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

WRIT PETITION NO.1090 OF 2021

Umesh Navnitlal Shah HUF]
 20, 5th Floor, Swashray Building, E Road,]
 81, Marine Drive, Mumbai – 400 002]
 PAN : AAAHU6459D].....Petitioner.

Versus

1] Income Tax Officer – Circle 18(3)(5),]
 having office at 6th Floor, Earnest]
 House, Nariman Point, Mumbai -]
 400021]
]
 2] Principal Commissioner of Income]
 Tax – 19 (Designated Authority]
 under Direct Tax Vivad se Vishwas]
 Act, 2020) having office at 2nd Floor]
 Matru Mandir, Tardeo, Mumbai]
]
 3] Commissioner of Income Tax]
 (Appeals) – 29 having office at Room]
 No.208, Kautilya Bhavan, Bandra]
 Kurla Complex, Bandra (East),]
 Mumbai].....Respondents

Mr K. Gopal and Ms. Neha Paranjape, for the Petitioner.
Mr Siddharth Chandrashekhar, for Respondent Nos. 1 to 3.

**CORAM M.S. Sonak &
Jitendra Jain, JJ.**

**Reserved on : 06 January 2025
Pronounced on : 08 January 2025**

JUDGMENT : (Per M. S. Sonak, J.)

1. Heard learned counsel for the parties.
2. Rule. The rule is made returnable immediately at the request of and with the consent of learned counsel for the parties.
3. The Petitioner seeks the following substantive reliefs in this Petition:-

a. That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction order or a writ including a writ in the nature of 'Certiorari' to call for the records and verify the declaration filed under section 4(1) of the DTVSV Act and direct the Respondent no. 2 to accept the amount payable as determined by the Petitioner in the declaration dated 21.03.2020 as per section 3(a) of the DTVSV Act and grant the refund as sought in the same.

b. That the Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India appropriate writ or order or direction including a writ in the nature of 'Mandamus' directing the Respondent No. 2 to accept the amount payable as per section 3(a) of the DTVSV Act as determined by the Petitioner in the declaration dated 21.03.2020 filed in Form 1 and 2 and grant the refund as claimed in the same.

c. That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate writ or order or direction including a writ in the nature of 'Prohibition' restraining the Respondent no. 3 from disposing of the appeals pending before him and the Respondent no. 1 and 2 from recovering the outstanding demand disputed in appeals pending before the Respondent no. 3.

d. That this Hon'ble Court may be pleased to issue an appropriate direction or order restraining the Respondents from initiating the recovery proceedings with respect of the 'disputed tax' determined by the Respondent No.3 in the certificate issued in Form 3 and restrain the Respondent no.3 from disposing of the appeal pending before him till the disposal of the present Writ Petition.”

4. At the outset, Mr. K Gopal, the learned counsel for the Petitioner, submitted that the calculation of the amount at the rate of 125% by relying upon the circular dated 04 December 2020 was entirely illegal and ultra-vires. He submitted that this calculation is based on the premise that a search was executed in some other taxpayer's case and that this was not a case of voluntary disclosure by the Petitioner or that this was not a "non-search" case. He submitted that this was indeed a "non-search case", and the Respondents accept this position in paragraph 34 of the Affidavit-in-Reply filed by Mr Vimalendu Verma – Principal Commissioner of Income Tax – 19 on 17 July 2021. Accordingly, he submitted that the calculation should have been based on the rate of 100% of the disputed tax, not 125%. Mr Gopal relied upon **Bhupendra Harilal Mehta Vs. Principal Commissioner of Income-tax, Mumbai-19**¹, in support of this contention.

5. Mr. Gopal submitted that the non-consideration of the additional grounds raised by the Petitioner in the Appeals instituted before the specified date was illegal and arbitrary. He submitted that attempts were made to raise these grounds before 31 January 2020, but this was not possible because of transitional issues and software glitches. He submitted that on 04 December 2020, the Petitioner did raise additional grounds challenging the addition of Rs.2,02,50,919/- on account of Long-Term Capital Gains ("LTCG") under Section 68 of the Income Tax Act, 1961. However, the Respondents have not considered these grounds for determining the disputed tax under the Direct Tax Vivad Se Vishwas Act, 2020 ("DTVSV Act").

¹ (2021) 435 ITR 220 (Bombay)

6. Mr. Gopal submitted that the Respondents have also failed to consider and apply CBDT Circular No.21 of 2020, dated 04 December 2020, which specifies that additional grounds must be considered when computing disputed tax. He submitted that the CBDT Circulars are binding upon the Respondents, and their non-consideration or non-application is illegal and arbitrary.

7. Mr. Gopal submitted that the reliefs claimed in this Petition may be granted based on the above contentions.

8. Mr.Siddharath Chandrashekhar, the learned counsel for the Respondents, submitted that the Petitioner's case was incorrectly treated as a "search case" for computation of the amount payable under the DTVSV Act. He submitted that this error is acknowledged and will be corrected as stated in paragraph 34 of the Principal Commissioner's Affidavit in Reply dated 17 July 2021.

9. Mr. Chandrashekhar, however, submitted that there is no merit whatsoever in the Petitioner's second contention. He submitted that this contention was clearly in the nature of a belated afterthought. This contention was raised after the Petitioner conceded to adding Rs.2,02,50,919/- under Section 68 of the Income Tax Act. This attempt was only to secure the additional benefits under the DTVSV Act, even though the Petitioner was not entitled to such benefits. Accordingly, Mr. Chandrashekhar submitted that there is no illegality or arbitrariness involved in not considering this amount to determine the disputed tax.

10. Mr. Chandrashekhar submitted that there was no breach of the CBDT Circular dated 04 December 2020 because the circular provides that any additional ground filed on or before 31 January

2020 (specified date) could be considered. He pointed out that in the present case, the application for amendment was made only on 04 December 2020. Therefore, he submitted that there was no question of considering these additional grounds even under the Circular dated 04 December 2020.

11. Mr. Chandrashekhar submitted that there were no transitional issues or software glitches, as the Petitioner vaguely claimed. He pointed out that there was not even correspondence to support such contention. He, therefore, submitted that there was no ground for including the amount of Rs.2,02,50,919/- in the “disputed tax” and awarding the Petitioner any additional benefits under the DTVSV Act/Scheme.

12. Mr. Chandrashekhar accordingly submitted that except for redressing the Petitioner’s first grievance, no other reliefs ought to be granted to the Petitioner in this Petition.

13. The rival contentions now fall for our determination.

14. On 11 July 2014, the Petitioner filed its return of income for Assessment Year 2014-15, declaring a total income of Rs.10,46,510/—after claiming a deduction of LTCG under Section 10(38) of the Income Tax Act. During the assessment, the first Respondent, relying upon the information received from the Investigation wing, doubted the genuineness of the LTCG deduction. Accordingly, the petitioner was granted an opportunity to show cause and clear such doubts.

15. On 25 November 2016, the Petitioner tried to contend that the claim under Section 10(38) was genuine and supportable by documents. However, to buy peace and avoid litigation, the Petitioner voluntarily offered this LTCG amount of

Rs.2,02,50,919/- to tax under Section 68 of the Income Tax Act. In the concluding paragraph of the communication dated 25 November 2016, the Petitioner pleaded against initiating any penalty proceedings under Section 271(1)(c) of the Income Tax Act.

16. The penultimate and ultimate paragraphs of the Petitioner's communication dated 25 November 2016 are transcribed below for the convenience of reference: -

“Voluntarily Offering the LTCG to Tax

Your assessee believes that the entire transaction as elucidated herein above was carried out in good faith and for value. The bonafides of the transaction have been clearly brought out in the above explanation as regards the LTCG on sale of 46250 shares of Sunrise Asian Limited. It is equally clear that the gains also qualify for the exemption since the transaction is properly covered by section 10(38) of the Act

In as much as from the clarifications relating to the nature of your assessee's transactions & the stock exchange position of Sunrise Asian Limited it seems clear that your assessee is eligible to claim the requisite exemption u/s. 10(38), your assessee voluntarily offers the LTCG of Rs.2,02,50,919/- on sale of 46250 shares of Sunrise Asian Limited to income tax. This voluntary offering of income is in light of recent tax controversies surrounding the claiming of exemption of LTCG on disinvestment of equity shares. Thereby your assessee is voluntarily giving up the claim of LTCG exemption in order to buy peace of mind and to avoid any tax controversies and litigations.

Penalty Proceedings under the Act

As is evident from the above, the bonafides of the transaction are not in question & that your assessee has voluntarily agreed to offer the exempt LTCG to income tax, there is every reason to believe that true and complete particulars of the facts have already been provided by the assessee. In that light, your assessee pleads before your honours to avoid the initiation of any penal proceedings as against the assessee u/s 271(1)(c) of the Act.

Kindly take the above matters on your records and oblige

For Umesh N Shah HUE,

UMESH NAVNITLAL SHAN HUF

Mr Umesh N Shah KARTA

Karta”

17. On 26 December 2016, the Income Tax Officer (Respondent No.1) made an Assessment Order under Section 143(3) of the Income Tax Act, making addition of Rs.2,02,50,919/- by denying the claim of LTCG under Section 10(38) of the Income Tax Act and further made a disallowance of Rs.9,11,037/- towards commission allegedly paid by the Petitioner under Section 69C of the Income Tax Act. This Assessment Order, dated 26 December 2016, is at Exhibit-C (pages 42 to 44 of the paper book of this Petition).

18. The Assessment Order dated 26 December 2016, after computing the Petitioner’s total income at Rs.2,22,08,470/-, clearly provides that penalty proceedings under Section 271(1)(c) are being initiated separately. Therefore, it is not as if the Petitioner was unaware that its plea for non-initiation of penalty proceedings under Section 271(1)(c) of the Income Tax Act was rejected by the Income Tax Officer vide Assessment Order dated 26 December 2016.

19. On 27 January 2017, the Petitioner appealed the Assessment Order dated 26 December 2016 only to the extent of disallowance of Rs.9,11,037/- under Section 69C of the Income Tax Act. However, the Petitioner did not appeal the addition of Rs.2,02,50,919/- towards LTCG. This was obviously because the Petitioner had conceded and agreed that this amount was liable to

be added to the total income and that the Petitioner was not claiming any deduction under Section 10(38) of the Income Tax Act. This is evident from the perusal of the Appeal Memo at Exhibit-D (Pages 45 to 50 of the paper book of this Petition). The Petitioner even paid the tax on this added amount without any demur.

20. As indicated in the Assessment Order dated 26 December 2016, penalty proceedings were separately initiated against the Petitioner. On 29 June 2017, the Income Tax Officer passed an order under Section 271(1)(c) of the Income Tax Act levying a concealment penalty of Rs.72,07,774/—on the additions towards LTCG and commission.

21. The Petitioner, aggrieved by the penalty order dated 29 June 2017, instituted an Appeal on 01 August 2017. However, this appeal was only restricted to challenging the penalty levy on the two added amounts. In the statement of facts filed along with the appeal memo, the Petitioner contested the additions made in the assessment order only for the limited purpose of quashing the penalty order. This is evident from the Appeal Memo at Exhibit-F (pages 53 to 62 of the paper book of this Petition).

22. When both Appeals were pending, the DTVSV Act 2020 came into force, providing for an amnesty scheme. Section 3 of this Act provides that subject to the provisions of this Act, where 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 arrears, 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 the Act shall be as specified in the table in Section 3 of the said Act.

23. The Table in Section 3 of the DTVSV Act refers to the computation of the amount payable based on the amount of the disputed tax. The expression “disputed tax” is defined under Section 2(j) of the DTVSV Act and, in the context of the present Petition, is to be computed under Section 2(j)(A) of the DTVSV Act. Thus, the “disputed tax”, in the context of the issue raised in the present Petition, means the income tax, including surcharge and cess payable by the appellant under the provisions of the Income-tax Act, 1961, as computed hereunder: -

“(A) In a case where any appeal, writ petition or special leave petition is pending before the appellate forum as on the specified date, the amount of tax that is payable by the appellant if such appeal or writ petition or special leave petition was to be decided against him.”

24. The expression “specified date” referred to in Section 2(j)(A) is defined under Section 2(n) of the DTVSV Act to mean the 31st day of January 2020. Thus, the amount payable under the DTVSV Act, at least in the present case, must be determined based on the amount of tax payable by the Petitioner if its two appeals pending as of 31 January 2020 were to be decided against the Petitioner.

25. As noted earlier, in the Appeal instituted by the Petitioner on 27 January 2017, the Petitioner had only challenged the disallowance of Rs.9,11,037/- under Section 69C of the Income Tax Act. In the appeal instituted by the Petitioner on 01 August 2017, the Petitioner only challenged the penalty of Rs.72,07,774/- on both the additions ordered in the Assessment Order dated 26 December 2016. As of the specified date, i.e. 31 January 2020, there was no challenge to adding Rs.2,02,50,919/- towards LTCG.

This was because the addition was based on Petitioner’s concession and acknowledgement.

