

M/S. TANNA AND MODI
v.
C.I.T. MUMBAI XXV AND ORS.

MAY 17, 2007

[S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

Voluntary Disclosure of the Income Scheme, 1997 :

s.64(2)—Revocation of certificate—Search and seizure action against partners of firm—Income Tax authorities having already discovered assets declared in VIDS by assessee firm—Fact of search not disclosed in VIDS application—Certificate declared null and void—Writ Petition dismissed by High Court—Held: Though under Income Tax Act and VIDS, 1997 a firm and its partner may have to be treated differently, a firm is the conglomeration of its partners, and it is not a juristic person—On facts, disclosure made by firm related to some amount which had been disclosed by partner during search and seizure action—Even source of income was found to be the same—As income of firm vis-a-vis its partners have a direct correlation, while construing a statute granting immunity it should not be construed in such a manner so as to frustrate its object—Keeping in view the purport and object of 1997 Scheme, rule of purposive construction should be applied—Applying the principles underlying Article 136 and 142 of the Constitution, and having regard to nature of fraud practiced upon statutory authorities, no case made out for invoking jurisdiction under Article 136—Constitution of India, 1950—Arts. 136 and 142—Income Tax Act, 1961—Partnership Act, 1831—s. 19—Interpretation of Statutes—Purposive construction

Interpretation of Statutes :

Tax statutes—Circulars issued by Central Board of Direct Taxes—Held: May also be taken into consideration for purpose of construing the statute—Executive construction is ordinarily allowed to prevail and shall be binding on authorities under I.T. Act.

Appellant-assessee, a partnership firm, made a voluntary disclosure, under the Voluntary Disclosure of the Income Scheme, 1997. The said declaration was accepted and a certificate was issued. However, by order dated

- A 8.4.2003, the Commissioner of Income Tax declared the said certificate to be null and void u/s 64(2) of the Scheme, as the search and seizure action had been carried out in respect of the partners of the assessee relating to the assets declared by it in the VDIS application which had been discovered earlier by the Income Tax Department during the course of search and seizure action, but the assessee did not disclose this fact while filing the VDIS declaration.
- B The writ petition filed by the assessee firm having been dismissed by the High Court, the firm filed the instant appeal.

- C It was, *inter alia*, contended for the assessee-appellant that the firm for the purpose of applicability of provision of Income Tax Act being a distinct and separate entity *vis-a-vis* its partners, and there being no search and seizure of the premises of the firm, nor any warrant having been issued, the proceedings could not have been initiated for revoking the certificate issued under the VDI Scheme.

Dismissing the appeal, the Court

- D HELD : 1.1. For the purpose of the application of the provisions of the Income Tax Act, 1961 and the Voluntary Disclosure of Income Scheme, 1997, a firm and its partner may have to be treated differently as a partner of a firm may have income other than his share of profits from the firm.

[Para 17] [243-E]

- E 1.2. It is, however, also well settled that fraud vitiates all solemn acts. Fraudulent actions shall render the act a nullity. It would be *non est* in the eyes of law. Acts of a firm *vis-a-vis* its partners, however, as is understood in common parlance or in terms of the provisions of the Partnership Act, 1932, in a case of this nature, may have to be taken into consideration for judging the validity of action. Under the Partnership Act, a partner represents a firm. He has an implied authority in terms of Section 19 thereof and thus, any action taken by a partner of a firm *vis-a-vis* the firm, unless otherwise specific, binds the firm itself. It is one thing to say that for the purpose of invoking the provisions of the Income Tax Act and other taxation laws a firm and its partners are treated to be separate entities but while construing a statute involving immunity from certain penal actions, the provisions thereof should not ordinarily be judged on the touchstone of the provisions of the 1961 Act, only because the 1997 Scheme has a direct nexus therewith. The immunity granted pursuant to acceptance of a declaration made under the voluntary taxation scheme or Kar Vivad Samadhan Scheme, 1998 does not lead to a total immunity. Immunity granted under the Scheme has its own limitations. The
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Scheme must be applied only in the event the conditions precedent laid down therefore are applicable. [Para 19 and 20] [243-G-H; 244-A-C]

