A.F.R.
3-4-08

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 3RD DAY OF APRIL 2008

PRESENT:

THE HON'BLE MR. JUSTICE DEEPAK VERMA

AND

THE HON'BLE MR. JUSTICE ANAND BYRAREDDY

I.T.A. No. 171/2003 C/w

I.T.A. NO. 172/2003 & I.T.A. No. 173/2003

BETWEEN:

Bhawarlal (H.U.F)
C/o M/s. Motmal
Ratanchand & Co.,
Mohan Buildings
Chickpet
Bangalore ....APPELLANT IN I.T.A.No. 171/2003

Bherumal (H.U.F)
C/o M/s. Motmal
Ratanchand & Co.,
Mohan Buildings
Chickpet
Bangalore ....APPELLANT IN I.T.A.No. 172/2003

Heerachand (H.U.F)
C/o M/s. Motmal
Ratanchand & Co.,
Mohan Buildings
Chickpet
Bangalore ....APPELLANT IN I.T.A.No. 173/2003

(By Shri. M.V. Javali, Advocate)

AND:

The Assistant Commissioner of
Income Tax (INV.) Circle-2(2)
Unity Building Annexe
P. Kalingrao Road
Bangalore-560 027 ... RESPONDENT COMMON

(By Shri. M. V. Seshachala, Advocate)

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These ITAs are filed under Section 260-A of I. T. Act, 1961 arising out of order dated 23.12.2002 passed in ITA Nos 533/Bang/1997 in ITA No. 171/2003, 532/Bang/1997 in ITA No. 172/2003 and 534/Bang/1997 in ITA No. 173/2003 respectively for the Assessment year 1993-94 and etc.

These appeals having been heard and reserved and coming on for pronouncement of Judgement this day, **ANAND BYRAREDDY J.**, delivered the following:-

JUDGMENT

These appeals are by assessees who belong to the same family. Being aggrieved by a common order, they have preferred these separate appeals. As the issues and questions of law that arise for consideration are identical, the appeals are disposed of by this common judgement.

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2. The facts as are relevant for consideration of these appeals are as follows:

The appellants had, as co-owners of a commercial complex, carried out construction thereof and had declared a total cost of construction in their respective returns of income for the assessment year 1993-94 at Rs. 42,68,642. Whereas the estimation framed by the Departmental Valuation Officer was at Rs. 62,27,795. Therefore, Rs. 19,59,150 was treated as unexplained income, equally in the hands of the three appellants.

3. And further, the appellants had received a sum of Rs. 16,85,000 as co-owners from their tenant who had occupied two shop units separated by a common wall – the above amount was paid as consideration for permitting the tenant to create a opening in the wall for the tenant's convenience. This amount was treated as a revenue receipt and one-third share of each of the appellants was assessed to tax by the department, out of the said amount of Rs. 16.85 lakh (Rs. 5,61,667).

4. The appellants challenged the assessment orders by way of individual appeals before the Commissioner of Income Tax.

By a common order dated 31.3.1997 the Appellate Commissioner reduced the estimate of cost of construction to Rs 35,69,015. One-third of the said amount (Rs. 4,33,458) in respect of each assessee, was directed to be taxed. Insofar as the receipt of Rs. 16.85 lakh was concerned, it was held not to be a revenue receipt and one-third of the amount in each assessee's case was directed to be deleted. The assessee's as well as the Revenue preferred appeals before the Income Tax Appellate Tribunal challenging the above common order.

5. During the pendency of the appeals the Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as the 'Scheme' for brevity) under Chapter IV of the Finance (No.2) Act, 1998 (hereinafter referred to as 'the Act' for brevity) was introduced. The object of the scheme as contained in Sections 86 to 98 of the said Act was as explained by the Finance Minister in his speech (See (1998) 231 ITR (st) 67)

> "Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in pursuing a large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes.

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> Declogging the system will not only incentivise honest tax payers, enable Government to realise its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-friendly. I, therefore, propose to introduce a new scheme called 'Samadhan'."

6 The assessee – appellants, seeking to avail of the benefit of the scheme, made a declaration under Section 88, in accordance with Section 89, of the tax arrears and had paid the taxes as determined by the Commissioner of Income Tax (CIT), who in turn had issued a certificate, in that regard, under Section 90 (2), read with Section 91 of the Act. On the basis of the certificate issued by the CIT, the appeals of the assessee before the Tribunal were dismissed as withdrawn as on 30.8.2002. However, the appeals of the revenue, which were also pending, were not withdrawn.

