

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 3759 of 2010****With****SPECIAL CIVIL APPLICATION NO. 7784 of 2010****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE A.J. SHASTRI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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HASMUKHLAL THAKORDAS DALWALA....Petitioner(s)**Versus****COMMISSIONER OF INCOME TAX & 2....Respondent(s)**

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Appearance:**MR MANISH J SHAH, ADVOCATE for the Petitioner(s) No. 1****MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1 - 2****RULE SERVED for the Respondent(s) No. 3**

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CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI**and****HONOURABLE MR.JUSTICE A.J. SHASTRI****Date : 03/10/2016****ORAL JUDGMENT**

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These petitions arise in common background and would therefore, be disposed of by this common judgment. For convenience, we may record facts from Special Civil Application No.3759 of 2010. The petitioner is an individual. He has challenged an order dated 25.6.1999 passed by the Settlement Commission under the Income-Tax Act,1961 (for short 'the Act') determining the petitioner's liability under Section 245D(1) of the Act. The petitioner has also challenged further orders passed by the Settlement Commission under Section 154 of the Act, to which a reference would be made at a later stage.

2. Search operations were carried out concerning the petitioner under Section 132 of the Act on 10.1.1989. On the basis of search operations, the Assessing Officer completed assessment for the Assessment Years 1987-88, 1988-89 and 1989-90 on 31.3.1993. The petitioner preferred appeal against said order of the Assessing Officer. The Appellate Commissioner by his order dated 13.1.1994 set aside the assessment for the said years and asked the Assessing Officer to carry out fresh assessments. When the assessment proceedings after remand were thus pending before the Assessing Officer, the petitioner filed an application dated 24.11.1995 before the Settlement Commission under Section 245C of the Act for the above 3 years.

3. While such proceedings were pending before the Settlement Commission, the Assessing Officer passed the fresh order of assessment on 29.3.1996 for the same period. On 30.9.1996, the Settlement Commission admitted the

petitioner's application in terms of Section 245D(1) of the Act.

4. While these proceedings were, thus pending before the Settlement Commission, the Parliament enacted the Kar Vivad Samadhan Scheme, 1998 (hereinafter to be referred as 'the KVSS, 1998') under Chapter-IV of the Finance Act of 1998. The petitioner therefore, filed an application on 26.11.1998 before the authority under Section 90(1) of the KVSS, 1998. In such application, the petitioner offered to pay tax as per the said Scheme of Rs.4808/-, Rs.22720/- and Rs.231466/- for Assessment Years 1987-88, 1988-89 and 1989-90 respectively on the disputed income of Rs.12,020/-, Rs.56,800/- and Rs.5,78,665/- for the said 3 years.

5. On 13.11.1998, the Commissioner of Income-Tax, to whom such application was made by the petitioner, asked him to withdraw the petition before the Settlement Commission only after which the benefits under KVSS, 1998 would be granted. The petitioner thereupon applied to the Settlement Commission for withdrawal of the settlement application. The Settlement Commission, however, rejected such application by an order dated 16.11.1998 primarily on the ground that the provisions of the settlement do not envisage withdrawal of an application for settlement once made. The petitioner, therefore, approached the High Court by filing Special Civil Application No.11145 of 1998 and prayed for a direction to the competent authority under the KVSS, 1998 to accept the application of the petitioner for Kar Vivad and to issue necessary certificate under Section 90(2) of the KVSS, 1998. The Division Bench of this Court by the judgment dated 24.3.1999 accepted the petitioner's request and issued

following order :

“In the result, the respondent No.1 is directed to reconsider and pass appropriate order determining the amount payable by the declarants in accordance with the provisions of KVS Scheme and consider to grant certificate in the prescribed form to the petitioners stating the particulars of tax arrears and the sum payable after such determination towards full and final settlement of tax arrears of tax in both the petitions in accordance with section 90(1) of KVS Scheme 1998, and consider the question of issuance of necessary certificate under section 90(2) of the Scheme. The petitions are, accordingly, allowed. Rule is made absolute. There shall be no order as to costs.”

6. The Commissioner of Income-Tax, Surat thereupon issued a certificate in prescribed proforma in terms of Section 90(2) of the KVSS,1998. He accepted the petitioner's declaration that he had paid the sum of Rs.2,58,993/- which was tax arrears determined by the designated authority. In the certificate, it was provided as under :

“Now therefore, in exercise of the powers conferred by sub-section (2) of Section 90 read with Section 91 of the Finance (No.2) Act,1998 the designated authority here by issues this certificate to the said declarant.

(a) certifying the receipt of payment from the declarant towards full and final settlement 90 read with determined in the order dated 12.4.99 on the declaration made by the aforesaid declarant.