State, CBI v. Sashi Balasubramanian & Anr., [2006] 10 SCALE 541 and *Alpesh Navinchandra Shah v. State of Maharashtra and Ors.*, [2007] 2 SCC 777, relied on

1.3. In the instant case, a raid was conducted in the premises of the firm. Search warrant might have been issued in the name of a partner of the firm. The partner made certain statements. The search revealed some undisclosed income. The firm has a separate legal entity, it could have made a declaration, but it was done in respect of the same amount regarding the partner of the firm made disclosures. It is one thing to say that when a firm has concealed income, each partner need not make a declaration but it would be another thing to say that when a search has been made on the premises of the firm and the books of accounts of the firm are inspected, on the strength of a search warrant issued in the name of one of the partners thereof, a declaration can be made by the firm so as to cover the loopholes. In a case of this nature where fraud is alleged one cannot be oblivious of the fact that each firm acts through its partner. [Para 21] [244-D-G]

1.4. A firm is the conglomeration of its partners, and is not a juristic person. In the instant case, the purported disclosure made by the firm relates to the same amount which has been disclosed by the partner. Even the source of income was found to be the same. As the income of a firm *vis-a-vis* its partners have a direct co-relation, while construing a statute granting immunity, it should not be construed in such a manner so as to frustrate its object. Keeping in view the purport and object which the 1997 Scheme seeks to achieve, in the place of literal interpretation, the rule of purposive construction should be applied. [Para 21] [244-H; 245-A-B]

Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors., [2006] 3 SCC 434 and *National Insurance Co. Ltd. v. Laxmi Narain Dhut*, [2007] 4 SCALE 36, relied on.

Francis Bennion's Statutory Interpretation, referred to.

2. Executive construction is ordinarily allowed to prevail and shall be binding on the authorities under the Act. A' fortiori, clarificatory circulars issued by the Central Board of Direct Taxes may also be taken into

A consideration for the purpose of construction of the statute.

[Para 18] [243-F]

B 3. In any event, it is not a fit case where this Court should invoke its extra-ordinary jurisdiction under Article 136 of the Constitution. It is now well settled that this Court does not exercise its jurisdiction only because it is lawful to do so. It, for the purpose of doing complete justice to the parties, not only may or may not interfere with the impugned judgment but also issue directions in terms of Article 142 of the Constitution. Applying these principles, and particularly having regard to the nature of fraud practiced upon the statutory authorities, no case has been made out for invoking our jurisdiction under Article 136 of the Constitution. [Para 23 and 24]

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2696 of 2007.

From the Final Judgment and Order dated 19.07.2005 of the High Court of Judicature at Bombay in Writ Petition No. 918 of 2005.

D Vimal Chandra, S. Dave, Neelam Kalsi, S.N. Singh, Pallavi Divekar for the Appellant.

Amarjit Singh, Vikas Singh, ASGs., Neera Gupta and B.V. Balaram Das for the Respondents.

E The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

F 2. Interpretation and application of the provisions of Voluntary Disclosure of Income Scheme falls for our consideration in this appeal which arises out of the judgment dated 19.7.2005 passed by the High Court of Judicature at Bombay in Writ Petition (Civil) No. 918 of 2005 dismissing the writ petition filed by the appellant herein, questioning the correctness of an Order dated 13.5.2004 passed by the Commissioner of Income Tax, Mumbai City XXV refusing to entertain an application under voluntary disclosure scheme.

