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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.586 OF 2021

Bhupendra Harilal Mehta
1/B, Rizvi Park,
5-A, Altamount Road,
Mumbai 400 026
vs.

...Petitioner

1. Principal Commissioner of Income Tax,
Mumbai 19, Mumbai

2. The Central Board of Direct Taxes,
Through the Under Secretary,
Department of Revenue,
Government of India,
North Block, New Delhi-110001

3. Union of India through
the Secretary,
Department of Revenue,
Government of India,
North Block, New Delhi

...Respondents

Mr.Percy Pardiwalla, Senior Advocate a/w Mr.Sukhasagar Singh i/b Mint
Confreres for the petitioner
Mr.Sham Walve for the respondents

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

DATE ON WHICH JUDGMENT IS RESERVED : APRIL 5, 2021.

DATE ON WHICH JUDGMENT IS PRONOUNCED : APRIL 27, 2021

JUDGMENT : (Per Court)

1. Petitioner is stated to be an individual, his income being profits from a partnership firm, income from house property, interest, dividend and income from dealing in shares and derivatives.

2. Petitioner filed his return of income for Assessment Year 2015-16 on 29th September 2015 declaring a total income of Rs.1,52,19,010/-. The case was picked up for scrutiny assessment and an order dated 27th December, 2017 was passed under Section 143(3) of the Income-tax Act, 1961 ("Income Tax Act") wherein an addition of Rs.84,25,075/- was made under Section 68 and an addition of Rs.11,75,901/- was made under Section 69C of the Income-tax Act. It appears that additions were made by the Assessing Officer on the basis that petitioner had booked artificial long term capital gains of Rs.5,73,23,123/- and claimed exemption under Section 10(38) of the Income-tax Act thereon by selling shares of M/s. Lifeline Drugs and Pharma Limited ("Lifeline Drugs") for a total consideration of Rs.5,87,95,055/-. The case of the Assessing Officer was that the price of this share was artificially rigged by certain operators, the details of which were divulged in the course of a search under Section 132 of the Income Tax Act carried out by the Kolkata Investigation wing of the Income Tax department during which certain statements were recorded under Section 132(4) and in the course of a survey action under Section

133A of the Income Tax Act on the premises of M/s. Gateway Financial Service Limited and Korp Securities Limited where also statements of Directors were recorded. By an Order dated 18th February 2019 under Section 154 of the Income-tax Act, the addition under Section 68 of the Income-tax Act was revised to Rs.5,87,95,055/- .Aggrieved by both the aforesaid orders, petitioner filed appeals to the Commissioner of Income-tax (Appeals).

3. While the aforesaid appeals were pending, the Direct Tax Vivad Se Vishwas Act,2020 (“DTVSV Act”) received the assent of the President of India on March 17, 2020, giving an option to the tax payers to settle their income tax disputes by making a declaration to the designated authority and paying varying percentages of the disputed tax as specified under Section 3 of the DTVSV Act. On 18th March 2020, the Direct Tax Vivad se Vishwas Rules, 2020 (the “DTVSV Rules”) were notified under Section 12 of the DTVSV Act. On 22nd April 2020, respondent No.2 Central Board of Direct Taxes (“CBDT”) issued Circular No.9 of 2020 under Sections 10 and 11 of the DTVSV Act clarifying certain aspects of the DTVSV Act in the form of answers to Frequently Asked Questions. On 4th December 2020, respondent No.2 issued another Circular being Circular No.21 making further clarifications again in the form of Questions and

Answers. One such question being FAQ No.70 and its answer which is also the subject matter of challenge in this petition. While this petition was pending, CBDT has issued another circular No.4/2021 dated 23rd March 2021 further clarifying the answer to Qus.No.70 on which we will dwell little later.

4. Petitioner filed declaration in Form No.1 under Section 4(1) of the DTVSV Act read with Rule 3(1) of the DTVSV Rules on 16th December 2020. The disputed income was declared to be Rs.5,98,90,960/- and the disputed tax thereon as Rs.2,02,69,581/-. Petitioner submitted that the gross amount payable by it was 100% of the disputed tax i.e. Rs.2,02,69,581/- out of which a sum of Rs.69,31,892/- was declared to have been paid and the balance of Rs.1,33,37,689/- was declared to be payable by Petitioner.

5. By Order dated 26th January 2021, Respondent No.1 being the Designated Authority, passed an order in Form No.3 under Section 5(1) of the DTVSV Act read with Rule 4 of the DTVSV Rules, determining the tax payable by petitioner to be Rs.2,57,67,714/- being 125% of the disputed tax as against Rs.2,02,69,581/- being 100% of the disputed tax declared by Petitioner.

6. Being aggrieved by the aforesaid order, petitioner is before us seeking the following reliefs :-

“(a) that this Honourable Court may be pleased 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, quashing the impugned order passed by Respondent No.1.

