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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
R-32

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W.P.(C) 1597/1999

B.P. JAIN AND ASSOC AND ANOTHER Petitioners
Through Mr V.P. Gupta, Advocate with
Mr Anunav Kumar, Advocate.

versus

COMMISSIONER OF INCOME TAX Respondent
Through Mr Dileep Shivpuri, Senior Standing
Counsel and Mr Zoheb Hossain, Junior Standing
Counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER

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01.02.2016

Dr. S. Muralidhar, J.:

1. The controversy in the present writ petition is regarding the calculation of the disputed income for the purposes of determination of the tax to be paid by the Assessee in terms of the Kar Vivad Samadhan Scheme 1998 (KVSS).
2. Petitioner No. 1 Assessee was a registered partnership firm of which Petitioner No. 2 was an erstwhile partner. Petitioner No. 1 filed its return of income for Assessment Year (AY) 1994-95 on 30th November, 1994 disclosing nil income. The Assessing Officer (AO) completed the assessment of the Petitioner No.1 on 18th March, 1997. The dissolution of Petitioner No. 1 took place during the AY. On dissolution, the assets of Petitioner No. 1 in the form of land was transferred to one of the partners at

the book value of Rs. 59,84,802/-. The AO noticed that the market value of the said land was Rs. 5,68,00,000. Accordingly, the taxable income of Petitioner No. 1 was computed by the AO at Rs. 5,08,15,200/- being the difference in the market value and that at which the land was transferred. An order was passed on 18th March, 1997 raising a demand of tax of Rs. 4,91,73,350. Subsequently it was rectified on 26th June, 1997 to Rs. 2,74,34,521/-. This comprised the tax payable on the income of Rs. 4,58,70,994/- on account of long term capital gains. The rate of tax on capital gains was 33.6%. The tax payable worked out to Rs. 1,54,12,652/- and the interest chargeable under Sections 234A and 234B of the Act worked out to Rs. 1,20,21,869/-. It is stated that Petitioner No. 1 made an aggregate payment of Rs. 72,54,260/- in the year 1998 towards the aforementioned tax demand.

3. The Petitioners decided to avail the KVSS which was introduced for the purposes of quick and easy settlement of tax dues. Under Section 87 (e) and (f) of the Finance Act, 1998, the terms 'disputed income' and 'disputed tax' were defined as under:

“87.(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”

87 (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 the date of making the declaration under Section 88.”

4. Section 88 of the Finance Act 1998 provided that the rate of tax payable by a firm would be 35% of the disputed income notwithstanding anything

contained in any direct tax enactment. Under Section 96 (1) of the Finance Act, 1998, the Central Government had the powers to issue directions, instructions and directions to the authorities for the proper administration of the KVSS. Under Section 96 (2) the Central Government was empowered to issue general special orders or instructions as to the principles or procedures to be followed by authorities in the work relating to the KVSS.

5. It is stated that pursuant thereto the Ministry of Finance, Government of India, issued circulars by way of clarifying the KVSS 1998 in the form of questions and answers. Question No. 18 of the instructions dated 7th October, 1998 provided the basis of calculating disputed income. Question No. 18 and the answer thereto read as under:

“Question No.18: Section 90(1) of the Scheme refers to the sum payable that may be determined by the designated authority. How is the sum payable to be worked out?

Answer: The sum payable is to be determined with reference to disputed income as defined in Section 87(e) to mean the whole or so much of the total income as is relatable to the disputed tax. The term, “disputed income” as used in the Scheme does not refer to the income in dispute by way of appeal, etc., but it refers to the income which is relatable to the disputed tax. The term “disputed tax” has been defined to mean the tax determined and payable but remaining unpaid on the date of declaration. The designated authority will work out the disputed income relatable to disputed tax by applying the marginal rate applicable for the relevant assessment year for that assessee and thereafter determine the sum payable in accordance with Section 88 of the Scheme.”