(b) granting immunity, subject to the provisions contained in the Scheme from instituting any proceeding for prosecution for any offence under.... or from the imposition of penalty under said enactment in respect of matters covered in the aforesaid declaration made by the declarant.”

7. The petitioner thereafter urged before the Settlement Commission that for the same period, there cannot be separate proceedings for settlement. The Settlement Commission by the impugned order dated 25.6.1999 rejected the application, proceeded to decide the petitioner's application for settlement. The Commissioner passed an order under Section 245D(4) of the Act and determined the petitioner's gross total income at Rs.56,952/-, Rs.56,517/- and Rs.5,29,467/- for the Assessment Years 1987-88, 1988-89 and 1989-90 respectively.

8. Subsequently, the Settlement Commission passed an order on 19.3.2004 exercising *suo-motu* powers under Section 154 of the Act providing for interest in terms of the judgment of the Supreme Court in case of **Anjum M.H. Ghaswala & Ors., reported in 252 ITR 1**, on the unpaid tax. The petitioner thereafter filed an application for rectification on 30.11.2009 and again requested the Commission to drop the entire proceedings which was rejected by the Commission. The petitioner has therefore, filed this petition challenging the order of Settlement Commission dated 25.6.1999 under Section 245D(4) of the Act and the subsequent orders of rectification.

9. In brief, the case of the counsel for the petitioner is that once the proceedings were entertained by the competent authority under the KVSS,1998, it was thereafter not open for the Settlement Commission to exercise powers of settlement. He submitted that upon issuance of certificate under Section 90(2) of the KVSS,1998, there would be finality of all issues mentioned therein. He drew our attention to sub-section (4) of

Section 95 of the KVSS,1998 to contend that only after the Settlement Commission passes an order under Section 245D(4) of the Act, the right of an assessee to apply for settlement under KVSS,1998 gets extinguished.

10. In support of his contention, learned counsel relied upon the following decisions;

- 1) on the judgment of the Division Bench of the Bombay High Court in case of **Desouza Motors V/s. Income Tax Settlement Commission & Ors.**, reported in **277 ITR 517 (Bom.)**.
- 2) on the decision of the Supreme Court in case of **Smt. Sushila Rani V/s. Commissioner of Income-Tax & Anr.**, reported in **253 ITR 775**.

11. On the other hand, learned counsel, Mr.Sudhir Mehta for the department opposed the petition contending that the issues before the authority under the KVSS,1998 and before the Settlement Commission were completely different. The Settlement Commission was therefore, within its authority to proceed further for deciding the application for settlement.

12. The short question that calls for consideration is, can the Settlement Commission proceed with the petitioner's application made under Section 245C(1) of the Act, after issuance of certificate under Section 90(2) of the KVSS,1998, which had till then only reached the stage of being admitted for further hearing in terms of Section 245D(1) of the Act ?

13. We may refer to the statutory provisions. Chapter- XIXA was added to the Act by Finance Act, 1987 with effect to 1.6.1987 and pertains to settlement of cases. Under sub-section (1) of Section 245C, an assessee in a case relating to him, may make an application for settlement before the Commission in such manner as may be prescribed. The term 'case' has been defined under clause (b) of Section 245A and as it stood at the relevant time meant any proceeding under the Act for assessment or reassessment of any person in respect of any year or years or by way of appeal or revision in connection with such assessment or reassessment which may be pending before the Income-Tax authority on the date on which an application under sub-section (1) of Section 245C of the Act, is made. Thus, in terms of the provisions of Chapter- XIXA, as they stood at the relevant time, an assessee could make an application for settlement in connection with any proceedings pending for assessment or reassessment or any appeal or revision in connection with such assessment or reassessment.

14. On such an application being filed, the same would be processed by the Settlement Commission as per the procedure laid down in Section 245D of the Act. As per the provisions of sub-section (1) of Section 245D, the Settlement Commission would first decide, whether such application should be allowed to proceed further or that the same should be rejected at that very stage. If allowed to proceed further, the application would pass through various stages envisaged under Section 245D of the Act and finally, the Settlement Commission would pass under sub-section (4) thereof such order as it thinks fit on the matters covered by the application

and any other matter relating to the case not covered by the application but, refer to in the report of the Commissioner. Section 245H of the Act envisages the power of Settlement Commission to grant immunity from prosecution and penalty.

15. The KVSS,1998 contains Section 87 which is a definition provision. Clause (e) of Section 87 defines term 'disputed income', which reads as under :

“(e) ‘disputed income’, in relation to an assessment year, means the whole or so much of the total income as is relatable to the disputed tax.