“(b) that this Honourable Court may be pleased 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, directing Respondent No.1 to pass an order in Form No.3 determining tax payable by the Petitioner to be the amount declared by it in Form No.1, i.e. one hundred percent of the disputed tax.

“(c) that this Honourable Court may be pleased to issue a direction under Article 226 of the Constitution of India that question number 70 in the impugned Circular No.21/2020 and the answer thereto are contrary to the provisions of the Act and are therefore to be ignored.”

7. Mr. Pardiwala, learned Senior Counsel for Petitioner, submits that in case of Petitioner for Assessment Year 2015-16, assessment has not been made on the basis of any search but the addition was made only on the basis of certain information obtained in the course of a search conducted on the premises of other entities. He submits that Petitioner has not directly been subjected to any search. Drawing attention of this Court to Section 3 of the DTVSV Act, he submits that sub-clause (a) is applicable

to the case of petitioner as 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 and therefore, the amount payable by the Petitioner would be the amount of the disputed tax. He submits that only in a case as contained in sub-clause (b) of Section 3, where the tax arrears include tax, interest or penalty determined in any assessment on the basis of search under Section 132 or Section 132A of the Income-tax Act, only then the amount payable under the DTVSV Act would be 125% of the disputed tax and in no other case. He refers to FAQ No.70 of Circular No.21/2020 to draw distinction from the same with respect to the case of petitioner.

8. He submits that it is only on the basis of answer to this question No.70 in Circular No.21/2020 that the non search case of petitioner has been treated as a search case. He submits that respondent No.1 determined a higher sum of tax as assessment in the case of petitioner was framed on the basis of a search under Section 132 of the Income Tax Act. According to him, a plain reading of the DTVSV Act and the Rules nowhere suggests that an addition made on the basis of certain information obtained in the course of search of another tax payer can lead to the assessee being considered as a search case. This is not contemplated within

the scheme of DTVSV Act nor the DTVSV Rules.

9. He submits that this Circular has been issued under section 10 and 11 of the Act. Sub-section (1) of section 11 states that an order can be passed by the Central Government to remove difficulties, however, the same cannot be inconsistent with the provisions of the Act. Though Section 3 of the DTVSV Act states in unequivocal terms that one hundred and twenty five percent of the disputed tax is payable only to those cases where an assessment is made on the basis of a search. Respondent No.1's order based of the Circular would make it contrary to the provisions of the Income Tax Act and also to several judgments of the Supreme Court and to that extent, the Circular is liable to be quashed. In any event, in interpreting the scope of a provision of a statute, the Courts are not bound by the Circulars issued by the CBDT.

10. He submits that the first category of cases, i.e. 'search cases', would be those where an assessment is made either under section 153A read with section 143(3)/144 of the Income-tax Act in a case where a search is conducted on the declarant itself, or those where an assessment is made under section 153C read with section 143(3)/144 of the Income-tax

Act in a case where in the course of a search conducted on another assessee, any assets, documents or books of accounts belonging to the declarant are found and such assets, documents or books of accounts are handed over to the AO of the declarant to assess the income in light of the same. The case of the Petitioner does not fall under either of the above.

11. He submits that in row numbers 2 and 3 of the impugned order, Respondent No.1 himself holds that the case of Petitioner is not a search case but contradicts himself in determining the amount payable as if the case of Petitioner was a search case and is resorting to approbating and reprobating at the same time, which cannot be permitted in law.

12. Mr.Pardiwala also submits that to interpret the assessment order, such that the case of the assessee would be search case even though neither any such search has been conducted on the assessee nor there has been any direct reference of the assessee's involvement in the findings of the investigation would lead to an absurd situation where every shareholder or person involved in the transaction of M/s. Lifeline Drugs would have to be treated as search case which is not the intention of the DTVSV Act. The Assessing Officer has noted that there are 84 such companies where allegedly, artificial capital gains have been booked. He submits that since these are listed companies having thousands of

investors and if the interpretation of Respondent No.1 is accepted, it would mean that the assessment of all such hundreds of thousands of assesseees would be deemed to be a search assessment, a proposition which is plainly absurd. Respondent No.1 has failed to appreciate that this question also talks of an assessment order being framed on the basis of a search, and not of an addition being made on the basis of a search.

13. He submits that in the assessment order passed under section 143(3) of the Income Tax Act.

14. He purports to draw the attention to the object behind the promulgation of the Act. He submits that the object is to settle tax disputes and reduce litigation. The DTVSV Act confers benefits on the taxpayers, who can put an end to tax litigation by paying specified percentages of tax and obtain immunity from penalty and prosecution and waiver of interest. Taking into consideration these objects, the DTVSV Act must be construed liberally so as to further its object. He refers to paragraphs 23 and 24 of the decision of this Court in the case of Macrotech Developers Ltd. v/s. Principal Commissioner of Income Tax and Ors. in W. P. No.79 of 2021 dated 25th March 2021 to submit that the whole action on the part of the respondent designated authority would frustrate the objective and the purpose for which the Act has been enacted.