6. A further clarification was issued on 6th November, 1998 by the Ministry of Finance. Petitioner No.1 through Petitioner No.2 filed a declaration under the KVSS Scheme with the designated authority on 24th December, 1998. The Petitioner computed the tax payable in terms of the KVSS as Rs. 63,73,743/-, calculated at 35% of the disputed income. The said calculation reads as under:

“Calculation of Disputed Tax under the Scheme and the Sum Payable

Income on account of long term capital gain	Rs.4,58,70,994
Rate of Tax on long term capital gain applicable to petitioner (35% + 12% surcharges)	33.6%
Tax payable	1,54,12,652
Less: Tax Paid	
- Upto 31.3.98	30,04,261
- After 31.3.98	42,50,000
	<u>72,54,261</u>
Tax Unpaid	81,58,391
‘Disputed Tax’ in terms of sec. 87 (f) of the Finance Act	81,58,392
‘Disputed Income’ in terms of section 87 (e) of the Finance Act determined by applying the marginal rate applicable to Petitioner No.1 of 44.8 per cent	1,82,10,694
Amount payable under the scheme as per section 88 of the Finance Act @ 35 per cent	63,73,743

7. However, Respondent No.1 determined the amount payable by the Petitioner No.1 as Rs. 1,03,87,456. Respondent No.1 applied the marginal rate of 44.8% (40+10% surcharge) on the tax paid till the date of declaration,

whereas the Petitioners had calculated it on the basis of the unpaid tax i.e. at Rs. 81,58,391/-. As a result while the Petitioners determined the rate payable under KVSS as 63,73,743, Respondent No.1 computed it as Rs. 1,03,87,456. The Petitioner is before this Court seeking a declaration that the computation by the Petitioners of the amount payable in terms of the KVSS is the correct one.

8. There is an obvious mistake in the clarification issued by the Respondents. Instead of clarifying that the disputed income has to be calculated with reference to the 'unpaid tax', it states that the disputed income is to be calculated with reference to the paid tax. In any event, instructions issued by the Ministry of Finance cannot modify a scheme which is statutory in character. The KVSS was introduced by the Finance Act, 1998. Sections 88 and 89 thereof specifically dealt with the KVSS. As explained by the Supreme Court in ***Kerala Financial Corporation v. Commissioner of Income Tax [1994] 210 ITR 129 (SC)***, an order, instruction or direction that may be issued under Section 119 of the Act cannot take away or modify a benefit provided under a statutory notification. The Court noted that "the same would really amount to giving power to a delegated authority to even amend the provision of law enacted by Parliament."

9. As regards the instructions issued, there are two aspects - one regarding the calculation of the disputed income with reference to the unpaid tax. The other is in relation to the application of the marginal rate. At the outset it requires to be noticed that the Finance Act, 1998 does not talk of any

marginal rate to be applied. Also, it appears to the Court that the marginal rate was premised on an Assessee having to pay tax at different slab rates depending on the level of income. However, where the tax is on capital gains, there is only a single rate of tax i.e. 33.6%. In such event, the adoption of a 'marginal rate' is not apposite for determining the disputed income. In other words, the impugned instructions of the Ministry of Finance regarding applicability of a marginal rate to the unpaid tax for determining the disputed income cannot apply where the taxable income arises only from capital gains and to which a uniform rate of 33.6% applies.

10. It is sought to be contended by Mr Gupta, learned counsel for the Petitioners, that since the instructions require a marginal rate to be applied to the unpaid tax, the disputed income should be determined in that manner notwithstanding that the taxable income arises from capital gains.

11. For the reasons already explained, the Court is of the view that the instructions issued are not consistent with the provisions of the Finance Act 1998 which does not talk of a marginal rate, particularly when it comes to computing the disputed income arising out of the capital gains. All that the Finance Act does is to stipulate what should be the rate of tax where the tax is in arrears as in the present case. As far as the Petitioner No. 1 firm is concerned that rate is 35% of the disputed income.

12. Consequently, as far as the present case is concerned, the correct way to determine the disputed income would be to determine in the first instance the unpaid tax which undisputedly is Rs. 81,58,392. The next step is to

determine the disputed income in relation to the unpaid tax by applying the rate of 33.6%. Thirdly, the tax payable will be calculated at 35% of the disputed income so computed.

13. In that view of the matter, the writ petition is disposed of by directing the Respondents to re-compute the disputed income and thereafter calculate the tax payable by the Petitioners in terms of the KVSS in the above manner. The exercise of computing the disputed income, the tax payable and issuing a certificate of refund if any to the Petitioner be completed within a period of four weeks from today.

14. The petition is disposed of in the above terms.

S.MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 01, 2016

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