G 3. Appellant is a firm registered under the Indian Partnership Act, 1932. It is also registered under the Income Tax Act, 1961. A search and seizure proceeding was conducted against three individuals Smt. Kuntalaxmi Tanna, Shri Kashyap Tanna and Shri Kauntey Tanna. Office of the appellant was also situate at the same premises where the search and seizure was conducted. A H voluntary disclosure by the firm was made in respect of the assessment year

1994-1995 for a sum of Rs. 2,45,420/- for the assessment year 1994-1995 and Rs. 2,05,470/- for the assessment year 1995-1996 under the Voluntary Disclosure of the Income Scheme, 1997. A

4. By an Order dated 30.12.1997, the said declaration was accepted.

5. Requisite amount of tax was also paid. A certificate was issued by the Commissioner of Income Tax having satisfied himself with the various requirements of the Scheme. Additions made in respect of the assessment years 1994-1995 and 1995-1996 were directed to be deleted by the Commissioner of Income Tax on 29.1.2003 and 24.2.2003 respectively opining that the firm became entitled to the immunity being inherent in the Scheme. B

6. However, an Order was passed by the Commissioner of Income Tax on 8.4.2003 declaring the said certificate to be null and void under Section 64(2) of the Voluntary Disclosure of Income Scheme, 1997 stating; C

"Subsequent to the filing of declaration and issue of certificate u/s. 68(2) of the VDIS 97, it has been brought out that search & seizure action was carried out in respect of the assessee on 18/4/1997 relating to the assets declared by the assessee in the VDIS application filed on 30/12/1997 and this fact was not disclosed by the assessee while filing the VDIS declaration on 30/12/1997. As the assets declared by the assessee under VDIS' 97 had been discovered earlier by the Income Tax Department during the course of Search & Seizure action, the VDIS'97 certificate issued u/s. 68(2) of the VDIS'97 and as such, the certificate u/s. 68(2) of the VDIS'97 dated 10/3/98 issued by the Commissioner of Income Tax (Central) II is held to be null and void." D

7. Appellant contended that the said Order having been passed without complying with the principles of natural justice and behind its back was illegal. A Writ Petition was filed before the Bombay High Court and by an Order dated 4.2.2004, the matter was directed to be considered *de novo* by the Commissioner of Income Tax, whereupon, again by reason of an Order dated 13.5.2004, the Commissioner of Income Tax *inter alia* opined that as a partner is an intrinsic part of a firm, only because no specific search warrant was issued in the name of the assessee firm, the same would not entitle it to take benefit of the 1997 Scheme. E F

It was held; G

"The partner of the firm, Mr. Kauntey M. Tanna was searched and he H

A answered the questions asked of him, as partner of this concern, admitting to the receipt of on money. The figures available from the diaries found at the time of the search show that for F.Y., 93-94, relevant to A.Y. 94-95, total on money received was Rs. 16,36,128/- as per diary No. A-2 written by Shri Kauntey M. Tanna. It is exactly this figures which has been offered by the assessee as the gross receipts of on money under the V.D.I.S. declaration. Therefore, the assessee's claim before the Assessing Officer that the diary and the loose papers were in no way connected with him was patently incorrect. Similarly for the A.Y. 95-96 the diaries found during the course of the search form the basis of the declaration made by the assessee firm.

C It is pertinent to note that during the course of the search, the partner, Shri Kuntey M. Tanna, had admitted to the on money received by the assessee firms on the basis of the seized documents referred to in the assessment order. It is only subsequently that a retraction was made. The assessee had denied at the time of the assessment proceedings only (and not at the time of search proceedings) that the loose papers relied upon by the Assessing Officer written in the partner's hand, did not belong to them and yet it is these papers and loose paper which form the basis of the V.D.I.S. declaration made by them. Therefore, the assessee has falsely claimed before the assessing officer that the papers did not relate to them.

E Moreover, from the facts given above it is very clear that the income disclosed by the assessee firm under the V.D.I.S. 97 was already in the knowledge of the Department as a result of the search and seizure action and that the assessee deliberately withheld this fact from the C.I.T., Central II at the time of filing the V.D.I.S. declaration.

F The assessee has sought to escape through a procedural loophole by emphasizing that no search warrant was executed in the name of M/s. Tanna and Modi and therefore there was no search and seizure action in the case of the firm, and hence the declaration made by it under the V.D.I.S. was valid."