16. Clause (f) of Section 87 defines term 'disputed tax' as under :

“(f) “disputed tax” means the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on date of making the declaration under section 88.”

17. Clause (m) of Section 87 defines term 'tax arrear', relevant portion of which reads as under :

“(m) ‘tax arrear’ means,-

- (i) in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before 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.”

18. Section 88 of the KVSS,1998 pertains to settlement of tax payable, relevant part of which reads as under :

“Settlement of tax payable.

88. Subject to the provisions of this Scheme, where any

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

(a) Where the tax arrear is payable under the Income-Tax Act, 1961 (43 of 1961),-

- (i) in the case of a declarant, being a company or a firm, at the rate of thirty-five per cent of the disputed income;
- (ii) in the case of a declarant, being a person other than a company or a firm, at the rate of thirty per cent of the disputed income;
- (iii) in the case where tax arrear includes income-tax, interest payable or penalty levied, at the rate of thirty-five per cent of the disputed income for the persons referred to in clause (i) or thirty per cent of the disputed income for the persons referred to in clause (ii);
- (iv) in the case where tax arrear comprises only interest payable or penalty levied, at the rate of fifty per cent of the tax arrear;
- (v) where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search and seizure proceedings under section 132 or section 132A of the Income-Tax Act, 1961 (43 of 1961),-
 - (A) in the case of a declarant, being a company or a firm, at the rate of forty-five per cent of the disputed income;
 - (B) in the case of a declarant, being a person other than a company or a firm, at the rate of forty per cent of the disputed income."

19. Section 89 pertains to particulars to be furnished in declaration. Section 90 pertains to time and manner of payment of tax arrear, which reads as under :

“Time and manner of payment of tax arrear.

90. - (1) Within sixty days from the date of receipt of the declaration under Section 88, the designated authority shall, by order, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the tax arrear and the sum payable after such determination towards full and final settlement of tax arrears :

Provided that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived :

Provided further that the designated authority may amend the certificate for reasons to be recorded in writing.

(2) The declarant shall pay the sum determined by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment to the designated authority along with proof thereof and the designated authority shall thereupon issue the certificate to the declarant.

(3) Every order passed under Sub-section (1), determining the sum payable under this Scheme, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceedings under the direct tax enactment or indirect tax enactment or under any other law for the time being in force.

(4) Where the declarant has filed an appeal or reference or a reply to the show-cause notice against any order or notice giving rise to the tax arrear before any authority or Tribunal or court, then, notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in Sub-section (2) is passed:

Provided that where the declarant has filed a writ petition or appeal or reference before any High Court or the Supreme Court against any order in respect of the tax arrear, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the court, furnish proof of such withdrawal along with the intimation referred to in Sub-section (2)."

20. Section 91 of KVSS,198 envisages the designated authority granting immunity from prosecution or penalty in respect of matters which are covered under the declaration under Section 88 of the KVSS,1998 once the conditions of Section 90 are satisfied. Section 92 provides, inter-alia, that no appellate authority shall proceed to decide any issue relating to the disputed chargeable expenditure, interest, income, wealth etc. in respect of which an order has been made under Section 90 by the designated authority.

21. Section 95 of the KVSS,1998 pertains to scheme not to apply in certain cases, relevant portion of which reads as under:

"95. The provision of this Scheme shall not apply-

(i) in respect of tax arrear under any direct tax enactment,-

(a)xxx xxx xxx

(b)in a case where an order has been passed by the Settlement Commission under sub-section (4) of Section 245D of the Income-Tax Act or sub-section (4) of section 22D of Wealth Tax Act, as the case may be, for any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment."

22. It can thus be seen that the KVSS,1998 made comprehensive provisions for settlement of tax arrear. Under Section 88 of the KVSS,1998, a person could make an application within the time prescribed making a declaration to the designated authority in respect of tax arrears. The term 'tax arrear' in relation to direct tax enactments is defined as amount of tax, penalty or interest determined before 31.3.1998 which remained unpaid on the date of declaration. In such a case therefore, a person could make an application as referred to in Section 88. If such an application is so made, the computation of the tax arrear would be as provided in clause (a) thereof. Such computation would be on the basis of certain percentage of the disputed income. Under sub-section (1) of Section 90, upon receipt of such a declaration the designated authority would determine the amount payable by the declarant in accordance with the provisions of the KVSS,1998 and grant such certificate as may be prescribed setting the particulars of the tax arrear and the sum payable after such determination towards the full and final settlement of tax arrears. Under sub-section (2) of Section 90, the declarant would pay the said sum within 30 days from the date of the order, upon which the designated authority would

issue a certificate to the declarant. Under Section 91, the designated authority would subject to the conditions provided in Section 90, grant immunity from prosecution and penalty in respect of matters covered under the declaration under Section 88 of the KVSS,1998.

