CASE NO.:
Appeal (civil) 2614 of 2001

PETITIONER:
KILLICK NIXON LTD., MUMBAI

RESPONDENT:
DEPUTY COMMISSIONER OF INCOME TAX, MUMBAI AND ORS.

DATE OF JUDGMENT: 25/11/2002

BENCH:
RUMA PAL & B.N. SRIKRISHNA

JUDGMENT:
JUDGMENT

2002 Supp(4) SCR

The Judgment of the Court was delivered by

SRIKRISHNA, J. This appeal by special leave is directed against the judgment of the High Court of Bombay dated 04.12.2000 dismissing the Writ Petition under Article 226 of the Constitution by which the appellant challenged the notice issued under Section 142(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act')

The brief facts necessary to decide this appeal are as under:

On 26th February, 1993 the appellant filed its return for assessment year 1992-93 and followed it up with a revised return. The Assessing Officer made an order dated 27th March, 1995 under Section 143(3) of the Act disallowing certain claims and rejecting the contentions of the assessee. The appellant filed an appeal before the Commissioner of Income Tax (Appeals). The Appellate Authority by its order dated 25.09.1998 confirmed the order of the Assessing Officer in respect of the following items:

(a) Premium amount of Rs. 3,57,153.00

(b) Depreciation to the extent of Rs. 2,13,000.00

(c) Interest of Rs. 27,14,000.00 (Totaling Rs. 32,84,153.00)

With regard to four items/heads the Appellate Authority set aside the order of the assessment and remitted the matter back to the Assessing Authority with the direction to recompute/reassess after giving an opportunity of hearing to the assessee. The four items/heads remitted to the Assessing Officer were:

"(a) Whether receipt of Rs. 27,93,977.00 represented income from house property or whether it represented business income.

(b) Claim for bad debt of Rs. 68,02,046.00.

(c) Determination of capital gains to the extent of Rs. 4,00,000.00.

(d) Disallowance under Rule 6D to the extent of Rs. 31,963.00."

Being aggrieved by the decision of the CIT (Appeals), the assessee carried an appeal before the Income Tax Tribunal in respect of premium, depreciation and interest, which together represented an amount of Rs. 32,84,153.00.

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.

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.

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.

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:

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(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:

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(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;

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;"

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;"

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."

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.

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.

Counsel for the Revenue however, emphasized that the expression "determined and payable" used in Section 87 gives a clue to understanding the Section. He contended that, in the case of the present appellant, the giving effect order made by the CIT (Appeals) had not been fully worked out by the Assessing Officer as income under the four heads i.e. a) disallowance of bad debts to the extent of Rs. 68,02,046.00; b) income from house property to the.extent or Rs. 27,93,977.00; c) dispute regarding capital gains to the extent of Rs. 4,00,000.00 and d) disallowance under rule 6D amounting to Rs. 31,963.00 had not been finally computed by the Assessing Authority after the findings of the Assessing Authority on these four heads were set aside by the CIT (Appeals) and the matter was remitted to the Assessing Authority. It is Urged that the sum total of these amounts would be in the vicinity of Rs. 99 lacs, while the dispute before the Tribunal was only confined to disallowance of interest (Rs. 27,14,00.00), disallowance of depreciation (Rs. 2,18,000.00) and disallowance in respect of premium paid (Rs. 3,57,153.00). The demand notice issued was only in respect of these items totalling Rs. 33,65,298.00, this amount which had been declared under

the KVSS on which the appellant paid paltry amount of Rs. 9,35,888.00 as tax in full and final settlement. It is also contended that the appellant has escaped payment of tax on a large income of approximately Rs. 99,00,000.00 in respect of bad debts, income from house property, capital gains and disallowance under rule 6D as these disputed issues were never determined by the Assessing Officer. The Designated Authority had assessed the income of the appellant at Rs. 33,65,298.00 only on the basis of KVSS and that he could not have worked out the assessable income as he Assessing Officer had not yet determined the income under the above four heads.

We are unable to accept the contention urged on behalf of the Revenue on both counts. In the first place, we are unable to accept that the assessing Officer in his order dated 25.09.1998, while giving effect to the order of CIT (Appeals), had not taken account of the four major heads of dispute amounting to about Rs. 99 lacs. A reference to that order (which is at Exhibit C-l to the Writ Petition) makes the situation clear. The Assessing Officer starts by saying "Consequent upon the order of the CIT (A) C-l/AP.72/95-96 dated 16.3.1998 the total income of the assessee is re-computed as under:"

Then he starts with the figure of loss arrived at by his order dated 27.3.95 at Rs. 54,28,077.00 and adds thereto to the following items:"

1. Receipts of compensation treated as bad debts as against income from other sources Rs. 5428,077.00

in the original order (p.5)

2. Rent & Licence fees treated as business income as against income from house property Rs. 27,93,977.00

in the original order (p. 7)

3. Interest income treated as business income against income from other sources in the Rs. 15,49,724.00

original order (p. 29)

Totaling Rs. 2,00,81,732.00

He again deducts therefrom the reliefs which had been allowed by C1T (A) on account of following ;

1. Interest disallowance (p. 14) (70,50,000-27,14,756) Rs. 43,35,244.00

2. Disallowance under Rule 6B (p. 17) Rs. 1,25,279.00

3. Foreign travel expenses (p. 21) Rs. 53,740.00

4. Depn. Allowed on motor car, fan & furniture (p. 23) Rs. 67,746.00

Totaling Rs. 45,82,009.00

Finally, he further deducts the relief allowed on account of set-aside issues:

Bad debt (P. 10) Rs. 68,02,046.00

Income from property Rs. 29,52,492.00

Treated as business income Rs. 27,93,977.00

Income from other sources Rs. 1,73,18,438.00

After making these calculations, he arrived at the revised income Rs. 33,65,298.00. Finally, he appends a note on the foot of the order saying, "the following points are set aside by the CIT(A) to be done afresh after giving an opportunity to the assessee of being heard" and indicates the four major heads.

A careful scrutiny of this order suggests that, even while giving effect to the CIT (Appeals) order, the Assessing Officer has taken account of bad debt amounting to Rs. 68,02,046.00 and amount treated as business income as per the Appellate Authority direction of Rs. 27,93,977.00 while working out the revised total income. Out of the four items indicated at the end of the order item Nos. 1 and 2 (income from house property - Rs. 27,93,977.00 and claim of bad debt = Rs. 68,02,046.00 have been deducted by the Assessing Authority, indicating that he agrees with the Assessee's claim. The Assessing Authority does not seem to have taken account of two other items (Capital gains = Rs. 4,00,000.00 and Rule 6D disallowance = Rs. 31,963). We are, therefore, unable to accept the contention that the Assessing Authority had not assessed the disputed heads while giving effect to the CIT (A)'s order. We are fortified in our conclusion by reason of the fact that no demand notice/refund order could have been issued if the assessment was not complete. If the Assessing Officer had not completely assessed the income after taking note of the four issues remitted to him, there was no question of determining the revised total income, much less was there any scope for issuing a demand notice/refund order at that stage. Hence, we are unable to accept that the Assessing Officer had not fully given effect to the CIT (Appeals) order with respect to the four major heads.

It is true that even after this order there was correspondence between the appellant and authorities with respect to disallowance of certain items of tax deducted at source as the appellant-assessee was unable to produce documentary evidence, though it had furnished the necessary indemnity bonds. That, however, was an outstanding dispute by which the assessee, if at all, could be aggrieved. It is also pointed out that revised assessment order giving effect to the appellate order has not taken account of the heads of 'capital gains' and rule 6D disallowance totaling Rs. 4,31,963.00. The grievance, if any, on this count can only be made by the assessee and not the Revenue.

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.

In our view, the High Court erred in both counts in dismissing the writ petition.

In the result, we allow the appeal, set aside the judgment of the High Court and quash the notices under Section 142 (1) of the Act dated 16.8.1999 and 30.12.1999 read with letters dated 16.8.1999, 30.12.1999 and

15.2.2000.

In the facts and circumstances of the case, there shall be no order as to costs.