G It was further held;

H "...The V.D.I.S. 97 laid down certain parameters which were to be fulfilled before the assessee can take benefit of the immunity given by the scheme. The broad conditions were that the assessee should make

a full and true disclosure and that the information should not be in the prior knowledge of the Department. Neither, of these two conditions have been met by the assessee in this particular case. At the time of the V.D.I.S. declaration the assessee should have informed the C.I.T. Central II that there was a search and seizure operation and that the document on which basis the declaration was being made was seized at the time of the search operation. To the contrary the assessee has deliberately tried to mislead the C.I.T. Central II by stating that the V.D.I.S. declaration was on the basis of the decision of the Hon'ble I.T.A.T. The assessee failed to mention in his declaration that the information of the on money taken by it on the sale of flat/shop was already with the Department as a result of the search proceedings, therefore the assessee failed to make a full and true disclosure as envisaged in the V.D.I.S. 97.

Moreover, there is no denying that the information relating to the on money received by the assessee firm was available with the Department prior to the V.D.I.S. 97 declaration made by him and that in fact the Departments had been questioning the assessee firm and asking them to explain exactly these entries. Instead of explaining these entries, the assessee firm denied that the documents found belonged to them thereby attempting to subvert the due process of law and deny its genuine tax liability as well as to save itself from further proceedings that it was liable to."

8. Writ Petition filed thereagainst by the appellant has been dismissed by reason of the impugned judgment.

9. The learned counsel appearing on behalf of the appellant *inter alia* would submit that:

- (i) The order passed under Section 64(2) issuing a valid certificate issued by the Commissioner of Income Tax could not have been revoked as by reason thereof full immunity had been granted to the declarant under the Scheme
- (ii) Once a declaration is made under the Scheme, there being no search and seizure on its premises nor any warrant having been issued, the proceedings could not have been initiated for revoking the certificate by the Commissioner of Income Tax.
- (iii) A firm for the purpose of applicability of the provisions of the

A Income Tax Act is a distinct and separate entity vis-a-vis its partners and in the event if it is held that an action on the part of a partner would not bind the firm, the impugned orders cannot be sustained.

B (iv) In any event the partner having retracted his admission, the question of taking any action on the basis thereof would not arise.

C (v) The circulars by the Central Board of Direct Taxes binding on the department where the search warrant having been issued and executed in the name of an individual and the fact that he was a partner of the firm being known to the department, no further information was necessary to be supplied.

D 10. Mr. Vikas Singh, learned Additional Solicitor General appearing on behalf of the respondent, on the other hand, would submit that in this case, the parties not only had a common office but what was declared by the partner of the firm was the very same amount representing the income of the firm and even the source thereof was the same and, thus, a clear case of misrepresentation and unfair disclosure has been made out.

E 11. A Scheme known as Voluntary Disclosure of Income Scheme, 1997 was made by the Parliament under the Finance Act of 1997.

12. Relevant provisions of the said Scheme, before we embark upon the rival contentions of the parties as noticed herein before, may be noticed by us:

F Section 63(a) - "declarant" means a person making the declaration under sub-section (1) of section 64;

G Section 64(1) - Subject to the provisions of this Scheme, where any person makes, on or after the date of commencement of this Scheme but on or before the 31st day of December, 1997, a declaration in accordance with the provisions of section 65 in respect of any income chargeable to tax under the Income-tax Act for any assessment year-

(a) for which he has failed to furnish a return under section 139 of the Income -tax Act;

H (b) which he has failed to disclose in a return of income furnished by him under the Income-tax Act before the date of commencement

of this Scheme. A

- (c) which has escaped assessment by reason of the omission or failure on the part of such person to make a return under the Income-tax Act or to disclose fully and truly all material facts necessary for his assessment or otherwise.

then, notwithstanding anything contained in the Income-tax Act or in any Finance Act, income-tax shall be charged in respect of the income so declared (such income being hereinafter referred to as the voluntarily disclosed income) at the rates specified hereunder, namely - B

(i) in the case of a declarant, being a company or a firm, at the rate of 35 per cent of the voluntarily disclosed income; C

(ii) in the case of a declarant, being a person other than a company or a firm, at the rate of 30 per cent of the voluntarily disclosed income.