7 At the hearing of the appeals of the Revenue, a preliminary objection was raised, by the assessees, as to maintainability of the same. The objection was to the effect that the dispute relating to the Income tax for the impugned assessment years having been settled under the scheme and the payment of the

taxes as determined having been certified – the appeals by the revenue pertaining to the very assessment year would also be infructuous.

8. The Tribunal, however, has opined that the settlement preferred by an assessee, in relation to its own appeal will not have any bearing on the cross appeal filed by the revenue as long as the assessee does not opt to settle the issue under the scheme even in respect of such other cross appeal of the revenue. And accordingly rejected the said preliminary objection of the assessees. And proceeding to consider the appeals of the revenue on merits has reversed the order of the first appellate authority to the effect that any consideration received by a owner of property in return for the occupation and permission for usage of the property is taxable as rent receipts under the Income Tax Act and cannot be taken to be capital in nature. While rejecting the other contention regarding the computation of estimated cost of construction as being erroneous.

9 It is in the above background that the present appeals are filed. While admitting the appeal to file, this Court had opined

that the questions of law as framed in the memorandum of appeal do arise for consideration. The questions of law are as follows:

"~~Question of Law~~ 1. Whether on the facts and in the circumstances of the case, the Tribunal was right in allowing the Revenues appeal in respect of receipt of Rs. 16,85,000 by Co-owners; contrary to instruction dated 26.11.1998 issued under Section 96(1) of Finance Act (2) of 1998/K.V.S.S 1998, which is binding on Revenue. (vide Annexure 'E' – page) [234 ITR(st)52]

~~Question of Law~~ 2. Whether the Tribunal was correct in rejecting the objection of the appellant against the maintainability of appeal inspite of appellants having filed a declaration under K.V.S.S. 1998 scheme, and a certificate issued by designated authority thereon.

~~Question of Law~~ 3. Whether the Tribunal ought to have applied the instructions of C.B.D.T./Finance Department issued under Section 96(1) of Finance Act(2) 1998/K.V.S.S. 1998, reported as F. No. 149/145/98-T.P(L) dated 03.09.1998 vide (1998) 233 ITR (st) 51. (vide Annexure 'F' – page), and upheld the non-maintainability of appeal of Revenue.

~~Question of Law~~ 4a. Whether Tribunal ought to have applied the decision of Delhi High Court in All India Federation of Tax Practitioners Vs. U.O.I (1999) 236 ITR 1 (Del), (vide Annexure 'G' – page) holding that the K.V.S.S. 1998 will apply to both the Assessees appeals and Departmental/Revenues appeal pending and dismissed appeal of Department/Revenue.

4b. Whether the Tribunal ought to have upheld the claim of appellant for exemption as capital receipt the amount of Rs. 5,61,666 received as co-owner."

10. Heard the Counsel for the parties.

Shri. M. V Javali appearing for the appellants contends as follows:

That the Tribunal was in error in holding that there ought to be two separate declarations made under the scheme – merely because the revenue had also filed appeals against the very impugned order, whereby a certain relief had been granted by the first appellate authority in favour of the appellants. He would point out that there is no such provision under the scheme which requires such declarations in respect of the same assessment year.

That the Tribunal has failed to consider the decision of the Delhi High Court in the case of *All India Federation of Tax Practitioners Vs. Union of India (1999) 236 ITR 1* wherein the Constitutional validity of the scheme was challenged by way of a public interest petition and a division bench of the Delhi High Court having held that the proviso to Section 92 of the Act was ultra vires Article 14 of the Constitution of India. This has been accepted by the Central Government. The Tribunal has failed to appreciate the effect of the said decision. And further on merits contends that the Tribunal was in error in holding that the receipt of Rs. 16.85 lakh as being a revenue receipt, since the same was a lump-sum payment for a convenience provided to the tenant and was in the nature of a capital receipt.