15. He has also tendered across Circular No.4/2021 dated 23rd March 2021 with respect to the clarifications issued by CBDT with reference to FAQ No.70 of Circular No.21/2020. It appears to address several representations that have been received seeking clarity with regard to the clarification of case as a “search case” for the purpose of DTVSV Act, 2020. He submits to remove any uncertainty it is clarified that a search case means an assessment or reassessment made under Section 143(3)/144/147/153A/153C/158BC of the Income-tax Act in the case of a person referred to in Section 153A or Section 153C or Section 158BC or Section 158BD on the basis of search initiated under Section 132, or requisition made under Section 132A of the Income-tax Act modifying FAQ No.70 of Circular 21/2020 to that extent. He submits that petitioner is not a person referred to in Section 153A or in Section 153C. He also submits that since the case of the assessee is post the 31st May, 2003, the provisions of Section 158BC or Section 158BD as contained in Chapter XIV-B do not apply to the case of Petitioner in view of Section 158BI which clearly states that the said Chapter shall not apply where a search is initiated after the 31st day of May of 2003. He submits that firstly no search has been initiated in the case of Petitioner, secondly, the dates of the reports, statements with respect to the purported investigation referred to in the

Assessment Order are post May, 2003. He submits that therefore the said provisions do not apply to the Petitioner.

16. Learned senior counsel Mr.Pardiwala has also drawn our attention to the assessment order dated 22nd December 2017 in support of his contentions. He submits that a plain reading of the assessment order suggests that the case of petitioner was selected for scrutiny under “CASS” selection and notice under section 143(2) of the Income Tax Act as well as further notice under section 129/142(1) of the Income Tax Act were issued to petitioner. He submits that even the sections and sub sections under which the assessment is made refers only to section 143(3) of the Income Tax Act. No where the assessment order suggests that the said assessment order is pursuant to or read with the provisions of the search and seizure contained in Chapter XIV-B of the Income Tax Act where the special procedure for assessment of search case is prescribed.

17. Referring to paragraph 4 of the assessment order, he submits that the assessment proceedings are in respect of long term capital gain of Rs.5,73,23,123/- on sale of shares during the assessment year 2015-16 and the said gains came to be exempted under section 10(38) of the Income Tax Act. Long term capital gains was from the sale of M/s.Life Line Drugs and Pharma Limited was Rs.5,87,95,055/- which shares were through off

market deal as set out in the said paragraph. He further refers to paragraph 5.1 of the assessment order to submit that the long term capital gains from the sale of shares has been examined from various available tools including ITD data, BSE data, money control website, Taxman, Court rulings, internet as well as investigation wing report and the findings of SEBI. He submits that this is the basis of the assessment and not search. Referring to paragraph 5.2 to 5.7 of the assessment order which refers to the findings of the investigation wing, he submits that no where the name of the petitioner appears. Even the findings in the case of assessee in paragraph 5.8 only refer to data verification and analysis as per share market fundamentals and the return of income to allege that the petitioner long term capital gain shown in the return of income was pre arranged in connivance with operator. He submits that these are statements bereft of any specific statement and cannot be meant to say that the assessment is based on the search conducted. Even in the conclusion in paragraph 6.6, he submits that there is only reference to the method of share trading in general but no where it mentions the name of petitioner or that he was involved in any share price manipulation. Referring to the statement of Shri Pawan Kayan recorded under section 132(4) recorded on 30.03.2015 as referred to in paragraph 7 (A) of the assessment order, learned senior counsel submits that neither in the questions put by the investigation wing

nor in the answers, name of petitioner figures. Referring to paragraph 7 (B), he submits that there is a clear mention of survey action under section 133A and not search and that too in the premises of M/s.Korp Securities Limited, Kolkata in which, statement of Anupkumar Maheshwari, Director of Lexus Shares and Stock Brokers Private Limited, Eastern India Pvt. Ltd. and Anuj Realtors Private Limited is referred to. Even here petitioner's name is not there. The same goes with paragraph 7(C) which refers to survey action and not search conducted in the premises of M/s.Gateway Financial Services Limited in which the statement of Praveen Kr Agarwal Director has been recorded. Even here there is no mention of petitioner. The same is with paragraph 7(D) where the survey action and not search was conducted under section 133 in the premises of Korp Securities Limited and in which the statement of Anuj Agarwal is recorded. Even here the name of petitioner does not figure. Learned senior counsel refers to paragraphs 7.4 and 7.5 to submit that the department has not conducted its own investigation and statedly only on the basis of circumstantial evidences of survey findings on all the brokers/agents, SEBI and NSE findings and purportedly on applying the test of human probabilities has stated that the price hike in the shares of Lifeline Drugs is a pre planned activity. He submits that the entire assessment order is on the basis of study and analysis of financials of Lifeline Drugs and Pharma

Limited, share trading pattern of the petitioners, investments, deductions on the basis of SEBI orders, analysis and circumstantial evidence, survey findings.

