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

WRIT PETITION NO.2537 OF 1999

The Bombay Dyeing & Manufacturing Co. Ltd.
a company incorporated under the Companies
Act, 1886 and having its Registered Office
at Neville House, Ballard Estate, Bombay 400 001 ..... Petitioner

Vs.

1. H.D. Trivedi, Deputy Commissioner
of Income Tax, Central Circle 8,
having his office at Old C.G.O.
Annexe Building, Maharsi Karve Road,
Bombay 400 020.

2. H.C.Parekh, Commissioner of
Income Tax, Central-1, Bombay
having his office at old C.G.O.
Annexe Building,
Maharshi Karve Road,
Bombay 400 020.

3. Union of India ..... Respondents

Mr.Madhur Agrawal i/b Mr.Atul K. Jasani for the Petitioner
Mr.Suresh Kumar for the Respondents

CORAM: K.R. SHRIRAM, J &
FIRDOSH P. POONIWALLA, J.

RESERVED ON: 23rd JUNE 2023

PRONOUNCED ON: 14th JULY 2023

JUDGMENT (PER FIRDOSH P. POONIWALLA, J):

1. The present Writ Petition challenges the legality and

validity of the orders passed by Respondent no.2 determining the amount of tax payable by the Petitioner pursuant to a declaration filed under the Kar Vivadh Samadhan Scheme, 1998 ("KVSS") introduced by Finance (No.2) Act, 1998 ("Finance Act"). In particular, the Petitioner has challenged the Certificate dated 25.02.1999 issued by Respondent no.2 in terms of sub-section (1) of Section 90 of the Finance Act, Order dated 17.03.1999 passed by Respondent no.2 rejecting the Petitioner's Rectification Application and a Certificate dated 02.08.1999 issued by Respondent no.2 under Section 90(2), read with Section 91, of the Finance Act.

2. The Petitioner is a public limited company which carries on the business *interalia* of manufacture and sale of textiles. The Petitioner had filed a Writ Petition in this Court, being Writ Petition No.2007 of 1991, wherein it had challenged *interalia* the validity of Section 115J of the Income Tax Act, 1961 ("the Act"), the validity of CBDT Circular No.495 dated 22.09.1987 and the manner in which Respondents ought to apply the said Section in the matter of working out the set off of brought forward depreciation and investment allowance. In the said Writ Petition, Rule was issued by this Court on 26.06.1991. While issuing Rule, this Court passed an interim order whereunder the Petitioner was permitted to pay advance tax or self assessment tax and/or file its return of income in

accordance with the third interpretation given in the said Writ Petition to the provisions of Section 115J of the Act. Further, the Respondents were permitted to proceed with the assessment but could not serve any notice of demand on the Petitioner pending further orders in the said Writ Petition. Interest under Sections 234A. 234B and 234C of the Act as well as additional tax under section 143(1A) of the Act were to be paid in accordance with the third interpretation set out in the Petition. The Petitioner was also to furnish a bank guarantee of a nationalised bank for 50% of differential tax less advance tax and tax deducted at source for Assessment Year 1991-92 on the basis of the difference between the interpretation of Section 115J as per the said Circular No.495 dated 22.09.1987 issued by the Central Board of Direct Taxes and the third interpretation, which bank guarantee was to be furnished within three months from the date of the determination and which was so furnished.

3. On 20.12.1991, the Petitioner filed its Return of Income for Assessment Year 1991-92. The Petitioner returned a nil income and on account of the Advance Tax of Rs.4,51,50,000/- paid and the tax deducted at source of Rs.1,01,74,620/- the Petitioner claimed a refund of Rs.5,53,24,620/- in the Return as filed on 20.12.1991.

4. Respondent no.1 processed the Return filed on 20.12.1991 and made an intimation under section 143(1)(a). Respondent no.1, by his letter dated 11.06.1992, intimated to the Petitioner that the total tax, including interest under section 234B was determined at Rs.19,23,82,029/- and after allowing for credit of advance tax and tax deducted at source aggregating to Rs.5,47,97,545/- a sum of Rs.13,75,84,484/- was payable and accordingly, a demand was raised. The Petitioner was called upon to furnish a bank guarantee for a sum of Rs.6,87,92,242/- being 50% of the said demand.

5. The Petitioner, by its letter dated 27.11.1992, applied for rectification of certain errors. The said application was disposed by an Order dated 31.12.1992 made under section 154 of the Act. Respondent no.1 determined the total income at Rs.6,51,19,488/- and the tax payable thereon at Rs.3,59,45,957/-. After giving credit for advance tax of Rs.4,51,50,000/- and tax deducted at source of Rs.96,47,545/-, aggregating to Rs.5,47,97,545/-, a refund of Rs.1,88,51,588/- was determined. Respondent no.1 also granted interest to the Petitioner under Section 244A of the Act of a sum of Rs.45,24,384/- and accordingly determined the total sum refundable at Rs.2,33,75,972/-. This refund was adjusted against a demand for the Assessment Year 1990-91.

6. Being aggrieved by the said Order dated 31.12.1992, the Petitioner filed an Appeal to the Commissioner of Income tax (Appeals). The Petitioner also filed an application for rectification by its letter dated 24.05.1993.

7. Respondent no.1, by an Order dated 15.07.1993, rectified his earlier order and granted an additional credit for tax deducted at source of Rs.5,24,909/- as well as recomputed the interest allowable under section 244A. Accordingly a further refund of Rs.16,30,205/- was worked out and the same was received by the Petitioner.

8. The Petitioner's Appeal challenging the said Order dated 31.12.1992 was allowed by the Commissioner of Income Tax (Appeals) by his Order dated 02.09.1993. On further Appeal by the Revenue to the ITAT, by an Order dated 22.12.1997, the ITAT restored the matter to the file of the Commissioner of Income Tax (Appeals) with a direction that the Appeal be disposed *de novo*.

9. By a letter dated 31.03.1994, Respondent no.1 intimated to the Petitioner that its assessment for the Assessment Year 1991-1992 had been completed under Section 143(3) of the Act and the total income was determined at Rs.29,04,54,928/-.

10. Respondent no.1, thereafter, by his letter dated 16.11.1994 addressed to the Petitioner, worked out the tax payable on a provisional basis at Rs.11,60,82,920/- and called upon the Petitioner to furnish a bank guarantee of 50% thereof viz., Rs.5,80,41,460/- within ten days of the receipt of the said letter.

11. Thereafter, pursuant to reopening of the Petitioner's assessment under Section 148 of the Act, the total income of the Petitioner was revised to Rs.31,96,52,478/- and a demand of Rs.17,84,62,709/- was raised.

12. The Petitioner decided to take advantage of the KVSS to put an end to the disputes. Therefore, by its letter dated 30.12.1998 addressed to Respondent no.2, Petitioner forwarded a declaration under the KVSS for the Assessment Year 1991-92. The tax arrears outstanding as on 31.03.1998 for the Assessment Year 1991-92 were computed at Rs.17,84,62,709/- consisting of tax demand of Rs.9,17,17,686/-, interest of Rs.6,17,38,846/- and another sum of Rs.2,50,06,177/- which was the refund inclusive of interest granted under section 244A and which was received pursuant to the intimation made. The disputed income was computed at Rs.19,93,86,274/- on which the tax liability under the KVSS was determined at Rs.6,97,85,196/-. The computation of tax liability

under the KVSS, as done by the Petitioner, is as under:

(A) Computation of Disputed Tax		Rs.
Tax & Surcharge Payable		147040140
Less: Advance Tax & Tax Deducted at Source		55322454
Net Tax Payable		91717686
Disputed Tax		91717686
(B) Computation of Disputed Income		
Disputed Tax		91717686
Disputed Income		1993862739
	Say	199386274
(C) Computation of Tax Payable under the Kar Vivad Samadhan Scheme, 1998		
Disputed Income		199386274
Tax liability under Kar Vivad Samadhan Scheme, 1998		
		69785195.9
Tax payable under the Kar Vivad Samadhan Scheme, 1998		69785196

13. Respondent no.2 issued as per the KVSS, a Certificate dated 25.02.1999 under sub-section (1) of Section 90 of the Finance Act and determined the tax arrears at Rs.17,84,62,709/- in agreement with the Petitioner's determination. However, Respondent no.2 computed the tax payable under KVSS at Rs.8,88,11,635/-. The Petitioner was called upon to make payment of the said sum of Rs.8,88,11,635/- within a period of thirty days from the date of the said Certificate. Whilst determining the disputed tax, Respondent no.2 determined the tax paid at

Rs.3,03,16,277/- as against the Petitioner's claim that the total tax paid was Rs.5,53,22,454/-. According to Respondent no.2, from the advance tax paid and tax deducted at source aggregating to Rs.5,53,22,454/-, the refund of Rs.2,50,06,177/- granted pursuant to the intimation under section 143(1)(a) had to be reduced. The calculation made by Respondent no.2 is as under:

KAR VIVAD SAMADHAN SCHEME, 1998

A)	Assessed income		Rs.31,96,52,478
B)	Assessed tax thereon (including S.C.)		Rs.14,70,40,140
C)	Taxes paid:		
	TDS & advance tax	Rs.5,53,22,454	
	Less: R.O.issued as per 143 (1)(a)	Rs.2,50,06,177	
			Rs. 3,03,16,277
	Tax arrears (disputed tax)		Rs.11,67,23,863
	When tax is Rs.14,70,40,140/- income is		Rs.31,96,52,478
	When tax is Rs. 3,03,16,277/- income is		Rs. 6,59,04,950
	Disputed income		Rs.25,37,47,528
	Hence amount payable under KVSS 1998 @ 35% of disputed income		Rs. 8,88,11,635

14. The Petitioner, by its letter dated 03.03.1999 addressed to Respondent no.2, pointed out that the difference between the disputed income and the tax payable pursuant to the declaration under KVSS as determined by Respondent no.2, and as per the declaration filed, arose on account of the fact that from the advance tax paid and tax deducted at source aggregating to Rs.5,53,22,454/-

Respondent no.1 had deducted the refund granted to the Petitioner of Rs.2,50,06,177/-. It was further submitted that assuming such refund was to be deducted, the interest granted under section 244A of the Act of Rs.56,29,680/- which formed a part of the said refund, could in no event have been reduced. The Petitioner further submitted that the adjustment so made was not in accordance with the provisions of the KVSS and that Respondent no.2 was required to amend his Certificate and issue a fresh certificate.

15. Respondent no.2, by his Order dated 17.03.1999, rejected the Petitioner's rectification application. According to Respondent no.2, the refund of Rs.2,50,06,177/- granted pursuant to the intimation made was to be deducted from the tax paid for arriving at the amount of net payment of tax, and as the adjustment was in accordance with the KVSS, there was no merit in the rectification application.

16. It is the case of the Petitioner that, as the last date of payment of tax was 27.03.1999, the Petitioner had no option but to make the payment, and, accordingly, the Petitioner paid a sum of Rs.8,88,11,635/- on 24.03.1999.

17. The Petitioner, by its letter dated 30.03.1999 addressed to Respondent no.2, pointed out that the Petitioner had, without

prejudice to its rights and contentions, paid the amount of Rs.8,88,11,635/- on 24.03.1999 and furnished the proof of payment of the said sum. Respondent no.2 was requested to issue a Certificate under section 90(2) of the Finance Act.

18. Further, in accordance with the provisions of section 90(4) of the Finance Act, the Petitioner applied to this Court to withdraw Writ Petition No.2007 of 1991 and this Court, by its Order dated 22.06.1999, permitted the withdrawal of the said Petition.

19. The Petitioner filed a copy of the said Order with Respondent no.2, who thereafter issued a Certificate dated 02.08.1999 under Section 90(2), read with Section 91, of the Finance Act.

20. The present Writ Petition was filed on 17.09.1999. On behalf of the Respondents, Respondent no.2 filed an Affidavit dated 12.11.1999 opposing the granting of any reliefs in the Petition. By an Order dated 06.12.1999, this Court issued Rule on the Petition.

21. Although raised in the Writ Petition, Mr.Agrawal did not press the submission that the amount of tax refund of Rs.1,93,76,497/- should not have been reduced to determine the amount of tax paid by the Petitioner.

22. Mr.Agrawal, however, submitted that, even if it is held that the amount of tax refunded to the Petitioner is to be reduced while determining the amount of disputed tax, then, also, only the amount of Rs.193,76,497/-, being the tax refund, should be reduced and not the amount of interest under Section 244A of Rs.56,29,680/-. In this context, Mr.Agrawal submitted that, from the tax paid by the Petitioner of Rs.553,22,454/-, the tax which had been refunded to the Petitioner is only Rs.193,76,497/- and as the Revenue had the benefit of the said sum of Rs.193,76,497/- from the date of payment to the date of refund, interest on the said amount of Rs.56,29,680/- had been paid to the Petitioner under Section 244A of the Act. He submitted that it is undisputed that what was refunded to the Petitioner by way of tax is only the amount of Rs.193,76,497/- and, therefore, in any view of the matter, it is only this amount which should be reduced to determine the amount of tax paid by the assessee and not the amount of interest. Mr.Agrawal further submitted that, if the amount of interest is also reduced while determining the amount of tax paid by the assessee, it may lead to absurdity. In this context, Mr.Agrawal gave an example that, if the assessee had paid tax of Rs.1,00,000/- and the whole amount had been refunded to the assessee along with interest of Rs.15,000/- under section 244A of the Act, in such a case it may be held that the

assessee has not paid any tax and therefore, the tax paid by the assessee would be 'NIL' as the whole of the tax paid of Rs.1,00,000/- had already been refunded to the assessee. However, if the argument of the Respondents is to be accepted, then the amount of tax paid by the assessee would be determined as negative, i.e. - Rs.15,000/- because according to the revenue, although the assessee has paid tax of Rs.1,00,000/-, refund to the assessee has been granted of Rs.1,15,000/- and therefore, tax paid by the assessee is negative, i.e. - Rs.15,000/-. He submitted that it would be absurd to say that the tax paid by the assessee is a negative amount as it is not possible for an assessee to pay tax in the negative.

23. In these circumstances, Mr.Agrawal submitted that even if one was to reduce the amount of refund granted to the assessee from the tax paid by an assessee, the said reduction should be restricted to the refund of tax and not refund of interest.

24. On the other hand, Mr.Suresh Kumar, the learned Counsel for the Respondents, reiterated the contents of the Affidavit in Reply dated 12.11.1999 filed by Respondent no.2 and in particular, the contents of sub-paragraphs (a), (b) and (c) of paragraph 6 of the said Affidavit, which read as under:-

> (a) The "Disputed Tax" means the total tax determined and payable in respect of the

assessment year but which remains unpaid as on the date of declaration under Kar Vivad Samadhan Scheme. It is true that in the case of the Petitioner the income assessed for the A.Y. 1991-92 was of Rs.31,96,52,478/- and tax determined on the same was of Rs.14,70,40,140/-. The assessee had paid Rs.5,53,22,454/- by way of advance tax and tax deducted at source. The assessee was however issued refund of Rs.2,50,06,177/- which accrued to the assessee as a result of processing of the assessee's return u/s. 143(1)(a) of the Act. This refund amount of Rs.2,50,06,177/- comprised of Rs.1,93,76,497/- being the amount of excess prepaid taxes and Rs.56,29,680/- being the amount of interest on this amount of Rs.1,93,76,497/-. Thus though the assessee had paid Rs.5,53,22,454/- by way of advance tax and tax deducted at source, an amount of Rs.2,50,06,177/- was refunded back to the assessee as per the intimation u/s. 143(1)(a) of the Act much prior in time to making of the assessment and thereby determining the assessed income and the tax payable thereof. The tax paid in advance by the assessee was therefore Rs.3,03,16,277/-only (5,53,22454- 2,50,06,177). On the day of assessee's filing the declaration under the Kar Vivad Samadhan Scheme the tax remaining unpaid i.e. the disputed tax was therefore of Rs.11,67,23,863/- which is the resultant figure arrived at by deducting Rs.3,03,16,277/- being the tax paid in advance from Rs.14,70,40,140/- being the amount of assessed tax. As per the definition the "disputed tax" means the tax determined and payable but which remains unpaid. In view of the fact that in this case an amount of Rs.2,50,06,177/- was already refunded back to the assessee (Rs.1,93,76,497/- being the amount of the excess prepaid taxes and Rs.56,29,680/- being the amount of interest on it) from the prepaid taxes of Rs.5,53,22,454/- obviously while calculating the tax remaining unpaid the deduction of the amount of Rs.3,03,16,277/- was given as the

taxes already paid from the tax determined and payable.

(b) In this case the tax determined and payable was of Rs.14,70,40,140/- and the on the day of declaration under Kar Vivad Samadhan Scheme tax remaining unpaid was of Rs.11,67,23,863/- as already an amount of Rs.2,50,06,177/- was refunded back to the assessee.

(c) It is obvious that while taking into account the amount of the prepaid taxes, the amount of tax already refunded back (out of the prepaid taxes) to the assessee has to be deducted from the amount of the prepaid tax and this fact was intimated to the assessee while rejecting its application for the rectification."

25. In our view, the submissions made on behalf of the Petitioner do not have any merit. Section 88(a)(i) of the Finance Act reads as under:

> ***88:- Settlement of tax payable:-*** Subject to the provisions of this Scheme, where any person makes, on or after the 1st day of September, 1998, but on or before the 31st day of December, 1998, a declaration to the designated authority in accordance with the provisions of section 89 in respect of tax arrear, then, notwithstanding anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under this Scheme by the declarant shall be determined at the rates specified hereunder, namely:-
>
> "*(a) where the tax arrear is payable under the Income-tax Act, 1961 (43 of 1961), -*

> *(i) in the case of a declarant, being a company or a firm, at the rate of thirty-five per cent of the disputed income."*

26. Under the provisions of section 88(a)(i) of the Finance Act, on the basis of the tax arrears / disputed tax, the disputed income of the assessee has to be worked out, and, in order to claim benefits under KVSS, the assessee, if it is a company or a firm, has to pay taxes at the rate of thirty-five per cent of the disputed income so worked out.

27. Section 87(e) of the Finance Act defines disputed income as under:-

> *87(e) "disputed income", in relation to an assessment year, means the whole or so much of the total income as is relatable to the disputed tax."*

28. Section 87(f) of the Finance Act defines disputed tax as under:

> *87(f) "disputed tax" means the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under section 88."*

29. On the basis of the said definitions of disputed tax and disputed income, it is clear that, in order to arrive at the disputed tax, the total assessed tax for that particular year would have to be

worked out, and, from the same, the taxes which may have been paid by the assessee have to be deducted. That disputed tax has to be total tax determined and payable but which remains unpaid, as per the provisions of Section 88(f), 'tax which remains unpaid' as on the date of making declaration. To calculate tax which remains unpaid, it is obvious that, whilst deducting from the total assessed tax the tax already paid, effect would have to be given to any refund issued by the Revenue to the Assessee and to any interest paid thereon by the Revenue to the Assessee. If effect is not given to the said Refund and interest paid by the Revenue to the Assessee, then the figure of disputed tax which would be arrived at would not be tax which remained unpaid.

