

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

**HON'BLE SHRI JUSTICE SUSHRUT ARVIND
DHARMADHIKARI**

&

HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA

ON THE 8th OF DECEMBER, 2023

WRIT PETITION No. 10173 of 2021

BETWEEN:-

**SHRI JAGAT BINGLEY LEGAL HEIR OF SMT.
SUMITRA RAJE DALVI S/O LATE SHRI
RAVINDRA BINGLEY, AGED ABOUT 61 YEARS,
1350/2/1 , GULMOHAR COLONY NARSINGARH
KOTHI (MADHYA PRADESH)**

.....PETITIONER

***(SHRI P. M. CHOUDHARY LEARNED SENIOR ADVOCATE WITH SHRI
ANAND PRABHAWALKAR, ADVOCATE)***

AND

**THE DESIGNATED AUTHORITY THR. THE
COMMISSIONER OF INCOME TAX
INDORE CONSTITUED UNDER THE VIVAD**

- 1. SE VISHWAS ACT 2020, AAYAKAR BHAWAN
OPP WHITE CHURCHROAD RESIDENCY
AREA (MADHYA PRADESH)**

**COMMISSIONER OF INCOME TAX
(APPEALS) I INCOME TAX DEPARTMENT**

- 2. AAYAKAR BHAWAN, OPP. WHITE CHURCH,
RESIDENCY AREA (MADHYA PRADESH)**

PRINCIPAL COMMISSIONER OF INCOME
TAX INCOME TAX DEPARTMENT AAYKAR
3. BHAWAN, OPP. WHITE CHURCH,
RESIDENCY AREA (MADHYA PRADESH)

4 CENTRAL BOARD OF DIRECT TAXES
INCOME TAX DEPARTMENT NORTH
BLOCK SECRETARIATE BUILDING
(DELHI)

.....RESPONDENTS

(SHRI VEENA MANDLIK, ADVOCATE)

*This petition coming on for admission this day, JUSTICE SUSHRUT
ARVIND DHARMADHIKARI passed the following:*

ORDER

Heard finally with the consent of both the parties.

In the present writ petition under Article 226 of the Constitution of India the petitioner seeks to challenge the orders dated 31.03.2021 as also the order dated 15.04.2021 passed by the Designated Authority (Respondent No.1) under the Direct Tax Vivaad se Vishwas Act, 2020 (hereinafter referred to as “DTVSV Act, 2020 or 'Scheme'") whereby the said authority has rejected the declaration filed by the deceased assessee Smt. Sumitra Raje Dalvi on the ground that the condition regarding pendency of appeal as on 31.01.2020 is not satisfied.

2. The brief facts of the case are that the petitioner is the son of Smt. Sumitra Raje Dalvi and the same has been filed in the capacity as her legal heir. The deceased mother was a regular income tax assessee and was filing her income tax returns regularly. The present matter relates to Assessment Year 2012-13 relevant to Financial Year 2011-12 in respect of

which an order under Section 143(3) r/w Section 147 of the Income Tax Act, 1961 (hereinafter referred to as the “Income Tax Act”) was passed by the Income Tax Officer – 2(3), Indore vide her order dated 25.12.2019. The said order was passed during the lifetime of the original assessee.

3. Meanwhile and prior to filing of the appeal against the order dated 25.12.2019, the Finance Act 2020 introduced a scheme known as “**The Direct Tax Vivad Se Vishwas Act, 2020**” mainly for settlement of the disputed arrears of taxes and matters connected therewith or incidental thereto. According to the said scheme, an assessee whose appeal, writ petition or special leave petition is pending as on 31.01.2020 before any appellate forum or in whose case, the period of limitation for filing appeal has not expired on 31.01.2020 was eligible to file a declaration under the scheme and was entitled to settle the disputed amount of arrears of taxes in accordance with the scheme. The original time for filing the declaration under the scheme was upto 31.03.2020. However, the period was extended from time to time and ultimately the last date was 31.03.2021. As per the scheme, to take the benefit of the same, could be availed subject to the condition that the appeal is pending on 31.01.2020 or the time for filing appeal has not expired on that day ie. 31.01.2020. Thereafter, a clarificatory Circular No. 21 of 2020 dated 04.12.2020 was issued by the Central Board of Direct Taxes clarifying that in all the cases where the limitation for filing appeals had expired between the period from 01.04.2019 to 31.01.2020 but appeals have been filed alongwith the application for condonation of delay which were pending before the issuance of the said circular dated 04.12.2020 would become eligible to file declaration under the scheme, subject to the condition that the delay has been condoned by the Appellate Authority prior to filing of such