(2) Nothing contained in sub-section (1) shall apply in relation to - D

(i) the income assessable for any assessment year for which a notice under section 142 or section 148 of the Income-tax Act has been served upon such person and the return has not been furnished before the commencement of this Scheme;

(ii) the income in respect of the previous year in which a search under section 132 of the Income-tax Act was initiated or requisition under section 132A of the Income-tax Act was made, or survey under section 133A of the Income-tax Act was carried out or in respect of any earlier previous year. E

68(1) - The amount of the voluntarily disclosed income shall not be included in the total income of the declarant for any assessment year under the Income-tax Act, if the following conditions are fulfilled, namely :- F

(i) the declarant credits such amount in the books of account, if any, maintained by him for any source of income or in any other record, and intimates the credit so made to the Assessing Officer; and G

(ii) the income-tax in respect of the voluntarily disclosed income is paid by the declarant within the time specified in section 66 or 67. H

A 13. The Central Board of Direct Taxes in exercise of its power conferred upon it under sub-Sections (1) and (2) of Section 71 of the Finance Act, 1997 made rules known as Voluntary Disclosure of Income Rules, 1997 (the Rules).

Rule 10 of the Rules reads as under:-

B "10. The particulars furnished by a declarant shall be kept secret and shall be treated as confidential. No court or any other authority shall be entitled to require any officer of the Income-tax Department or the declarant himself to produce before it any such declaration or to give evidence before it in this regard. Further, nothing contained in any
C declaration shall be admissible as evidence against the declarant for the purpose of any proceeding relating to imposition of penalty or launching of prosecution under the Income-tax Act, the Wealth-tax Act, the Foreign Exchange Regulation Act, 1975, or the Companies Act, 1956.

D 14. It appears that as there remained certain doubts in regard to the applicability of the said Scheme, *inter alia* in relation to the partners of a firm vis-à-vis firm, some questions were posed which were sought to be answered by issuance of a circular letter No. 754 dated 10.6.1997 by CBDT.

E Question No. 5 : If the firm had concealed income, can the partners file, declaration in respect of such concealed income?

F Answer : The declaration will be by the firm verified by the managing partner. If there is no managing partner, then by one of the partners. The partners need not make declaration regarding their respective share of income.

G Question No. 7 : Where a private limited company has not filed return of income for assessment year 1990-91 in respect of its income as per books of account, can it file a declaration under the scheme and pay tax at 35 per cent?

Answer : Yes

H Question No. 13 : Immunity should also be granted to directors of a company, partners of the firm and members of

the AOP which makes a declaration under the scheme. A

Answer : As far as firms and AOPs are concerned, it is enough if firm and AOPs declare. There is no need for partners and members to declare separately in respect of the income declared by the firm or AOP. In respect of disclosure by the company, no director of the company shall be prosecuted. B

15. There cannot be any doubt that under the Income Tax Act, a firm whether registered or not under the provision of the Indian Partnership Act is treated as a separate assessee. An Order of assessment is passed on the basis of income derived by a person. His total income may consist of his share of profit out of the income of the firm. C

16. It may be true that in that view of the matter, assessment of a firm and assessment of a partner would stand on different footings. D

17. For the purpose of the application of the provisions of the Income Tax Act, 1961 and the Voluntary Disclosure of Income Scheme, 1997, a firm and its partner may have to be treated differently as a partner of a firm may have income other than his share of profits from the firm. E

18. We would also accept and particularly having regard to a large number of decisions of this Court operating in the field that executive construction is ordinarily allowed to prevail and shall be binding on the authorities under the Act. A' fortiori, clarificatory circulars issued by the Central Board of Direct Taxes may also be taken into consideration for the purpose of construction of the statute. F