11 The Counsel would place reliance on the following authorities in support of the appeal:

a) A clarification issued by the Central Board of Direct Taxes bearing No. 149/145 98-TPL (See: 233 ITR (st) 50 wherein it has been clarified that the Department understands the scheme to be a ...... "Package for settlement of tax arrears of a particular assessment year in entirety ...." And that an assessee could not seek settlement of part of arrears towards interest, under the scheme while reserving a right of appeal against the quantum of income or tax.

b) All India Federation of Tax Practitioners Vs. Union of India and others (1999) 236 ITR 1

c) Press Release dated 26.11.1998 issued by the CBDT to State that the Central Government has decided to accept the decision of the Delhi High Court, in 236 ITR 1

d) Killick Nixon Limited Vs. Deputy Commissioner of Income tax and others 258 ITR 627. Wherein it is held:

> "The order to be made by the designated authority under the Kar Vivad Samadhan Scheme under Section 90 of the Finance (No.2) Act, 1998, is a considered order which is intended to be conclusive in respect of tax arrears and sums payable after determination towards full and final settlement of tax arrears. Once the declarant makes payment of the amount determined under Section 90, the immunity under section 91 springs into effect. Upon such declaration being made, tax arrears being determined and paid and certificate issued under section 92, there is no jurisdiction for the Assessing Officer to reopen the assessment by a notice under Section 143 of the Income-tax Act, 1961, except where the case falls under proviso 2 to sub-section (1) of Section 90 when it is found that any material particular furnished in the declaration is found to be false."

e) Nishit Construction Company Private Limited Vs. Income Tax Officer (2006) 204 CTR (MP) wherein it is held as follows:

> "In view of the fact that proviso to Section 92 was struck down by the Delhi High Court and the Department

> itself proceeded to accept the decision, the Department cannot try to take a different stand from the position to which it stands committed. However, if the Department finds that any material particular furnished in the declaration is false, it can always approach the designated authority for cancellation of the certificate under the first proviso to Section 90(1) or for amendment under the second proviso or for such other action as is permissible under the said Finance Act. However, once the valid declaration has been made and till the declaration continues to be valid, the Department's appeal shall not survive. The appeals pending before the Tribunal are dismissed as having become infructuous, in view of the certificate granted under Section 90."

The Counsel would hence pray that the appeals be allowed and the questions of law be answered in favour of the assessees.

12. Per contra, Shri. M. V. Seshachala appearing for the Revenue seeks to justify the view taken by the Tribunal and would submit that any other being taken insofar as the declaration of the assessee under the scheme pertaining to his own appeals, also applying to the appeals of the Revenue, would have far-reaching consequences that would adversely affect the Revenue.

He seeks to rely on the following authorities:

a) CBDT's clarification No. 149/152/98-TPL dated 17.12.1998;

b) Union of India Vs. Omkar S. Kanwar 258 ITR 761 wherein on the following facts it was held as follows:

> "A Limited, company, was clearing, for purposes of excise duty, certain tyres on the basis that the tyres were for use on trailers. It was found that these tyres were being fitted to light commercial vehicles. The Commissioner of Central Excise issued show-cause notices to the company as to why excise duty and penalty should not be levied. In the same show-cause notices the directo/officers of the company were also called upon to show cause as to why penalty be not imposed on them. The company and its directs/officers replied to the show-cause notices. The Commissioner adjudicated the show-cause notices and called upon the company to pay excise duty and also a penalty. The Commissioner also required each director/officer to pay a penalty. Appeals were preferred by the company as well as the directors/officers to the Customs, Excise and Gold (Control) Appellate Tribunal. Pending the appeals, the company as well as the directors/officers filed separate declarations under the Kar Vivad Samadhan Scheme, the settlements amounts were determined the company paid the amount so determined but the directors/officers paid the amounts so determined under protest. On a writ petition filed by the directors/officers in Kerala the Kerala High Court directed refund of the amounts paid by them. The Gujarat High Court dismissed similar writ petitions

filed by the directors/officers in Gujarat. On appeals to the Supreme Court.

Held, (i) that under the Kar Vivad Samadhan Scheme there is no adjudication on the subject matter of the demand notice or show-cause notice. There is a settlement of the "tax arrears". Even though the same show-cause notice may call upon the company and its directors/officers to show-cause, there is a separate demand for "tax arrears" against the company and a separate demand for "tax arrears" against the directors/officers. Each entity or person would have to file a declaration separately. The settlement is in respect of each declaration. Section 91 of the Finance (No.2) Act, 1998, only gives immunity in respect of matters covered in the declaration. The matter covered in the declaration by the company is the "tax arrears" of the company only and does not cover those of the directs/officers. They would get no immunity under section 91 on a settlement by the company."