18. He submits that the impugned order passed by respondent No.1 is contrary to the provisions of the DTVSV Act and ought to be quashed and respondent No.1 be directed to pass fresh order in Form No.1 determining tax payable by Petitioner to be the amount declared in the Form No.1 i.e. 100% of the disputed tax.

19. On the other hand, Shri Sham Walve, learned counsel for the respondents seeks to rely on the Affidavit in Reply of the respondents dated 25th March 2021 to counter the submissions made on behalf of petitioner. He submits that since the assessment order was framed based on search/survey enquiries conducted by the Directorate of Income Tax (Investigation), Kolkatta on 02.07.2013, the designated authority has rightly computed petitioner's liability under *Vivad se Vishwas Act* at Rs.2,57,67,714/- by adopting a rate of 125% of disputed tax applicable to search case in accordance with section 3 of the DTVSV Act. He would submit that the assessment order was framed based on the information shared by the investigation regarding manipulation of market price of

shares of certain companies listed on BSE in order to provide entry of bogus long term gains to the beneficiaries including petitioner. The assessment order passed under section 143(3) of the Income Tax Act is on the basis of the search and seizure action and the statement recorded under section 132 (4) of the Income Tax Act coupled with post search enquiries and as the petitioner had failed to demonstrate the genuineness of the transactions, addition was made.

20. He submits that section 3(b) and section 9(a) (i) of the DTVSV Act refer to an assessment, where the tax arrear has been determined on the basis of search under section 132/132A of the Income Tax Act and therefore provisions of section 3(b) and section 9(a)(i) of the DTVSV Act apply to every assessment for which the basis is a 'search' conducted under the Act. When search is conducted in case of an assessee, assessment pertaining to six assessment years preceding the assessment year of search and relevant assessment years are assessed under section 153A of the Act. If the search was conducted in case of any other person but money, bullion, jewellery, assets, books, documents belonging or pertaining to assessee are seized or information contained therein relate to the assessee, the assessment pertaining to six assessment years preceding the assessment year of search (i.e the year in which such seized asset/ books/ documents

etc. are handed over to the AO of assessee) and relevant assessment years is framed under section 153C read with section 153A of the Act. In any other case, the assessment is framed either under section 143(3) or section 147 of the Act depending on the time elapsed from the end of the relevant assessment year. Thus, the phrase 'on the basis of search' used in the DTVSV Act has a broad connotation and covers all assessment orders. The principle of equity demands that similarly placed cases should be treated in a similar manner. It cannot be argued that a person whose assessment is framed under section 153C of the Income Tax Act on the basis of information contained in seized assets pertaining to him should be treated differently from a person in whose case information emanates from search but he is not covered by the provisions of section 153C of the Act. In petitioner's case, the basis for assessment was information emanating from a search conducted by the Directorate of Income Tax (Investigation), Kolkata. Had the assessment not been based on information emanating from a search, the question of clarification would not have arisen. However, in petitioner's case there is no doubt that the assessment was based on information emanating from a search and hence is required to be treated as a search case. Hence, designated authority has correctly applied the relevant rate of 125% of disputed tax to determine amount of tax payable as per the DTVSV Act. Further, the row no.2 and 3 in Form No.3

issued by designated authority contains details as filled by the petitioner in the Form 1 and 2. Since petitioner had filed declaration and undertaking under DTVSV Act stating that his case is not a search case the same is reflected in row 2 and 3. The designated authority had correctly mentioned in the remarks that in the case of petitioner the assessment order was framed on the basis of search conducted by investigation wing and hence amount payable under Act is 125% of the disputed tax. Therefore, it is clear that there is no contradiction in the certificate issued by designated authority.

21. He submits that the market price of shares of M/s.Life Line Drugs and Pharma Limited being pennystock company was manipulated by operators to obtain bogus long term capital gain as has been revealed pursuant to statements under section 132(4) and post search enquiry. Had the search not happened, assessing Officer during assessment proceedings would not have conducted further analysis and recorded statement of the assessee regarding pennystock.

22. He submits that FAQ 70 and its answer in circular No.21 of 2020 was to clarify that the provisions of DTVSV Act apply uniformly to all cases where assessment is based on search. He submits that the assessment

order describes *modus operandi* followed by the racket of accommodation of entry providers which was unearthed during the search proceedings. He stresses on the words “on the basis of search” to emphasis this point.