23. It can thus be seen that the KVSS,1998 envisaged settlement of tax arrears. A declaration under Section 88 could be made only in respect of tax arrear i.e. the tax which had remained unpaid before 31.3.1998. If the tax determined by the designated authority under Section 90(1) of the KVSS,1998 is paid, thereafter no further proceedings in terms of prosecution or penalty would lie nor appellate authority would proceed on any issue relating to such disputes.

24. In terms of such provisions, the petitioner could have applied for settlement since the order of assessment was already passed determining tax liability which had remained unpaid. Once such application was accepted, it is difficult to comprehend how the Settlement Commission would continue to enjoy the jurisdiction over the same subject matter, particularly when the settlement declaration was accepted by the designated authority and the petitioner also paid the taxes as per the directives of the designated authority. For the same period the Settlement Commission would not be allowed to process the application for settlement. Any other view would give rise to independent and separate proceedings for settlement; first under Chapter-XIXA of the Act and the second, under KVSS,1998. This could lead to incongruent results and a possible clash between orders by two separate authorities, a consequence legislature would ordinarily not be

expected to bring about.

25. Whatever doubt one may have, would disappear when we look at the relevant portion of Section 95 of the KVSS,1998. To make the matters abundantly clear, this section provides that the provision of the section would not apply in case where an order was passed by the Settlement Commission under sub-section (4) of Section 245D of the Act or similar such provision for settlement under the Wealth Tax Act to any tax arrear in respect of such assessment year. In plain terms therefore, the provisions of the KVSS,1998 would be ousted in a case where the Settlement Commission has passed an order under sub-section (4) of Section 245D, to any tax arrear in respect of such assessment year. This provision would have two purposes; first, it makes it abundantly clear that if other conditions are satisfied, a person can make a declaration in terms of Section 88 of the KVSS,1998 so long as the order has not been passed by the Settlement Commission under sub-section (4) of Section 245D of the Act and secondly, this provision also puts the controversy beyond any debate, whether if a tax assessed by the Commissioner had remained unpaid, for the purpose of KVSS,1998 could it take a shape of the tax arrear and in respect of which an offer for settlement could be made under the KVSS,1998. Once therefore the Settlement Commission passes an order under sub-section (4) of Section 245D of the Act, it would not be open for an assessee to then approach the designated authority under the KVSS,1998 and seek any adjustment in the tax arrear. Till then, however, the issue would be wide open and the assessee, as in the present case, could approach the designated authority under the KVSS,1998. The Settlement

Commission therefore, committed a serious error in holding to the contrary.

26. We are fortified by the judgment of the Bombay High Court in case of Desouza Motors (Supra). In somewhat similar factual background, the Court held as under :

“9. Having regard to the facts and circumstances of the case, it is explicitly clear from the provisions of s.90 (2) of the Kar Vivad Samadhan Scheme, 1998, Chapter IV of the Finance (No.2) Act, 1998, that only if an order is passed by the Settlement Commission under sub-s. (4) of s.245D of the IT Act, the said Kar Vivad Samadhan Scheme, 1998, will not apply. As pointed out hereinabove, there is no dispute that no final order was passed by the Settlement Commission under sub-s.(4) of s.245D, when the above matter was taken up.

10. Over and above, as it was pointed out, that once the final certificate is granted under s.90(2) effect would be that all the proceedings and other orders come to an end and the order passed under s.90(2) shall prevail over other orders and thereafter total immunity is granted to the assessee concerned. The bar would arise only if there is an order passed by the Settlement Commission under s. 245D(4) and not otherwise.

11. Under the aforesaid facts and circumstances, and in view of the aforesaid very clear, specific and express provisions, we have no doubt in our mind, that the petitioners are entitled to succeed and accordingly rule

is made absolute in terms of prayer cl. (a) and (b), however, with no order as to costs in all the above three petitions.”

27. The Supreme Court in case of Smt. Sushila Rani (Supra) observed that the certificate issued under Section 90(1) of the KVSS,1998 making a determination as to the sum payable under KVSS,1998 is conclusive as to the matters stated therein and cannot be reopened in any proceedings under law for the time being in force, except on the ground that false declaration by a declarant.

28. In the result, the impugned order dated 25.6.1999 passed by the Settlement Commission under Section 245D(4) of the Act is set aside. With that, the consequential orders passed by the Settlement Commission in purported exercise of rectification powers are also set aside. Petitions are disposed of accordingly.

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THE HIGH COURT
OF GUJARAT

(AKIL KURESHI, J.)

WEB COPY

(A.J. SHASTRI, J.)

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