By the same token of reasoning the Counsel would contend that on an appeal having been preferred by the department the dispute of the department could not have been settled by a declaration only as regards the dispute raised by the assessee alone, there was however no bar to have claimed the benefit of the Scheme in respect of the amount in dispute, that was the subject matter of the Revenue's appeal, in a separate declaration in that regard. And hence would submit that the appeals be dismissed.

13 In the light of the above contentions we proceed to examine the matter on merits.

We may first take note of the relevant provisions of the Scheme, which according to us would be germane to address the facts and circumstances of the present case.

The Scheme has come into force on 1.9.1998. From a reading of the definitions under Section 87 of the Act, it follows that in relation to an assessment year, whether it is chargeable expenditure, chargeable interest or income which is in dispute, it would be construed as the <u>whole of such</u> disputed chargeable expenditure, disputed chargeable interest or disputed income as is relatable to the disputed tax which is contemplated;

- "Disputed tax" is defined as follows:

> "(It) 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"

- "Tax arrears" is defined as:

"(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;"

Under the scheme, where any person makes a declaration, after 1.9.1998 but on or before 31.12.1998, in respect of his tax arrears – the amount payable under the scheme was to be determined at the rates specified under Section 88. In the case of a declarant being a person as in the instant case, was at thirty percent of the disputed income.

When a declaration is made under Section 88 before the designated authority in the form prescribed – such authority shall within 60 days from the date of receipt of the declaration, determine the amount payable by the declarant in accordance with the Scheme and grant a Certificate to the declarant in respect of the tax arrears payable after such determination towards full and final settlement of tax arrears. It is provided that where any material particular furnished is found to be false, it would be presumed as if the declaration was never made and all the consequences under the Income-tax Act, 1961, under which the proceedings were pending, shall be deemed to have been revived.

14. The declarant was required to pay the sum determined within thirty days of the order by the designated authority and upon intimation of such payment, the authority would issue the Certificate to the declarant. It is also laid down that where the declarant had filed an appeal, against any order giving rise to the tax arrears, such appeal would be deemed to have been withdrawn on the day on which the order is passed by the authority against payment made as aforesaid. Section 92 of the Act does contain a Proviso which lays down that in the case of an appeal filed by the department in respect of an issue relating to the disputed tax arrear, the Appellate Authority shall decide the appeal irrespective of a declaration under the Scheme.

Section 92 is reproduced for ready reference:

> "92. Appellate authority not to proceed in certain cases – No appellate authority shall proceed to decide any issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear specified in the

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declaration and in respect of which an order had been made under section 90 by the designated authority or the payment of the sum determined under that section:

Provided that in case an appeal is filed by a Department of the Central Government in respect of such issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear (except where the tax arrear comprises only penalty, fine or interest), the appellate authority shall decide the appeal irrespective of such declaration."

15. The entire Scheme was challenged as falling foul of Article 14 and Entry 82 in List-I of the VII Schedule to the Constitution, in the case of All India Federation of Tax Practitioners vs. Union of India and Others, [1999] 236 ITR 1, with particular reference to the Proviso to Section 92, the Court has, by way of an example, explained the unfairness of the classification made in the class of litigating assessees where the litigating assessee is in arrears merely by reference to the fact whether they are prosecuting the litigation or defending themselves, as follows:-

"There are two assessees A and B identically situated in all respects in the matter of nature of income, quantum of taxable income and the category of tax but they are situated at two different places, say X and Y, respectively. Two Assessing Officers finalising their assessments at X and Y find their incomes and taxable incomes identical and levy an identical amount of tax on the two. Both file appeals before the Commissioner (Appeals). The legal plea raised by A before the Commissioner at X finds favour with him and the appeal is allowed. The Commissioner at Y does not agree with the same plea raised by B as an appellant and dismisses the appeal. B prefers his appeal before the Income-tax Appellate Tribunal. In the case of A, the Department comes up on appeal to the Tribunal. The appeals are pending on the date of coming into force of the scheme.

The Tribunal would take the same view on the legal issue arising for decision in the two appeals and, therefore, the decision would be the same in both the appeals. B is covered by the scheme and may take benefit thereof, whereafter his appeal shall not be decided by the Tribunal. A cannot take the benefit of the scheme for he will not be treated as in arrears. The appeal preferred by the Department shall be heard and decided on the merits on account of the proviso enacted to Section 92.

A and B are both litigating assessees. Both are in arrears of tax. From none of the two the Revenue has realised the amount of tax. The cases of the two are sought to be distinguished solely by applying the distinguishing feature of who is the appellant. Here the distinction between the two becomes unreal and artificial and in any case arbitrary. In our opinion, both the cases should have been covered by the scheme. In both the cases, the

Legislature would achieve the twin object; the litigation would come to an end and the arrears of tax will be realised in the same quantity from the two assessees. In fact, the Revenue should show more inclination in favour of the assessee-A who in spite of having succeeded at one stage of the litigation is still prepared to give up his fight though by way of defence and is prepared to accept his liability to pay the tax which was quantified at one stage.

The learned ASG submitted that even here the distinction is well defined and intelligible. As against B, he having lost in the tax litigation, the amount of tax levied on income would be treated to be in arrears by the Revenue so long as it is not realised. In the case of A, he having succeeded in appeal before the Commissioner, the tax ceases to be in arrears and it would assume the character of arrears only on the appeal by the Tribunal being decided favourably to the Revenue. Therefore, where the Department is the appellant, an assessee though litigating cannot be treated to be in arrears. We find it difficult to agree.

The above said submission puts a narrow and too rigid a meaning on "arrears" which does not fit in the context. The term "arrears" means an amount or quantity which still needs to be paid. If refers to money that is owed. Wharton's Law Lexicon (Fourteenth edition) defines "arrears" to mean – 'money unpaid at the due time: as spent behind;.....money in the hands of an accounting party'. It is true that "tax arrears" has been defined as the amount of tax, penalty or interest "determined" on or before March 31, 1998, under clause (m) of section 87.

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Still it cannot be denied in the illustration given hereinabove that at one point of time the tax was determined though such determination was reversed in appeal by the Commissioner (Appeals). The determination is sought to be restored in the appeal preferred by the Department before the Tribunal. Once the appeal is allowed, the determination would relate back to the date of originating the same. Under the scheme of the Income-tax Act, it is well known that a determination of liability to pay tax does not necessarily call for an order of adjudication. Take the cases of self assessment, payment of advance tax, deduction of tax at source and so on. Several provisions, prescribe for penalty or interest which liability is incurred automatically and by operation of law, even when an order of adjudication has not been made, though there may be need for quantification which may be a mathematical exercise merely. The provision of section 90(1) throws light on this aspect. On declaration being made, the designated authority shall determine the amount payable by the declarant. The previous determination which is sought to be restored in appeal by the Department may be finalised by the designated authority.

In our opinion, no sub-classification can therefore, be made in the class of litigating assessees in arrears merely by reference to the fact whether they are prosecuting the litigation or defending themselves. In our opinion, once a liability to pay the tax was incurred and determined on or before March 31, 1998, the assessee would be treated to be in arrears in spite of his having succeeded at one stage of the litigation if the Revenue has chose to continue with the

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litigation and there is no reason why the benefit of the scheme should be denied to him. To this extent, the scheme is discriminatory and violative of article 14 of the Constitution. All the assessees litigating and in arrears belong to one class. Any attempt at carving out further classes by reference to who is the prosecutor/ appellant/ applicant in the pending litigation void as based on no intelligible differentia. It is arbitrary, irrational and evasive. It will have no rational relation to the object sought to be achieved by the Act. The twin test laid down in R. K. Garg's case (1982) 133 ITR 239 (SC), would fail. On the other hand, keeping them in one class would enable the twin objectives of the legislation being achieved – (i) the reduction of litigation, and (ii) the realisation of revenue."

And held, that the Proviso to Section 92 is ultra vires Article 14 of the Constitution as it results in creating two artificial classes between the same class of assessees and that the definition of 'tax arrears' should be read so as to mean the amount of tax determined by the competent authority on or before March 31, 1998, <u>though such determination might have been set aside at a later stage, if such setting aside has not been accepted by the department and continues to remain under challenge, before a Court or a Tribunal</u> (emphasis supplied)

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16. The Central Government having accepted this decision has issued instructions to implement the Scheme subject to the above decision in its Clarification bearing No 149/152/98 TPL dated 17.12.1998, with reference to the declarations filed by the assessees under the Scheme and the manner in which they shall be regulated, as under.-

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(i) The assessee has the option of filing declaration either in respect of arrears disputed in his appeal or of taxes involved in Departmental appeal or for both independently of each other.