23. He also takes us through paragraph 11 of the assessment order in support of his contentions which reads thus:

“11. Thus, considering the findings of the search/survey, inquiries conducted in the case of brokers, operators, entry providers and exit providers and on the basis of the SEBI and NSE findings, the nature of transaction entered into by the assessee for receiving LTCG in respect of shares of Lifeline Drug and the exemption claimed u/s.10(38) of the I.T. Act,1961 are not allowed. Since, these transactions are not treated as genuine and not resulting in a genuine capital gains, hence, he sale proceeds received by the assessee of Rs.5,87,95,055/- on shares of Lifeline Drug is treated as unexplained taxable income earned during the year and accordingly, added under section 68 of the I.T.Act,1961 to the total income of the assessee during the relevant year under consideration. Further, an amount of Rs.11,75,901/- i.e 2% of Rs.5,87,95,055/- (commission paid to the entry provider/operator) is being added to the total income of the assessee u/s 69C of IT Act,1961 on account of unexplained expenditure. Penalty proceeding u/s.271(1)(c) are separately initiated for furnishing inaccurate particulars of income leading to evasion of tax.”

24. With reference to circular No.4 of 2021, revenue has tendered a note submitting as under :

“A further clarification dated 23.3.2021 was issued by CBDT vide Circular No.4/20-21. Vide paragraph 4 of the circular, the CBDT has clarified that a ‘search case’ means an assessment or reassessment made under sections 143(3)/ 144/ 147/ 153A/

158BC of the Income Tax Act in the case of a person referred to in section 153A or section 153C or section 158BC or section 158BD of the Income Tax Act. On the basis of search initiated under section 132, or requisition made under section 132A of the Income Tax Act.

2 It is emphasized that circular dated 23.03.2021 has only modified or rather has enlarged the scope of FAQ 70 where, initially, only section 143(3)/ 144 was mentioned.

It is also pertinent to highlight section 153C(1)(b) which reads as under:

“Any books of accounts or documents, seized or requisitioned pertains or pertain to, or any information contained therein relates to a person other than the person referred to in section 153A....”

Vide this scheme it is very clear that if search is conducted in the case of some person and transaction pertaining to other persons have been found, other person's case shall be treated as search case.

In other words, as per DTVSV Act 2020, it is not material that a 'search case' essentially should be a case wherein warrant is executed u/s.132 of the Income Tax Act. To emphasize FAQ No.70 is identical to section 153C of the Income Tax Act wherein the cases are considered as 'search case' even though warrant is not executed on him but transaction or information are found from the person subjected to search action u/s 132 of the Act.”

25. He submits that it is, therefore clear from the new circular that if search is conducted in the case of some persons and transactions pertaining to other persons have been found, then the other persons' case shall be treated as a search case. And would not be material that warrant under section 132 of the Income Tax is not executed, for a case to be treated as search case.

26. He, therefore, submits that there is no merit in the contentions of petitioner and the petition ought to be dismissed with costs and petitioner be directed to make payment of Rs.2,57,67,714/- being 125% of the disputed tax to the revenue.

27. We have heard learned counsel for the parties and with their able assistance, we have perused the papers and proceedings in the matter.

28. It would firstly be appropriate to dwell on certain relevant provisions of the DTVSV act and the rules, its statement of object and reasons, as well as the circulars issued thereunder as are referred to above as also certain provisions of the income tax act.

29. The statement of objects and reasons of the DTVSV act are set out as under:

“Over the years, the pendency of appeals filed by taxpayers as well as Government has increased due to the fact that the number of appeals that are filed is much higher than the number of appeals that are disposed. As a result, a huge amount of disputed tax arrears is locked-up in these appeals. As on the 30th November, 2019, the amount of disputed direct tax arrears is Rs.9.32 lakh crores. Considering that the actual direct tax collection in the financial year 2018-19 was Rs.11.37 lakh crores, the disputed tax arrears constitute nearly one year direct tax collection.

2 *Tax disputes consume copious amount of time, energy and resources both on the part of the Government as well as taxpayers. Moreover, they also deprive the Government of the timely collection of revenue. Therefore, there is an urgent need to provide for resolution of pending tax disputes. This will not only benefit the Government by generating timely revenue but also the taxpayers who will be able to deploy the time, energy and resources saved by opting for such dispute resolution towards their business activities.*

3 *It is, therefore, proposed to introduce the Direct Tax Vivad se Vishwas Bill, 2020, for dispute resolution related to direct taxes, which, inter alia, provides for the following namely:-*

(a) *the provisions of the Bill shall be applicable to appeals filed by tax payers or the Government, which are pending with the Commissioner (Appeals), Income Tax Appellate Tribunal, High Court or Supreme Court as on the 31st day of January, 2020 irrespective of whether demand in such cases is pending or has been paid;*