26. The CBDT issued Circular No.21 of 2020 on 04 December 2020. This circular contains certain Frequently Asked Questions (“FAQs”) in the context of implementing the DTVSV Act. The Petitioner relies on the Answer to FAQ 77. Therefore, FAQ 77 and the answer to the same are transcribed below for the convenience of reference: -

Question No.	77	Whether any additional ground filed in relation to an appeal is to be considered while computing disputed tax?
Answer		If any additional ground has been filed on or before January 31, 2020, it shall be considered for the purpose of computing disputed tax.

27. Significantly, on 04 December 2020 itself, the Petitioner, vide the document at Exhibit-G (pages 63 to 66 of the paper book of this Petition), attempted to raise additional ground in the pending Appeal to belatedly challenge the addition of Rs.2,02,50,919/—on account of LTCG under Section 68 of the Income Tax Act. This attempt was made after the filing of the declaration under the DTVSV Scheme.

28. Though the learned counsel for the Petitioner tried to contend that for the period between 27 January 2017 and 31 January 2020, the Petitioner made attempts to amend the Appeal Memo by raising a challenge to the addition of the amount of Rs.2,02,50,919/- and the Petitioner was unable to do so account of transitional issues and software glitches, we find that there is absolutely nothing on record to substantiate this contention. Assuming that such attempts were made, the minimum expected was some correspondence on this issue, which would have

included some grievances about transitional issues or software glitches. Besides, it is unlikely that the Petitioner, having explicitly conceded to the addition of Rs.2,02,50,919/- towards the LTCG claim and paid tax thereon, would have turned around and challenged such addition when such addition was based on the Petitioner's concession or rather acknowledgement.

29. Besides, if the Petitioner was indeed and seriously aggrieved by adding Rs.2,02,50,919/- in the Assessment Order dated 26 December 2016, the Petitioner would have challenged the same in the Appeal lodged on 27 January 2017. At least at that stage, there was no question of any transitional issues or software glitches. The Petitioner did file an Appeal on 27 January 2017 without any difficulty. Still, in the said Appeal, the Petitioner chose to challenge only the disallowance of Rs.9,11,037/- under Section 69C of the Income Tax Act and not the addition of Rs.2,02,50,919/- towards the claim of LTCG under Section 68 of the Income Tax Act. This was the conscious decision simply because this addition of Rs.2,02,50,919/- was based upon the concession or the acknowledgement of the Petitioner, and it would be highly odd for the Petitioner to challenge the same. The Petitioner paid taxes on this conceded addition.

30. Mr. Gopal, however, submitted that the concession regarding LTCG was made on the premise that no penalty would be imposed on the Petitioner. He submitted that since a penalty was imposed, the Petitioner had every right to challenge the addition of Rs.2,02,50,919/—to LTCG. At least from a plain reading of the Petitioner's communication dated 25 November 2016 (Exhibit-B), we cannot hold that this was some case of plea bargaining (assuming such plea bargaining is permissible) or that the

concession or acknowledgement was based on the premise that no penalty could be levied upon the Petitioner.

31. In any event, the Assessment Order dated 26 December 2016 explicitly referred to the initiation of penalty proceedings under Section 271(1)(c) of the Income Tax Act regarding the addition of Rs.2,02,50,919/- and the disallowance of Rs.9,11,037/-. Therefore, at that stage, nothing prevented the Petitioner from appealing the addition of Rs.2,02,50,919/- in the Appeal instituted on 27 January 2017 to challenge the addition of Rs.9,11,037/- under Section 69C of the Income Tax Act. Also, nothing prevented the Petitioner from amending the Appeal Memo for the lengthy period between 27 January 2017 and 31 January 2020.

32. By simply and vaguely alleging transitional issues or software glitches, the Petitioner cannot gloss over its apparent attempt to belatedly amend its appeal and see if any additional benefits could be availed under the DTVSV Act or Scheme. As noted earlier, the Petitioner appealed the penalty order dated 29 June 2017, levying a penalty on both additions. However, even at that point in time, there is no material on record to show that the Petitioner retracted from the concession given regarding the addition of Rs.2,02,50,919/-, either by raising an additional ground or otherwise in such an appeal. Only after the DTVSV Act came into force, or rather, only after the CBDT issued its Circular dated 04 December 2020, was an attempt made by the Petitioner to belatedly amend the Appeal Memo and challenge the addition of Rs.2,02,50,919/-.

33. While giving the Petitioner benefits of the DTVSV Scheme, the Respondents correctly refused to consider this belated attempt to amend the Appeal Memo, claiming that even Rs.2,02,50,919/-

constituted a “disputed tax”. Such approbation and reprobation were quite correctly not appreciated by the Respondents. The Respondents' approach is consistent with the DTVSV Act and the CBDT circular dated 04 December 2020.