(ii) For declarations relating to Departmental appeals also the existing Form No. 1A can be used. In such cases, there are no outstanding taxes and hence the process of working out "disputed income" from outstanding taxes is not involved. The entire income under dispute in various grounds of appeal may constitute "disputed income" on which the sum payable can be determined. In respect of Departmental appeals, the declaration has to be for the entire income disputed in such appeals.

(iii) Where the declaration in respect of Departmental appeals are accepted by the designated authority, the CIT may proceed to withdraw such appeals on passing of the order under Section 90 (2).

(iv) In the event of cross appeals on same issue, if the assessee does not opt to declare in respect of taxes involved in Departmental appeals, the provisions of Section 92 would not apply as these place bar only in respect of issue covered in the declaration in respect of which order under Section 90 has been passed. This will also be the position, if the assessee does not opt for declaration in respect of other Departmental appeals. The appeals in all such cases should not be withdrawn."

The above clarifications are not with reference to the provisions of the Act providing for the Scheme, but an interpretation sought to be placed on the legal position and the manner in which the same ought to be implemented. The present case on hand having been decided by the Tribunal after the decision of the Delhi High Court in *All India Federation of Tax Practitioners supra*, the appeals by the department could not be placed on a separate pedestal as was required to be done under the Proviso to Section 92. A declaration made in terms of the Scheme was therefore, required to be considered with respect to the tax arrears pertaining to that assessment year irrespective of whether the dispute was in question in an appeal preferred by the assessee or in an appeal preferred by the Revenue.

17. In the instant case, when the assessees filed their declaration, the appeals of the Revenue were also pending. The determination by the designated authority of the tax arrears would necessarily have to take into consideration such arrears including what was raised in dispute by the Revenue by way of an appeal. This was a duty cast on the Designated Authority notwithstanding that the declaration may not have included the tax arrears in dispute which was sought to be raised by way of an appeal by the Revenue. It was open to the Designated Authority to have called upon the assessees to avail the benefit of settlement only if all tax arrears, including those which are disputed by the revenue and which are pending in appeal as on the date of such determination, are paid. In the instant case, the Designated Authority having determined the tax arrears as defined under the Act, would be deemed to include the amount of tax determined on or before 31.3.1998 in respect of that assessment year as modified by any appellate order, but remaining unpaid on the date of declaration and further, as held by the Delhi High Court, it would include such arrears, which after determination have been set aside, **<u>but such setting aside has not been accepted by the department</u>**

and continues to remain under challenge before a Court or Tribunal. Section 90 requires the designated authority to determine the amount payable by the declarant in accordance with the provisions of the Scheme and grant a Certificate setting forth the particulars of the tax arrears and the sum payable after such determination towards full and final settlement tax arrears. And upon payment of such amount determined and on an order having been passed under sub-section (1) of Section 9, it is conclusive and shall not be reopened. In this instant case, the Designated Authority having issued such a Certificate, the same attains finality.

The contention sought to be put forth that there ought to be an independent declaration insofar as the tax arrears that are subject matter of the appeals by the department, is therefore not tenable. The decision of the Delhi High Court having categorically laid down that there cannot be a classification of the litigating assessees in arrears, merely by reference to the fact whether they are prosecuting litigation or defending themselves on the determination of the arrears. The decision of the Delhi High Court having struck down the proviso to Section 92, the

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department insisting on its own hybrid procedure of requiring the assessees to file *two* declarations, one in respect of the appeals filed by the assessees and another in respect of the appeals by the Revenue, is a gloss sought to be placed by the department, at its whim and fancy. It was the duty of the Designated Authority while considering the declaration filed by the assessee to determine the tax arrears even with reference to any other amounts due from the assessee and which are not reflected in the declaration. It was then for the assessee to make payment or to desist from making payment on such determination. The Revenue having failed to do so in the present case and having issued a Certificate of the tax arrears for the assessment year, notwithstanding the apparent discrepancy, insofar as the tax arrears in relation to the dispute sought to be raised by the Revenue in its appeals, was not part of the said declaration, is attributable to the Revenue's own lapse and hence, there is no substance in the contentions put forth by the Revenue

Accordingly, the appeals are allowed. The judgments of the Tribunal are set aside The questions of law are answered in favour of the assessees and against the revenue.

Sd/-
Judge

Sd/-
Judge

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