(b) *the pending appeal may be against disputed tax, interest or penalty in relation to an assessment or reassessment order or against disputed interest, disputed fees where there is no disputed tax. Further, the appeal may also be against the tax determined on defaults in respect of tax deducted at source or tax collected at source.*

(c) *in appeals related to disputed tax, the declarant shall not pay the whole of the disputed tax if the payment is made before the 31st day of March, 2020 and for the payments made after the 31st day of March, 2020 but on or before the date notified by Central Government, the amount payable shall be increased by 10 per cent of disputed tax.*

(d) *in appeals related to disputed penalty, disputed interest or disputed fee, the amount payable by the declarant shall be 25 per cent of the disputed penalty, disputed interest or disputed fee, as the case may be if the payment is made on or before the 31st day of March, 2020. If payment is made after 31st day*

of March, 2020 but on or before the date notified by Central Government, the amount payable shall be increased to 30 per cent of the disputed penalty, disputed interest or disputed fee, as the case may be.

4 The proposed Bill shall come into force on the date it receives the assent of the President and declaration may be made thereafter up to the date to be notified by the Government.”

30. The DTVSV Act is an Act to provide a resolution for pending tax disputes which have been locked up in litigation. Taxpayers can put an end to tax litigation by opting for the scheme and also obtain immunity from penalty and prosecution by paying percentages of tax as specified therein. This would bring peace of mind, certainty, saving of time and resources for the taxpayers and also generate timely revenue for the Government.

31. In the context of this discussion, section 3 of the DTVSV Act assumes significance. For the sake of convenience, section 3 Of the DTVSV Act is quoted as under :

“3:- Amount payable by declarant:- 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:-

Sl. No.	Nature of tax arrear	Amount payable under this Act on or before 31 st day of March, 2020	Amount payable under this Act on or after the 1 st day of April, 2020 but on or before the last date.
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(a)	Where the <u>tax arrear</u> is the <u>aggregate amount of disputed tax, interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax.</u>	<u>Amount of the disputed tax</u>	The aggregate of the amount of disputed tax and ten per cent of disputed tax; provided that where the ten per cent of disputed tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act.
(b)	Where the tax arrear includes the tax, interest or penalty determined in any assessment <u>on the basis of search under section 132 or section 132A of the Income Tax Act,</u>	The aggregate of the <u>amount of disputed tax, and twenty five per cent of the disputed tax;</u> 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 leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act.	The aggregate of the amount of disputed tax and thirty-five percent of disputed tax; provided that where the thirty-five per cent of disputed tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable.
(c)	Where the tax arrear relates to disputed interest or disputed penalty or disputed fee	Twenty-five per cent of disputed interest or disputed penalty or disputed fee.	Thirty-five per cent of disputed interest or disputed penalty 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 decisions 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.”

According to the said section, where a declarant files a declaration to the designated authority in accordance with section 4 in respect of tax arrear, then, the amount payable by the declarant under the DTVSV Act shall be amount of the disputed tax where the tax arrear is the aggregate amount of disputed tax, interest and penalty on such disputed tax. In other words in such a case the amount payable would be 100% percent of the disputed tax declared. And in case, where tax arrear includes tax interest or penalty determined in any assessment on the basis of search under section 132 or section 132 A of the Income Tax Act, the amount payable would be the aggregate of the amount of disputed tax and 25% of the disputed tax. This means that where the assessment is on the basis of a search the amount payable would be 125% of the disputed tax declared by petitioner.

32. It would also be relevant at this stage to refer to FAQ No. 70 of circular No. 21 /2020 along with its answer as under:

Q.No.	70.	If the assessment order has been framed in the case of a taxpayer under section 143(3) / 144 of the Act based on the search executed in some other taxpayer's case, whether it is to be considered as a search case or non-search case under Vivad se Vishwas?
Answer :		Such case is to be considered as a search case.

33. The answer to question 70 suggests that even if there has been no search in the case of an assessee or taxpayer and the assessment order has been framed under section 143 (3)/144 of the Income Tax Act based on search executed in some other taxpayer's case, then the case of the 1st assessee would be considered as a search case.

34. With reference to the aforesaid question No. 70 and its answer in circular No. 21, a further circular No. 4/2021 dated 23 March 2021 has been issued which is also quoted as under:

“With the objective to inter alia reduce pending income tax litigation, generate timely revenue for the Government and benefit taxpayers by providing them peace of mind, certainty and savings on account of time and resources that would otherwise be spent on the long-drawn and vexatious litigation process, the Direct Tax Vivad Se Vishwas Act, 2020 (hereinafter referred to as “Vivad se Vishwas”) was enacted on 17th March, 2020.

