# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# ORDINARY ORIGINAL CIVIL JURISDICTION

## WRIT PETITION NO.2189 OF 2000

Citibank N.A., )
a Body Corporate incorporated under the )
laws of the United States of America and )
having its main Branch Office in India at )
5th Floor, Plot C-61, Bandra Kurla Complex, )
G-Block, Bandra (E), Mumbai – 400 051 ) ….Petitioner

V/s.

1. S.K. Ojha, )
the Joint Commissioner of Income-Tax, )
Special Range – 15, Mumbai, having his )
Office at Room No.621, 6th Floor, Aayakar )
Bhavan, Maharshi Karve Road, Mumbai – )
400 020 )

2. N.C. Tewari, )
the Commissioner of Income-Tax, Mumbai )
City-III, having his office at Aayakar Bhavan, )
Maharshi Karve Road, Mumbai – 400 020 )

3. The Union of India )
Aayakar Bhavan, M.K. Road, Churchgate, )
Mumbai – 400 023 ) ….Respondents

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Mr. Percy Pardiwalla, Senior Advocate a/w. Ms. Bindi Dave, Mr. Raghav Gupta, Ms. Treesa Ann Benny and Ms. Sanyukta Karne i/b. Wadia Ghandy and Co. for petitioner.
Mr. Suresh Kumar for respondents.

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CORAM : K. R. SHRIRAM &
M.M. SATHAYE, JJ.
DATED : 9th JUNE 2023

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.) :

1 Rule came to be issued on 23rd January 2008 on which date the interim protection granted on 6th November 2001 was continued pending the hearing and final disposal of the petition.

2 Petitioner is a body corporate incorporated in the United States of America and has been carrying on business in India through its branches. Petitioner has been an assessee under the Income Tax Act, 1961 [hereinafter referred to as "the Act"].

3 By this petition, petitioner is challenging the action of respondent no.1 seeking to reopen the completed assessment of petitioner for the Assessment Year 1992-1993. According to petitioner, despite repeated request to provide the reasons to believe, petitioner was not provided the same. The same, however, is annexed to the affidavit in reply filed by respondent no.1.

4 Petitioner had, on 1st January 1993, filed its return of income for the Assessment Year 1992-1993. During the course of assessment proceedings, respondent no.1 called for voluminous and comprehensive details and raised queries on various issues, one of which was relating to the amount assessable in the hands of petitioner in respect of its Portfolio Management Scheme (PMS) including transactions in units and transactions with Public Sector undertakings. All requisitions and queries of respondent no.1 were fully complied with and answered by petitioner. In addition to obtaining detailed information from petitioner, respondent no.1, for the purposes of making the assessment, even exercised his powers under Section 133(6) of the Act to call for information from third parties and also directed a special audit under Section 142(2A) of the Act. Respondent no.1

also raised queries based on certain observations in the reports of the Janakiraman Committee and the Joint Parliamentary Committee. The report of the special audit was also submitted on 15th April 1994. After fully examining the information provided by petitioner and also considering the material collected under Section 133(6) of the Act etc., the assessment was completed on 8th September 1995. Respondent no.1 made certain additions and disallowances in his order. Against a returned total income of Rs.2,75,98,77,220/- respondent no.1 assessed the income at Rs.3,34,51,56,300/- and computed a tax demand of Rs.35,11,67,448/- at the rate of 60% on the additionally assessed income and consequential interest under Section 234B and Section 234C of the Act of Rs.30,27,71,582/-. This assessment order dated 8th September 1995 was challenged by petitioner by filing an appeal on 11th October 1995 before the Commissioner of Income Tax (Appeals) [hereinafter referred to as "CIT(A)"].

5 Respondent no.2 by exercising his powers of revision under Section 263 of the Act passed an order on 25th September 1997 revising the assessment order of respondent no.1 on the ground that it was erroneous and prejudicial to the interest of Revenue since it omitted to charge petitioner's income tax at the rate of 65% instead of 60% tax rate actually charged by the Assessing Officer. This order was challenged by petitioner by filing an appeal on 3rd December 1997 before the Income Tax Appellate

Tribunal [hereinafter referred to as "ITAT"].

6 On 17th November 1997 respondent no.1 gave effect to the revisionary order of CIT by applying the tax rate of 65% and directed respondent no.2 to revise the entire income returned by petitioner. Against this order, an appeal was filed by petitioner before CIT(A) on 15th January 1998.

7 While these three appeals were pending, the Finance Act introduced the Kar Vivad Samadhan Scheme 1998 [hereinafter referred to as "the KVSS"]. The object of the KVSS was to declog the system of litigation by giving assessees an opportunity to settle finally all the tax issues relating to an assessment year upon payment of certain amounts. The KVSS enabled assessees, who had tax arrears and whose appeals were pending, to make a full and final settlement by following the procedure set out in the KVSS. The period of the operation of the scheme was also extended from 31st December 1998 to 31st January 1999. Mr. Pardiwalla submitted that though it had very good chance of success in the appeals filed by petitioner, in order to settle all issues finally pertaining to the Assessment Year 1992-1993 and to put an end to all controversies, disputes and litigation, petitioner decided to take advantage of the KVSS. Accordingly petitioner, as per the requirements of the KVSS, on 6th November 1998 filed a declaration in prescribed Form 1A under Section 89 read with Section 88 of the Finance Act.

8 The office of respondent no.2, in response to petitioner's declaration, determined the amount payable at Rs.14.18 Crores, which was reduced to Rs.9,83,65,400/-. Respondent no.2, by an order dated 18th December 1998 issued under Section 90(1) of the Finance Act, certified, by issuing Form 2A, the amount payable by petitioner pursuant to the declaration at Rs.9,83,65,400/-. Respondent no.2 subsequently issued a fresh certificate dated 7th January 1999 in Form 2A redetermining the amount payable at Rs.10,30,20,815/-. According to petitioner, though respondent no.2 did not have the power to issue such a revised Form 2A certificate, to put an end to all its proceedings for Assessment Year 1992-1993 and since the difference was only about Rs.47 lakhs, petitioner paid a sum of Rs.10,30,20,815/- in full and final settlement of its tax arrears under Section 90(2) read with Section 91 of the Finance Act. Consequently, respondent no.2 issued a certificate to petitioner in Form 3 on 8th January 1999.

9 It is petitioner's case that by virtue of Section 90(4) of the Finance Act, petitioner's three appeals, that were pending before the CIT(A) and ITAT for Assessment Year 1992-1993, were deemed to have been withdrawn on 8th January 1999 and were subsequently formally dismissed. CIT(A) dismissed the two appeals pending before him by an order dated 12th January 1999 and ITAT dismissed the appeal pending before the Tribunal on 1st July 1999.

10 It is petitioner's case that by virtue of Section 90(3) of the Finance Act, the certificate, viz., Form 3, was conclusive as to the matters stated therein and no matter covered thereby could be reopened in any other proceeding under any direct or indirect tax enactment or under any other law for the time being in force.

11 On 15th January 2000 petitioner received a notice dated 10th January 2000 from respondent no.1 under Section 148 of the Act alleging that petitioner's income for Assessment Year 1992-1993 had escaped assessment and requiring petitioner to file a return of its income for the said Assessment Year within 30 days. Petitioner challenged the validity of the notice and called upon respondent no.1 to furnish the reasons to believe recorded prior to issuance of the notice. Respondent no.1 refused to provide the same and hence, petitioner approached this Court.

12 Mr. Pardiwalla submitted that the notice issued on 10th January 2000 has to be quashed and set aside for the following reasons :

(a) once the assessment for the entire year was settled by following the provisions of the KVSS and the Designated Authority after application of mind had made an order under Section 90, which has been complied with by making payment of the tax computed under the KVSS, there was no question of reopening any issue which was subject matter of the order of the Designated Authority;

(b) the order of the Designated Authority passed under the KVSS is not mechanically passed but upon careful scrutiny of all the facts and circumstances pertaining to the declarant assessee and intended to bring about certain legal consequences under the KVSS. It was not open to the Income Tax Authorities to put back the clock by going back thereupon;

(c) the order of the Designated Authority is conclusive on all items/heads which go into the computation of the total income of the assessee and not confined only to the heads of income in respect of which an appeal or reference may be pending;

(d) once the payment has been made by the assessee of the sum determined by the Designated Authority and order by the Designated Authority has been passed, it shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force. Therefore, petitioner having paid the amount as determined by the Designated Authority and Form 3 has been issued under Section 90 of the Finance Act, the notice impugned in the petition could not have been issued. This has been so held in ***Killick Nixon Ltd. V/s. Deputy Commissioner of Income Tax, Mumbai and Ors.***[1]

(e) infact under Section 91 of the Finance Act, there is even immunity from prosecution and imposition of penalty;

1. (2003) 1 SCC 145

(f) in the alternative, respondent no.1 in the course of assessment proceedings had called for voluminous and comprehensive details and raised queries on various issues including the amount assessable in the hands of petitioner in respect of its PMS and in particular relating to Grasim Industries Ltd. The reasons to believe only raises an issue regarding petitioner's dealings with Grasim Industries Ltd. under the PMS account and nothing more. The Assessing Officer, in his assessment order dated 8th September 1995, has extensively dealt with the facts relating to the PMS scheme under the head "Irregularities in Portfolio Management Scheme" where under heading 5, the Assessing Officer has dealt with Grasim Industries Ltd. Therefore, once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It would, therefore, follow that the reopening of the assessment for the same subject matter is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding and this change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

Mr. Pardiwalla concluded that on these grounds the notice has to be quashed and set aside.

13 Mr. Suresh Kumar for Revenue basically reiterated what is stated in the affidavit in reply of respondent no.1. Of course, in fairness Mr. Suresh Kumar also submitted that in the affidavit in reply reliance has been placed on the judgment of the Bombay High Court in Killick Nixon Ltd. V/s. Deputy Commissioner of Income Tax, Mumbai and Ors. to submit that having filed a declaration under the KVSS, does not mean that there has to be a closure. But that is no more the position in law, the Apex Court having taken a view as explained below.

14 Mr. Suresh Kumar also submitted that there was misdeclaration. Mr. Suresh Kumar submitted that under Section 90(1) of the KVSS the proviso provides that if there is any misdeclaration, then the declaration shall be presumed as it has never been made.

We would not agree with Mr. Suresh Kumar because that is not the case of respondent no.1 in the reasons to believe for reopening the assessment and there is no order withdrawing the Form 3 issued.

15 As regards the case of *Killick Nixon Ltd.* (Supra), which was a similar case, the Apex Court has held that once the Designated Authority has issued the order under Section 90, it will be conclusive in respect of tax arrears and sums payable after such determination towards full and final settlement of tax arrears. Once the declarant makes payment of the amount so determined under Section 90, the immunity under Section 91 springs into effect. The Apex Court has also expressed a view that upon such

declaration being made, tax arrears being determined, paid and certificate issued under the KVSS, there is no jurisdiction for the Assessing Officer to reopen the assessment by a notice under Section 143 of the Act, except where the case falls under the proviso (2) of sub-section (1) of Section 90 where it is found that any material particular furnished in the declaration is found to be false. Paragraphs 5 to 10 and 19 read as under :

> *5. Pursuant to the order of the CIT (Appeal), the Assessing Officer made an order dated 25.9.1998 giving effect to the appellate order. The Assessing Officer determined the assessed income of the appellant at Rs. 33,65,298.00 and raised a demand of Rs. 26,27,545.00 In the meanwhile, Kar Vivad Samadhan Scheme, 1998 (herein after referred to as KVSS) was brought into effect by Finance (No. 2) Act, 1998. The appellant filed a declaration under the KVSS on 20.11.1998 disclosing its assessed income as Rs. 33,65,298.00 and working out the tax payable under the Scheme at Rs. 8,65,795.00. The said declaration was accepted by the Designated Authority under the KVSS by an order dated 19.1.1999 made under Section 90(1) of the Finance (No. 2) Act, 1998. The Designated Authority accepted the assessed income of the appellant at Rs. 33,65,298.00 and determined the tax payable by the appellant at Rs. 9,35,888.00. This amount of Rs. 9,35,888.00 was paid by the appellant on 12.02.1999 upon which a final certificate under Section 92 read with Section 91 of the Finance (No. 2) Act, 1998 and the KVSS, 1998 was issued certifying that the appellant had paid towards full and final settlement of the tax arrears determined in the order dated 19.1.1999 on the declaration made by the appellant and granting immunity consequent under the provisions of the Scheme.*
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> *6. By an order made on 16th August, 1999 purportedly under Section 142 (1) of the Act, the Assessing Officer called upon the appellant to furnish details in respect of Assessment Year 1992-93 in connection with taxing of the licence fee of Rs. 24,12,114.00 received from the State Bank of India for let out portion of its property under the head "Income from House Property" as also to furnish evidence to establish that the written-off debts had become bad and have been written-off in the books of accounts.*
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> *7. The appellant protested by its letter dated 21st January, 2000 and pointed out that the assessment for the Assessment Year 1992-93 had obtained finality in view of the declaration under KVSS, the determination of the tax under the Scheme and the final certificate issued by the Designated Authority The*

*Assessing Officer refused to accept it as final closure of the proceedings pertaining to Assessment Year 1992-93. Hence, the appellant moved the High Court under Article 226 to quash the impugned notice and further proceedings consequent thereto. The High Court by its judgment dated 04.12.2000 dismissed the writ petition. Hence this appeal.*

*8. A look at the material provisions of KVSS is necessary to appreciate the contentions urged :*

> *Section 87 - In this Scheme, unless the context otherwise requires -*
>
> *xxx xxx xxx*
>
> *(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;*
>
> *(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;*
>
> *xxx xxx xxx*
>
> *(m) "tax arrear" means -*
>
> *(1) in relation to direct tax enactment, the amount of tax penalty or interest determined on or before the 31st day of Mach, 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;*
>
> *xxx xxx xxx*
>
> *Section 88 - "Subject to the provisions of this Scheme, where any person makes, On or after the 1st day of September, 1998 but on or before the 31st day of December, 1998, a declaration to the designated authority in accordance with the provisions of Section 89 in respect of tax arrear, then, notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision for any law for the time being in force, the amount payable under the Scheme by the declarant shall be determined at the rates specified hereunder, namely :-*
>
> *(a) Where the tax arrear is payable under the Income-tax Act, 1961 (43 of 1961), -*
>
> *(i) in the case of a declarant being a company or a firm, at the rate of thirty-five percent of the disputed income;"*

*xxx xxx xxx*

*Section 90 - (i) "Within sixty days from the date of receipt of the declaration under Section 89, the designated authority shall, by order, determine the amount payable by the declarant in accordance with the provisions of the Scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the tax arrear and the sum payable after such determination towards full and final settlement of tax arrears;"*

*xxx xxx xxx*

*Section 94 -"For the removal of doubts, it is hereby declared that, save as otherwise expressly provided in sub-section (3) of Section 90, nothing contained in this Scheme shall be construed as conferring any benefit, concession or immunity on the declarant in any assessment or proceedings other than those in relation to which the declaration has been made."*

*9. The Scheme of the KVSS is to cut short litigations pertaining to taxes which were frittering away the energy of the Revenue Department and to encourage litigants to come forward and pay up a reasonable amount of tax payable in accordance with the Scheme after declaration thereunder.*

*10. The learned Senior Counsel for the appellant contended that once the assessment for the entire year was settled by following the provisions of the Scheme and the Designated Authority after application of mind had made an order under Section 90, which was complied with by making payment of the tax computed under the Scheme. there was no question of reopening any issue which were subject matters of the Order of the Designated Authority. He urged that the order of the Designated Authority is not mechanically passed, but upon Careful scrutiny of all the facts and circumstances pertaining to the declarant assessee and intended to bring about certain legal consequences under the KVSS. It was not open to the Income Tax Authorities to put back the clock by going back thereupon. The order of the Designated Authority is conclusive on all items/heads, which go into the computation of the total income of the assessee and not confined only to the heads of income in respect of which an appeal or reference may be pending.*

*xxx xxx xxx*

*19. As far as the provisions of KVSS are concerned, we agree with the contention of the learned Senior Counsel for the assessee that the order to be made by the Designated Authority under Section 90 is a considered order which is intended to be conclusive in respect of tax arrears and sums payable after such*

> *determination towards full and final settlement of tax arrears. Once the declarant makes payment of the amount so determined under Section 90, the immunity under Section 91 springs into effect. We are also of the view that upon such declaration being made, tax arrears being determined, paid and certificate issued under the KVSS, there is no jurisdiction for the Assessing Officer to reopen the assessment by a notice under Section 143 of the Act except where the case falls under the provisio (2) of sub-section (1) of Section 90 as it is found that any material particular furnished in the declaration is found to be false. In the present case, it is not the case of the Revenue that any material particular furnished by the appellant-assessee in the declaration was found to be false. Consequently, the Assessing Officer could not have re-opened the assessment by a notice under Section 143 of the Act.*

Therefore, on this ground alone, petitioner has to succeed.

16 In any event, since query had been raised during the assessment proceedings and the assessee had replied to it, as held by the Division Bench of this Court in ***Aroni Commercials Ltd. V/s. Deputy Commissioner of Income Tax-2(1)***[2], it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. Infact it was so and the issue of PMS relating to Grasim Industries Ltd. has been raised by the Assessing Officer during the assessment proceedings, detailed reply has been furnished and has been dealt with in detail in the assessment order. Therefore, this reopening of assessment, in our view, is merely on the basis of change of opinion of the Assessing Officer and that does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

2. (2014) 44 taxmann.com 304 (Bombay)

17 We would also add that the notice of reopening has been issued after the expiry of four years from the end of the relevant assessment year. Under Section 148 of the Act, where the notice has been issued after the expiry of four years from the end of the relevant assessment year, the onus is on the Assessing Officer to show that income chargeable to tax has escaped assessment by reason of the failure on the part of assessee to disclose fully and truly all material facts necessary for its assessment for that assessment year. There is not even a whisper in the reasons to believe that there was any such failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment.

18 In the circumstances, petition made absolute in terms of prayer clause – (a).

19 Petition accordingly stands disposed.

**(M.M. SATHAYE, J.)** **(K. R. SHRIRAM, J.)**