34. The DTVSV Act aims to settle tax disputes pending in Courts and other adjudicatory authorities as of the specified date. This Act is not some licence to revive settled disputes and, based thereon, claim refunds of the tax paid without demur or expand the scope of the disputes post facto and seek relief under the provisions of the DTVSV Act or the amnesty schemes. The petitioner attempted to post facto and belatedly expand the scope of the dispute to include amounts that the Petitioner had explicitly conceded as liable to additions. The Petitioner never appealed such additions and restricted its appeal only to the addition of Rs.9,11,037/- under Section 69C of the Income Tax Act. The Petitioner also paid the tax on the added amount of Rs.2,02,50,919/- towards LTCG. By such a belated expansion of the disputes, the object of the DTVSV Act or the amnesty schemes cannot be frustrated.

35. The remedies under Articles 226 and 227 of the Constitution are discretionary and equitable. Such jurisdiction must be exercised to promote justice. Here is the Petitioner, who conceded and acknowledged the addition of Rs.2,02,50,919/- towards LTCG, which was incorrectly claimed. It paid tax on this amount without any serious demur. Naturally, therefore, the Assessment Order dated 26 December 2016, which made the addition based upon such concession/acknowledgement, could not have been ordinarily appealed by the Petitioner. The Petitioner, therefore, did not appeal this addition in the Memo of Appeal lodged on 27 January 2017. By attempting to amend the appeal memo belatedly and after the specified date, this amount of Rs.2,02,50,919/- towards LTCG

cannot be considered the disputed tax amount. If this is permitted, the Petitioner, by such a subterfuge or by creating an artificial dispute, will claim a refund of the tax paid without demur or claim concessions even with respect to undisputed taxes already paid.

36. Accordingly, for all the above reasons, we are satisfied that the Respondents did not act illegally or arbitrarily in not considering the additional grounds concerning the addition of Rs.2,02,50,919/—in determining the amount payable under the DTVSV Act. Therefore, the challenge on this count is liable to be rejected and is hereby rejected.

37. However, the Petitioner is on firm ground in contending that the Petitioner's case was not a "search case", or that it was a "non-search case", and therefore, the computation at the rate of 125% as also FAQ 70 of Circular dated 04 December 2020 could be adopted. The record shows, and in fact, it was conceded by the Respondents, that the Petitioner's case was a "non-search case". Therefore, the computation could not be at the rate of 125% but had to be at the rate of only 100%.

38. The decision in *Bhupendra Mehta (Supra)* supports the Petitioner's case regarding the computation of the tax payable amount at 100% instead of 125%. The Respondents conceded this position at the stage of arguments and in the Principal Commissioner's Affidavit dated 17 July 2021. Accordingly, limited interference on this aspect is called for in this matter.

39. In the above regard, we refer to the averments in paragraph 34 of the Principal Commissioner's Affidavit dated 17 July 2021. The same is transcribed below for the convenience of reference: -

"34. However, subsequently, based on the decision of the Hon'ble Bombay High Court in the case of Bhupendra

Harilal Mehta Vs Principal Commissioner of Income Tax, Mumbai and Others dated 27.04.2021 in Writ Petition No.586 of 2021, assessee's case has been treated as a non-search case for determination of amount payable under DTVSV and the amount payable under DTVSV is calculated @100%. Accordingly, a revised Form 3 determining the amount payable @ 100% of the disputed tax for A.Y. 2014-15 is being issued by the Competent Authority.”

40. Mr Gopal submitted that, to date, the revised Form-3 has not been issued by the Competent Authority. Considering that the Affidavit was filed on 17 July 2021, this revised Form-3 should have been issued by now. In any event, we direct that revised Form-3 determining the amount payable at the rate of 100% of the disputed tax for the Assessment Year 2014-15 should be issued by the Competent Authority to the Petitioner within 30 (thirty) days from today, along with all consequential benefits.

41. Thus, the claim for including Rs.2,02,50,919/- for benefits under the DTVSV Act/Scheme is rejected. However, the Petitioner’s contention about determining the amount payable at the rate of 100% of the disputed tax for the Assessment Year 2014-15 is allowed, and the Respondents are directed to issue the revised Form-3 as undertaken by them in their Affidavit within 30 (thirty) days from today along with all consequential benefits.

42. The Rule is made partly absolute in the above terms without any costs orders. Interim orders, if any, are vacated.

(Jitendra Jain, J)

(M.S. Sonak, J)