2. Sections 10 and 11 of Vivad Se Vishwas empower the Central Government / Central Board of Direct Taxes to issue directions or orders in public interest or to remove difficulties. In order to facilitate the taxpayers, clarifications under the said sections in form of answers in frequently asked questions (FAQs) were issued vide circular no.9/2020 dated 22nd April, 2020 (covering FAQ 1-55) and circular no.21/2020 dated 4th December, 2020 (covering FAQ no.56-89).

3. FAQ no.70 of circular 21/2020 clarified eligibility the search case under Vivad se Vishwas. It was clarified that if the assessment order has been framed in the case of a taxpayer under section 143(3)/144 of the income-tax Act based on the search executed in some other taxpayer's case, it is to be considered as a 'search case' under Vivad Se Vishwas.

4. Several representations have been received seeking further clarity with regard to the classification of a case as a 'search case' for the purposes of Vivad Se Vishwas. The matter has been examined. In order to remove any uncertainty in this regard, and in exercise of powers under section 10 and 11 of Vivad se Vishwas, it is hereby clarified that a 'search case' means an assessment or reassessment made under sections 143(3) / 144 / 147 / 153A / 153C/ 158BC of the Income-tax Act in the case of a person referred to in section 153A or section 153C or section 158BC or section 158BD of the Income-tax Act on the basis of search initiated under section 132, or requisition made under section 132A of the Income-tax Act. The FAQ no.70 of circular 21/2020 stands modified to this extent.”

It is to be noted that the aforesaid clarification with respect to FAQ No. 70 has been issued after the petition had been filed. It clarifies that a “search case” means an assessment or reassessment made under Section 143(3)/144/147/153A/153C/158BC of the Income-tax Act in the case of a person referred to in Section 153A or Section 153C or Section 158BC or Section 158BD on the basis of search initiated under Section 132, or requisition made under Section 132A of the Income-tax Act. Answer to FAQ No.70 of Circular 21/2020 has been replaced by the above meaning.

To be considered a search case, the assessment/re-assessment should be:

- (i) under 143(3)/144/147/153A/153C/153BC of the Income Tax;
and
- (ii) be in respect of a person referred to in Section 153A or Section 153C or Section 158BC or Section 158BD Act; and
- (iii) should be on the basis of search initiated under Section 132, or requisition made under Section 132A of the Income-tax Act.

If all the three elements/criteria as above are satisfied, the case is a search case.

35. While there is an assessment under section 143(3) of the Income Tax Act; whether Petitioner is a person referred to in Section 153A or Section 153C or Section 158BC or Section 158BD Act? It would

therefore be appropriate to quote sections 153A, 153C.

“153-A. Assessment in case of search or requisition.—[(1)]
Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, in the case of a person where a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132-A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years [and for the relevant assessment year or years] referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made [and of the relevant assessment year or years]:

Provided *that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years [and for the relevant assessment year or years]:*

Provided further *that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years [and for the relevant assessment year or years] [referred to in this sub-section] pending on the date of initiation of the search under Section 132 or making of requisition under Section 132-A, as the case may be, shall abate:*

[Provided also that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made [and for the relevant assessment year or years] :]

[Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under Section 132 is initiated or requisition under Section 132-A is made on or after the 1st day of April, 2017.

Explanation 1.— For the purposes of this sub-section, the expression “relevant assessment year” shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2.— For the purposes of the fourth proviso, “asset” shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.]

[(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or Section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the [Principal Commissioner or Commissioner]:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.]

Explanation.—For the removal of doubts, it is hereby declared that, —

(i) save as otherwise provided in this section, Section 153-B and Section 153-C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

153-C. Assessment of income of any other person.—*[(1)] [Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, where the Assessing Officer is satisfied that,—*

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in Section 153-A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] [and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of Section 153-A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person [for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and] for the relevant assessment year or years referred to in sub-section (1) of Section 153-A] :]

[Provided that in case of such other person, the reference to the date of initiation of the search under Section 132 or making of requisition under Section 132-A in the second proviso to [sub-section (1) of Section 153-A] shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :]

[Provided further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made [and for the relevant assessment year or years as referred to in sub-section (1) of Section 153-A] except in cases where any assessment or reassessment

has abated.]

[(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under Section 132 or requisition is made under Section 132-A and in respect of such assessment year—

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of Section 142 has been issued to him, or

(b) a return of income has been furnished by such other person but no notice under sub-section (2) of Section 143 has been served and limitation of serving the notice under sub-section (2) of Section 143 has expired, or

(c) assessment or reassessment, if any, has been made,

before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in Section 153-A.”

36. As far as sections 158BC and 158BD are concerned, we note from Section 158BI that Chapter XIV-B which contains sections 153BC and 153BD shall not apply where a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A after the 31st day of May of 2003. The dates of the reports, searches/ surveys, statements of persons with respect to the investigation referred to in the Assessment Order are all post May, 2003. It is not the

case of the Revenue that action pursuant to sections 153A or 153C had been initiated in the case of petitioner. These facts are not disputed. Therefore, in our considered view, this criteria no. (ii) necessary for a case to be search case is not satisfied.

