the hands of Sri.A.N.Dyneswaran, then, the addition, made, in the hands of the petitioner, would stand vacated.

9.5. The petitioner carried the matter in appeal to the Income Tax Appellate Tribunal (in short ITAT). While the appeal was pending with the ITAT, the petitioner attempted to avail of the benefit of the Scheme, by filing the requisite Form, on 30.11.1998. Under the Scheme, the petitioner obtained a waiver equivalent to a sum of Rs.12,09,016/- and, thus, paid tax, amounting to Rs.5,58,792/-.

9.6. As a matter of fact, on that particular date, the petitioner was in arrears of tax to the extent of Rs.8,25,523/-. The ITAT recognising this fact, vide order dated 15.03.2004, declared, that the appeal had been rendered infructuous, in view of the petitioner having paid the tax, as quantified under the Scheme.

10. On 22.10.2012, respondent No.2 passed two (2) orders: the first order was passed under Section 154 of the 1961 Act,

whereby, he ordered refund of Rs.50,78,928/- in favour of the petitioner. The second order, was passed under Section 220(2) of the 1961 Act. By this order, respondent No.2 brought to fore the factum of outstanding penalty amount of Rs.16,51,046/-, which was imposed, apparently, vide order dated 25.06.1998 and, thus, went on to levy interest under Section 220(2) of the 1961 Act, equivalent to an amount of Rs.32,15,323/-.

10.1. The fact that the amount of Rs.50,98,928/-, which was ordered to be refunded in favour of the petitioner had been adjusted against penalty and interest, as adverted to above, was intimated to the petitioner by respondent No.2 via a subsequent communication/order, issued nearly two (2) months later, i.e., on 21.12.2012.

11. Given the aforesaid facts, what clearly emerges is, that, the petitioner was rightly issued an order of refund by respondent No.2. The justification given by respondent No.2 for adjustment of the refund was that, a demand towards penalty was outstanding, which was imposed vide order dated 25.06.1998.

11.1. According to the respondents/Revenue, this order was served on the petitioner on 30.06.1998. Therefore, the first question that requires to be answered is: whether penalty and interest could be charged on arrears of tax, which, though, outstanding as on 31.03.1998, had been settled and paid under the Scheme?

12. On this score, the argument of the respondents/Revenue is that, since, what was settled and paid under the Scheme, was tax, in arrears, as on 31.3.1998, the penalty, which was imposed, via order dated 25.06.1998, did not come within the ambit of immunity granted under the Scheme with regard to prosecution and imposition of penalty.

13. In order to appreciate this argument, one would have to examine Sections 2(m), 88, 89, 90 and 91 of the Scheme along with the provisions of the aforementioned Circular.

13.1. A reading of Section 88 would show that a person could make a declaration, with respect to tax arrears, in accordance with the provisions of Section 89 of the Scheme, after 01.09.1998, but before 31.12.1998. The declaration had to be made to a designated authority and, once, a declaration was made, tax qua arrears was payable by the declarant, depending on which clause of Section 88(a) of the Scheme, the declarant's case, fell in.

13.2. Furthermore, within sixty (60) days of receipt of such declaration, the designated authority, under Section 90 of the Scheme, was required to determine the amount, payable by the

declarant, in accordance with the provisions of the Scheme and, thereafter, issue a certificate, in the form prescribed, to the said declarant, setting forth therein, the particulars of arrears of tax and sum payable, after such determination, towards full and final settlement of tax arrears.

13.3. The first proviso to Section 90 (1) indicates that, the only instance, in which a proceeding could be reopened was, where the declaration submitted was found to be false. The first proviso creates a deeming fiction, to the effect, that, if, a declaration is found to be false, then, it would be presumed, as if, a declaration was never made and the declarant would thereafter, be visited with every consequence under the relevant enactment, with the added liability of having the pending proceedings being deemed as having been revived.

13.4. The second proviso to Section 90(1), however, provided a leeway to a designated authority to amend the certificate, issued under the Scheme, for reasons to be recorded in writing.

13.5. Sub-section (2) of Section 90 of the Scheme required the declarant to pay, the sum determined by the designated authority, within 30 days of an order being passed in that behalf. The declarant was also required to intimate the factum of payment to the designated authority along with the proof of payment, whereupon, the declarant was entitled to, issuance of a certificate under the Scheme.

13.6. Sub-section (3) of Section 90 of the Scheme clearly provides that every order made under Sub-section (1) of Section 90, would be conclusive as regards matters stated therein and, the aspects covered by such an order would not be reopened in any other proceedings under direct tax enactment or, indirect tax enactment or, any other law time being in force.

13.7. Sub-section (4) of Section 90 of the Scheme provides that where an appeal or, a reference or, a reply to a show cause notice which gave rise to tax arrears, was pending before any authority, tribunal or Court, then, those proceedings would be deemed as having been withdrawn on the day, when, the designated authority passed an order under sub-Section (2) of Section 90 of the Scheme.

13.8. In so far as the superior Courts were concerned, i.e., the High Court or the Supreme Court, the proviso to sub-section (4) to Section 90 required the declarant to move an application, before such forums, to seek withdrawal of the proceedings pending before them, whether in the form of a writ petition or, in the form of an appeal or, even a reference, albeit, with the leave of the concerned Court. The proof of such withdrawal was required to be submitted along with an intimation, sent to the

designated authority, constituted under sub-section (2) of Section 90.

14. In so far as Section 91 is concerned, it mandates the designated authority to grant immunity to the declarant against prosecution and imposition of penalty, in respect of matters covered in the declaration made under Section 88 of the Scheme, subject to conditions imposed under Section 90.

15. Therefore, what is required to be ascertained is: whether the declaration made, under Section 88 of the Scheme by the petitioner, covered the penalty amount and the interest levied thereon by the respondents/Revenue.

15.1. The respondents/Revenue, in rebuttal to the stand taken by the petitioner, have relied upon the definition of term "tax arrear", as obtaining in Section 2(m)(1) of the Scheme. For the sake of convenience, the said provision is extracted hereafter:

" (m) "tax arrear" means.-

(i) in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before the 31st day of March, 1998 under that enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration;

16. A careful perusal of the definition of "tax arrear" would show that it relates to the amount of tax, penalty or interest determined on or before 31.03.1998 under 1961 Act in respect an Assessment Year, which, as modified in consequence of giving effect to an appellate order, remains unpaid on the date of declaration.

17. In the instant case, the assessment made (under Section 143 read with Section 147 of the 1961 Act), on 10.03.1997, added the amounts reflected in the FDRs and the interest accrued thereon, on a protective basis to the income of the assessee. The order dated 10.03.1997 mooted the initiation of penalty proceedings under Section 271(1)(c) of the 1961 Act.

18. In this context, the arguments advanced on behalf of the petitioner were two (2) fold: first that, since, penalty related to the matter qua which tax was in arrears, with the issuance of the certificate under the Scheme, penalty could not be imposed, as this act triggered immunity qua the petitioner under Section 91 of the Scheme. Since, it was neither the case of false declaration nor, was an attempt made by the respondents/Revenue to amend the certificate, the certificate issued to the petitioner had to hold and, therefore, no penalty and/or

interest could be levied and thus, adjusted against the refund order.

18.1. Second, if, there was any confusion with regard to the right to impose penalty, and interest, since, they were not determined on 31.3.1998, the said confusion was settled by virtue of the Circular issued by the Board.

18.2. In this behalf, emphasis was laid on answers given in the aforementioned Circular to Question No.5, 7 and 9. For the sake of convenience, the said Question and answers are extracted hereafter:

"..... Question No.5.: In a case where taxes are outstanding on 31st March, 1998 and also on the date of declaration but the order of penalty is passed after 31st March, 1998, will the declarant be entitled to the waiver of penalty?

Answer: Section 91 empowers the Designated Authority to grant immunity from the imposition of penalty in respect of income which is the subject-matter of declaration. As the taxes outstanding on 31st March, 1998 will be covered under the declaration the Designated Authority can grant waiver of such penalty.

.....

Question No.7: The Scheme offers full waiver of interest and penalty where the tax arrear includes such interest or penalty along with tax. What kind of interest and penalty would be open for such waiver?

Answer: All interest and penalties that are directly related to assessed income or arrears of taxes will be open for full waiver, if the taxes are outstanding on the specified dates, e.g., interest under section 234A, 234B, 234C, 139 (8), 215, 216, 217, 158BFA 220(2) or penalties under section 271(1)(c), 221, 158BFA, 273 etc. But where the interest or penalty is not directly related to assessed income/arrears of tax, waiver of only 50 per cent thereof is available, e.g., interest under section 201(1A), penalties under section 271(1)(b), 271B, 271BB, 271C, 271D, 271E, 271F, 272A, 272AA, 272BB etc.

....

Question No.9: Whether the Scheme covers cases where taxes are outstanding on 31st March, 1998 but the appeal is filed after 31st March, 1998?

Answer: Yes, the pendency of appeal etc., should be on the date of declaration.
....."

(Emphasis is mine)

19. I tend to agree with the submissions made in this behalf by the learned counsel for the petitioner. A perusal of Answers to Question No.5 and 7, to my mind, would clearly establish that under Section 91 of the Scheme, a designated authority is empowered to grant waiver from imposition of penalty and interest in respect of income, which is subject matter of the declaration. Since, penalty and interest was levied in the instant qua tax, which was in arrears, as on 31.3.1998, the declaration issued by the designated authority, according to the Board's circular, would cover the penalty and interest, determined at a later point in time.

19.1. The circular, to my mind, was binding on the Revenue. Especially, in the circumstance, that, it seeks to explain as to how the Scheme is to operate - UCO Bank V. CIT [1999] 237 ITR 889 (SC); Navnit Lal C. Javari V. K.K.Sen, AAC, [1965] 56 ITR 198; and Varghese (K.P.) V. ITO, [1981] 131 ITR 597 (SC).

20. Having regard to the aforesaid, it cannot be argued by the Revenue that, since, the penalty order was issued on 25.06.1998, i.e., after 31.3.1998, it would not be covered by the certificate issued to the petitioner under the Scheme.

21. The other submission advanced on behalf of the petitioner, which, in my view, also, has merit, is that, the respondents/Revenue, on 25.06.1998 could not have issued an order of "protective" penalty, as order dated 10.03.1997 itself was an order that added the amounts reflected in the FDR (along with interest accrued therein) in the hands of the petitioner on a protective basis.

21.1 As rightly argued by the learned counsel for the petitioner, while there can be a protective order qua assessment, there cannot be a protective order in respect of penalty. [see : (i) Metal Stores V. Commissioner of Income Tax, [1990] 186 ITR 612 (Gau); (ii) Commissioner of Income Tax V. Super Steel (Sales) Co., [1989] 178 ITR 451 (Cal); and (iii) Commissioner of Income Tax, Pattiala - II V. Behari Lal Pyare Lal - [1983] 141 ITR 32 (P&H).]

22. This apart, what is even more disconcerting, is that, the communication/order dated 21.12.2012, whereby, adjustment of refund was made, no opportunity was given to the petitioner to present his side of the case.

22.1. In an attempt to defend an order, which was clearly, in breach of principles of natural justice, recourse was sought to be taken to the provisions of Section 245 of the 1961 Act. Mr.Chopda's contention, in this behalf, was that, respondent No.2 was empowered to adjust the refund against the outstanding penalty and interest, by virtue of power vested in him under Section 245 of the 1961 Act.

23. To my mind, a careful reading of the provisions of Section 245 of the 1961 Act would show that the refund could, perhaps, have been adjusted against any amount remaining payable under the Act, provided intimation in writing is given to the concerned person, (in this case, the petitioner) of the action "proposed to be taken", under the said provision.

23.1. Therefore, quite clearly, in my opinion, what is envisaged, is that, in the first instance, a proposal for adjustment, by way of a show cause notice, will have to be served on the person, to whom, refund is due. The proposal, to be meaningful, would have to set out the details and the reasons as to why adjustments is required to be carried out by the Revenue, against the refund due. Only after issuance of such a proposal/show cause notice and upon consideration of reply, if any, received - could a decision be taken as to whether or not an adjustment of refund is necessitated. Anything short of such minimum opportunity would, to my mind, result in a complete breach of principles of natural justice.

23.2. Therefore, in my opinion, the communication/order dated 21.12.2012 cannot be sustained.

24. Therefore, having regard to the conclusions reached hereinabove by me, the other issue, with regard to the service of the order dated 25.06.1998, whereby, penalty was imposed on the petitioner, loses its significance. I must, however, indicate that apart from the averment made in the affidavit, no material was placed to show dispatch, or, receipt of the said order by the petitioner.

25. Thus, for the foregoing reasons, the Writ Petition has to be allowed. Consequently, the notice of demand and penalty order dated 25.06.1998 and the consequential order of interest dated 22.10.2012 are quashed. As a logical corollary, the adjustment order dated 21.12.2012 will be rendered inefficacious in law. Resultantly, the petitioner would be entitled to refund in terms of the order dated 22.10.2012.

26. Accordingly, the Writ Petition is disposed of in the aforementioned terms, leaving the parties to bear their own costs. Consequently, the connected Miscellaneous Petition stands closed.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The Commissioner of Income-tax Central - II
No.108 Uthamar Gandhi Salai,
Nungambakkam, Chennai - 600 34.

2.Assistant Commissioner of Income-tax
(Now) Deputy Commissioner of Income-tax
Central Circle-II(4), No.108, Uthamar Gandhi Salai,
Nungambakkam, Chennai - 600 034.

+1cc to Mr.T. Pramod Kumar Chopda, Advocate SR. 14654

+1cc to Mr.J. Naresh Kumar, Advocate SR. 14572

Pre-Delivery Order in
Writ Petition No.10791 of 2014
& M.P.No.2 of 2014

AD(CO)
VR(10/03/2017)

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