19. It is, however, also well settled that fraud vitiates all solemn acts. Fraudulent actions shall render the act a nullity. It would be non est in the eyes of law. Acts of a firm vis-à-vis its partners, however, as is understood in common parlance or in terms of the provisions of the Partnership Act, 1932, in a case of this nature, may have to be taken into consideration for judging the validity of action. Under the Partnership Act, a partner represents a firm. He has an implied authority in terms of Section 19 thereof and, thus, any action taken by a partner of a firm vis-à-vis the firm, unless otherwise specific binds the firm itself. It is one thing to say that for the purpose of invoking G

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A the provisions of the Indian Income Tax Act and other taxation laws of a firm and its partners are treated to be separate entities but while construing a statute involving immunity from certain penal actions, in our opinion, the provisions thereof should not ordinarily be judged on the touchstone of the provisions of the 1961 Act, only because the 1997 Scheme has a direct nexus therewith.

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20. It may be necessary for the aforementioned purpose to bear in mind that the immunity granted pursuant to acceptance of a declaration made under the voluntary taxation scheme or Kar Vivad Samadhan Scheme, 1998 does not lead to a total immunity. Immunity granted under the Scheme has its own limitations. The Scheme must be applied only in the event the conditions precedent laid down therefor are applicable. See *State, CBI v. Sashi Balasubramanian & Anr.*, [2006] 10 SCALE 541 and *Alpesh Navinchandra Shah v. State of Maharashtra and Ors.*, [2007] 2 SCC 777.

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21. A raid was conducted in the premises of the firm. Search warrant might have been issued in the name of a partner of the firm. The partner made certain statements. The search revealed some undisclosed income. The firm has a separate legal entity, it could have made a declaration, but it was done in respect of the same amount regarding the partner of the firm made disclosures. What would be the effect of his subsequent retraction is not a matter which we are required to deal with herein. It is one thing to say that when a firm has concealed income, each partner need not make a declaration but it would be another thing to say that when a search has been made on the premises of the firm and the books of accounts of the firm are inspected, on the strength of a search warrant issued in the name of one of the partners thereof, a declaration can be made by the firm so as to cover the loopholes.

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F In a case where sub-section (2) of Section 64 is applied, sub-section (1) thereof would not apply inasmuch as it starts with the term "nothing contained" in sub-section (1) shall apply in relation to. What are the conditions which would make sub-section (1) of Section 64 inapplicable is the income assessable for any assessment year for which a notice under Section 142 or 148 of the Income Tax Act has been served upon such person and the return has not

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been furnished before commencement of the Scheme and upon strict construction, it is possible to argue that the word "such person" must relate to that declarant which being a firm would not include within its purview its partners. But, in a case of this nature where fraud is alleged, we cannot be oblivious of the fact that each firm acts through its partner. A firm is the conglomeration of its partners, and is not a juristic person. In the instant case,

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the purported disclosure made by the firm relates to the same amount which has been disclosed by the partner. Even the source of income was found to be the same. As the income of a firm vis-à-vis its partners have a direct correlation, in our opinion, while construing a statute granting immunity, it should not be construed in such a manner so as to frustrate its object. Keeping in view the purport and object which the 1997 Scheme seeks to achieve, we are of the opinion that in the place of literal interpretation, the rule of purposive construction should be applied.

22. In Francis Bennion's Statutory Interpretation, purposive construction has been described in the following manner:

"A purposive construction of an enactment is one which gives effect to the legislative purpose by-

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction)."

[See also *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors.*, [2006] 3 SCC 434 and *National Insurance Co. Ltd. v. Laxmi Narain Dhut*, [2007] 4 SCALE 36.

23. In any event, it is not a fit case where we should invoke our extraordinary jurisdiction under Article 136 of the Constitution of India. It is now well settled that this Court does not exercise its jurisdiction only because it is lawful to do so. It, for the purpose of doing complete justice to the parties, not only may or may not interfere with the impugned judgment but also issue directions for the purpose of doing complete justice to the parties in terms of Article 142 of the Constitution of India.

24. Applying the aforementioned principles, and particularly having regard to the nature of fraud practiced upon the statutory authorities, we are of the opinion that no case has been made out for invoking our jurisdiction under Article 136 of the Constitution of India. The appeal is dismissed.

RP.

Appeal dismissed.