37. Let us examine criteria no. (iii) i.e whether the assessment is on the basis of search initiated under Section 132, or requisition etc. made under Section 132A of the Income-tax Act. Admittedly, no search has been initiated in the case of Petitioner. Assessment order dated 22nd December 2017 suggests that the case of petitioner was selected for scrutiny under “CASS” selection and notices under the Income Tax Act were issued to petitioner not pursuant to any search under section 132 or requisition under section 132A. Assessment refers only to section 143(3) of the Income Tax Act and is not read with any provision of the search and seizure contained in Chapter XIV-B of the Income Tax Act where the special procedure for assessment of search case is prescribed. The name of Petitioner nowhere figures in any of the statements under section 132(4) of the searches referred to in the assessment order nor in the statements pursuant to survey action of persons under search or survey. Even the concluding paragraph referred to by counsel for Revenue refers only to the findings of the search/survey, inquiries conducted in the case of

brokers, operators, entry providers and exit providers and on the basis of the SEBI and NSE findings, the nature of transaction entered into by the assessee for receiving LTCG. The statement of Petitioner recorded on 14.12.2017 at the time of assessment under section 131, nowhere suggests any incriminating material or admission of purported manipulation/rigging of scrips of Lifeline Drugs except saying that he had purchased the shares on advice of his brother nor it is elicited that the Petitioner had any knowledge of penny stock company, its financial position or about the activities of the company. In the scenario, the allegation that the assessee in collusion with the parties who had rigged the prices of shares artificially by manipulation and thereby introduced the amount received in the guise of LTCG/STCG is rather conjecturous. Nowhere in the statements recorded, referred to in the assessment order is there any allegation that Petitioner was one of the parties that had booked any artificial gains. There is no allegation that any incriminating material belonging to Petitioner was obtained in the course of the search. The assessment therefore does not appear to be on the basis of search initiated under Section 132, or requisitions made under Section 132A of the Income-tax Act. Having regard to aforesaid, it is difficult to agree with the submissions made on behalf of the counsel for the Revenue that the assessment order is on the basis of search.

38. It is, therefore, not necessary for us to go in to the challenge to the vires of circular no. 21/2020 as we find that in view of circular no. 4/2021 modifying/replacing answer to FAQ no. 70 in circular no. 21, the case of Petitioner would not be a search case. Also it would not be necessary for us to go into or deal with the other arguments put forward on behalf of Petitioner.

39. The above referred circulars have been issued under section 10 and 11 of the DTVSV act. For the sake of convenience, the said sections are quoted as under:

“10.(1) The Central Board of Direct Taxes may, from time to time, issue such directions or orders to the income-tax authorities, as it may deem fit:

Provided that no direction or order shall be issued so as to require any designated authority to dispose of a particular case in a particular manner.

(2) Without prejudice to the generality of the foregoing power, the said Board may, if it considers necessary or expedient so to do, for the purpose of this Act, including collection of revenue, issue from time to time, general or special orders in respect of any class of cases, setting forth directions or instructions as to the guidelines, principles or procedures to be followed by the authorities in any work relating to this Act, including collection of revenue and issue such order, if the Board is of the opinion that it is necessary in the public interest so to do.

11. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, not inconsistent

with the provisions of this Act, remove the difficulty.

Provided that no such order shall be made after the expiry of a period of two years from the date on which the provisions of this Act come into force.

(2) Every order made under sub-section(1) shall, as soon as may be after it is made, be laid before each House of Parliament.”

40. The submissions of the Ld. Senior Counsel for Petitioner that the these circulars are to remove difficulties and to tone down the rigour of law and cannot be adverse to the assessee particularly keeping in mind the beneficial nature of the legislation carry along lot of weight. In view of above it would not be necessary for us to say anything further on this.

41. Also submissions made on behalf of the Revenue with respect to the new circular appear to be misplaced rather digressed in view of foregoing discussion. As such, the other arguments on behalf of the Revenue need not be gone into.

42. Since petitioner's case cannot be regarded as a search case, consequently order dated 26th January 2021 in Form No.3, passed by Respondent No.1 being the Designated Authority, would be unsustainable.

43. We accordingly set aside Order dated 26th January 2021 in Form No.3 passed by Respondent no. 1 and direct the Respondent no. 1 to



pass a fresh order in Form No.3 determining tax payable by the Petitioner as a non-search case in accordance with the DTVSV Act read with Rule 4 of the DTVSV Rules, as per Circular no. 4/2021 dated 23rd March, 2021 within a period of two weeks from the date of receipt of this order.

44 Petition is accordingly allowed in the above terms. No order as to costs.

[ABHAY AHUJA, J.]

[SUNIL P.DESHMUKH, J.]