30. It is true that income of the Petitioner assessed for A.Y. 1991-92 was of Rs.31,96,52,478/- and the tax determined on the same was of Rs.14,70,40,140/-. The Petitioner had paid Rs.5,53,22,454/- by way of advance tax and tax deducted at source. The Petitioner was, however, issued refund of Rs.2,50,06,177/- which accrued to the Petitioner as a result of processing the Petitioner's return under Section 143(1)(a) of the Act. This refund amount of Rs.2,50,06,177/- comprised of Rs.1,93,76,497/- being the amount of excess prepaid taxes and Rs.56,29,680/- being the amount of interest on this amount of Rs.1,93,76,497/-. Thus though

the Petitioner had paid Rs.5,53,22,454/- by way of advance tax and TDS, an amount of Rs.2,50,06,177/- was refunded to the Petitioner as per the intimation under Section 143(1)(a) of the Act much prior in time to making of the assessment and thereby determining the assessed income and the tax payable thereon. The tax paid in advance by the Petitioner was, therefore, Rs.3,03,16,277/- only (Rs.5,53,22,454/- - Rs.2,50,06,177/-). On the day of the Petitioner's filling the declaration under KVSS the tax remaining unpaid, i.e., the disputed tax was, therefore, Rs. 11,67,23,863/- which is the resultant figure arrived at by deducting Rs.3,03,16,277/- being the tax paid in advance from Rs.14,70,40,140/- being the amount of assessed tax. As per the definition, the disputed tax means the tax determined and payable but which remains unpaid. In view of the fact that in this case an amount of Rs.2,50,06,177/- was already refunded back to the Petitioner (Rs.1,93,76,497/- being the amount of the excess prepaid taxes and Rs.56,29,680/- being the amount of interest on it) from the prepaid taxes of Rs.5,53,22,454/- obviously while calculating the tax remaining unpaid the deduction of the amount of Rs.3,03,16,277/- only has to be given as the taxes already paid from the tax determined and payable.

31. In these circumstances, in our view, Respondent no.2, whilst calculating the disputed tax, has correctly taken the assessed

tax at Rs.14,70,40,140/-, and deducted the tax paid by the Petitioner by way of advance tax and tax deducted at source of Rs.5,53,22,454/- after deducting therefrom a sum of Rs.2,50,06,177/- which had been paid to the Petitioner by way of refund and interest under section 143 (1)(a) of the Act. After deducting the said sum of Rs.2,50,06,177/- from the tax paid of Rs.5,53,22,454/-, the Respondent no.2 has correctly arrived at the figure of Rs.3,03,16,277/- as the amount of tax paid. After deducting the said amount of Rs.3,03,16,277/- from the said sum of Rs.14,70,40,140/-, Respondent no.2 has correctly calculated the disputed tax as Rs.11,67,23,863/- and, on the basis of the said sum, has correctly worked out the amount payable by the Petitioner under the KVSS as Rs.8,88,11,635/-. In our view, the said calculation made by Respondent no.2 is in consonance with the provisions of the Finance Act and cannot be faulted.

32. Further, while considering this argument of the Petitioner, it is important to keep in mind the fact that the Revenue refunded tax to the Petitioner, and paid interest thereon, because the Petitioner had not disclosed and calculated tax properly. This being the situation, the Petitioner cannot take advantage of its own wrong and claim that the interest which has been paid to it should not be reduced while computing the disputed tax. We are not

inclined to entertain such an argument at all, and, in any case, definitely not whilst exercising our Writ Jurisdiction.

33. For all the aforesaid reasons, the Writ Petition is hereby dismissed and the Rule issued by this Court is discharged.

34. There shall be no order as to costs.

(FIRDOSH P.POONIWALLA, J.) **(K.R. SHRIRAM, J.)**