declaration.

4. Admittedly, the case of the petitioner is covered by the above clarification since the limitation for filing the appeal in this case had expired on 28.01.2020 i.e. between the period from 01.04.2019 to 31.01.2020. The petitioner had filed the appeal alongwith the application for condonation of delay on 24.11.2020 i.e. before the date of circular dated 04.12.2020, therefore, she was entitled to file declaration under the scheme and as a consequence a declaration under the scheme was filed vide application dated 18.12.2020 with the expectation that application for condonation of delay would be considered and decided by the appellate authority before final decision on the declaration.

5. The designated authority (Respondent No. 1) under the scheme rejected the petitioner's declaration on the ground that the appeal was not pending on 31.01.2020. Being aggrieved by the said order, the petitioner has preferred the present writ petition.

6. Learned Senior Counsel for the petitioner submitted that the Respondent No. 1 erred in holding that the petitioner was ineligible to settle the amount under the scheme for the Assessment Year 2012-13 on the ground that as per circular dated 04.12.2020, clarification on the provisions of the DTVSV Act 2020, FAQ No.59 did not cover the case of the petitioner and that the appeal ought to have been admitted by the appellate authority before the date of filing of the declaration.

7. Learned Senior Counsel contended that the petitioner had filed the declaration, the fulfilment of the two ingredients is necessary to process the claim of the petitioner.

*(i) That the appeal filed before the appellante forum
should have been pending;*

(ii) That the factum of the pendency of the appeal should have obtained on “specified date” i.e. 31.01.2020.

8. Learned counsel further submitted that the appeal was filed by the petitioner on 23.11.2020 (**Annexure P/5**) including an application for condonation of delay in preferring the appeal shows that the petitioner fulfilled the necessary prerequisites required for processing the claim under the provisions of 2020 Act. He further stated that as per FAQ No.59 which is the part of clarificatory circular dated 04.12.2020 is erroneous as it takes into account aspects which are beyond the scope of provisions of 2020 Act. In as much as the condition that the appeal must be admitted, amounts to creation of *class within a class* without any *intelligible differentia* which violates Article 14 of the Constitution of India.

9. On the other hand, learned counsel for the revenue contended that the authorities are bound to reject the declaration in view of the conditions mentioned in the FAQ-59. The word “*admitted*” is a precondition, therefore, the respondents have rightly rejected the claim of the petitioner.

10. We have heard learned counsel for the parties and perused the record.

11. The primary issue that arises for consideration in the present proceedings is as what is the meaning of the word “pending” in Section 2(1)(a) of the Act of 2020.

Section 2(1)(a) and Section 2(1)(n) of the VSV Act are reproduced herein below:

*“2(1) In this Act, unless the context otherwise requires—
(a) “appellant” means—
(i) a person in whose case an appeal or a writ petition or special leave petition has been filed either by him or by the income-tax authority or by*

both, before an appellate forum and such appeal or petition is pending as on the specified date....

xxx

xxx

xxx

(n) *“specified date” means the 31st day of January, 2020;*

(emphasis supplied)

12. In the opinion of this Court, when a section contemplates pendency of an appeal, what is required is that an appeal should be pending and in such a case there is no need to introduce the qualification that it should be valid, competent or admitted. **In Raja Kulkarni v. The State of Bombay** reported in **AIR 1954 SC 73**, the Supreme Court has held that “whether an appeal is valid, competent or admitted is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g. when it is held to be barred by limitation. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court”.

13. To the same effect is the law laid down by the judgments of the Supreme Court in the cases of **Tirupati Balaji Developers (P) Ltd. v. State of Bihar & Ors.** reported in **(2004) 5 SCC 1** and **Commr. of Income Tax, Rajkot Versus Shatrusailya Digvijaysingh Jadeja, (2005) 7 SCC 294**. In the said cases, it has been held that an appeal does not cease to be an appeal though irregular and incompetent.

14. The Gujarat High Court in **Tushar Agro Chemicals vs. The Principal Commissioner of Income Tax-1, 2021 (7) TMI 1267** has also held as under:-

“11. In view of the aforestated legal position, there remains no shadow of doubt that appeal

could be said to be pending, even if the delay occurred in filing the same was not condoned and even if it was allegedly irregular or incompetent. In the instant case therefore also, the Respondent could not have rejected the Declaration Form of the Petitioner filed under the said Act merely on the ground that the appeal was not valid or competent, as the delay occurred in filing the Appeal was not condoned by the Appellate Authority.....”

CBDT CANNOT ISSUE CIRCULARS ADVERSE TO THE ASSESSEE. THE FAQ NO.59 TO THE EXTENT IT CONTEMPLATES ADMISSION OF APPEAL AS A CONDITION PRECEDENT IN ORDER TO BE ELIGIBLE FOR SETTLEMENT UNDER THE VSV ACT IS CONTRARY TO LAW.

15. Though Section 10 of the VSV Act gives power to the CBDT to issue directions, yet this Court is of the view that the said Section is similar to Section 119 of the Act, 1961. Consequently, the CBDT under Section 10 of VSV Act cannot issue circulars adverse to the assessee.

16. In fact, the Supreme Court in **UCO Bank, Calcutta vs. Commissioner of Income Tax, W.B., (1999) 4 SCC 599** while interpreting Section 119 of the Act, 1961 has held as under:-

“9. xxx xxx xxx
Under sub-section (2) of Section 119, without prejudice to the generality of the Board's power set out in sub-section (1), a specific power is given to the Board for the purpose of proper and efficient management of the work of assessment and collection of revenue to issue from time to time general or special orders in respect of any class of incomes or class of cases setting forth directions or instructions, not being prejudicial to assessee, as the guidelines, principles or procedures to be followed in the work relating to assessment. Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board thus has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing

circulars in exercise of its statutory powers under Section 119 of the Income Tax Act which are binding on the authorities in the administration of the Act. Under Section 119(2)(a), however, the circulars as contemplated therein cannot be adverse to the assessee. Thus, the authority which wields the power for its own advantage under the Act is given the right to forego the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manner as laid down in Section 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorised as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities.”

(emphasis supplied)

17. It is also settled law that when the Supreme Court or High Court declare the law on a question arising for consideration, then the view expressed by the Supreme Court or the High Court has to be given effect to and not the circular issued by the CBDT. The Supreme Court in **Commissioner of Central Excise, Bolpur vs. Ratan Melting & Wire Industries, (2008) 13 SCC 1** has held as under:-

“7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

18. Consequently, the FAQ No.59 of Circular No.21/2020 dated

4th December, 2020 issued by CBDT to the extent it contemplates a condition of admission of appeal before filing of declaration as a condition precedent in order for the appeal to be treated as pending and to be eligible for settlement under the VSV Act is contrary to law, and accordingly the word “**admission**” needs to be ignored.

19. In our view, as noted above, the appeal would be pending as soon as it is filed and up until such time it is adjudicated upon and a decision is taken *qua* the same. The orders of rejection dated 31.03.2021 and 15.04.2021 are bad in law and therefore, the same are accordingly set aside. The respondent No. 1 is directed to process the claim of the petitioner under the provisions of the 2020 Act.

Accordingly, the petition stands **allowed**.

No order as to costs.

(S.A. DHARMADHIKARI)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE