

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SMT RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No.2652/Mum/2023
(Assessment Year :2010-11)**

Pragati PreFab(India) Pvt.Ltd. A-104, Hinal Heritage, Patel Wadi, SVP Road Behind Digambar Jain Temple, Borivali (W) Mumbai-400 092	Vs.	Income Tax Officer - 13(1)(4) Aayakar Bhavan Maharishi Karve Road Mumbai - 400 020
PAN/GIR No.AAEC7910M		
(Appellant)	..	(Respondent)

Assessee by	Shri Anant Pai
Revenue by	Ms. Madhu Malati Ghosh
Date of Hearing	07/05/2024
Date of Pronouncement	09/05/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 08/06/2023 passed by NFAC Delhi for the quantum of assessment passed u/s.147 r.w.s. 144 for the A.Y.2010-11.

2. The brief facts and background of the case are that assessee company had filed its return of income for A.Y.2010-11 on 23/09/2010 declaring total income of Rs.13,37,173/- and the

said return was duly processed and accepted vide intimation u/s.143(1) dated 29/08/2011. Based on certain information from Sales Tax department that assessee had taken some bogus purchases from hawala entry providers, the assessee's case was reopened u/s.147. Thereafter, an addition of entire purchases of Rs.34,04,690/- was made by the ld. AO. Apart from that, ld. AO has also made addition on account of share capital and share premium for sums aggregating to Rs.11,20,00,000/-. Against assessment order dated 28/03/2016, assessee preferred an appeal before the First Appellate Authority. During the pendency of first appeal, assessee opted for 'Vivad Se Vishwas Scheme' and filed declaration on 31/01/2021 under Direct tax VSVS Rules 2020. However, the said application / declaration was rejected by the department on the ground that the prosecution u/s. 276-C(2) had been filed before Chief Metropolitan Magistrate, Mumbai and therefore, assessee is not eligible for VSVS as already prosecution has been launched. Here in this case prosecution has been launched for non-payment of demand arising out of the assessment order as assessee had paid only 20% of the entire disputed payment arising from the additions / assessment made by the ld. AO vide order u/s.147 /144 and it is not the case that assessee has not paid tax on return of income. Against the said rejection of VSVS petition by the department, assessee filed writ petition before the Hon'ble Bombay High Court being writ petition No.5292 of 2021. The Hon'ble Bombay High Court after noting down the entire facts, discussing the entire scheme of DTVSV Act and the decision of the Hon'ble Bombay High Court

in the case of **Macrotech Developers Ltd reported in (2021) 434 ITR 131 (Bom)** held that the department cannot reject the application for VSVS under such circumstances. Hon'ble High Court after referring to the judgment and analyzing various provisions of DTVSV as well as Circular No.20 of 2020, the Hon'ble High Court observed and held as under:-

"20. In Macrotech Developers Ltd. (supra), the assessee had not paid even the self-assessment tax on time but deposited it later with interest after the due date.

In the case at hand, assessee had paid self-assessment tax but has not paid the demand made due to reassessment/reopening of assessment and has challenged the order now pending before ITAT. As permissible under Office Memorandum [F. No. 404/72/93-ITCC] dated 31st July 2017, petitioner had even deposited 20% of the demand and hence, is not an assessee in default. Later, Mr. Sridharan stated that the entire amount has been paid

We must also note that under section 9(a)(ii) of DTVSV Act, the only exclusion visualised is a pendency of prosecution in respect of tax arrear relatable to an assessment year as on the date of filing the declaration and not pendency of a prosecution in respect of an assessment year on any issue.

21. In the petition before us also prosecution has been instituted against petitioner under section 276C(2) of the Act. Therefore, in our view, Macrotech Developers Ltd. (supra), will squarely apply to the facts and circumstances of this case.

22. The declaration of petitioner filed on 31st January 2021 for Assessment Years 2010-2011 and 2011-2012 would have to be decided by respondent No. 1 in conformity with the provisions of DTVSV Act.

23. Petition is accordingly allowed to the extent indicated above.

4. Thus, once the Hon'ble High Court has held that declaration of the assessee filed on 31/01/2021 was in conformity with the provisions of DTVSV Act, therefore, the benefit of the said scheme has to be given to the assessee. However, before the judgment of the Hon'ble High Court was rendered i.e. 12/09/2023, ld. CIT (A) had already passed the order on 08/06/2023 and therefore, he did not had the benefit of the said judgment and had dismissed the appeal of the assessee *exparte*.

5. Accordingly, we are restoring this matter back to the file of the ld. CIT (A) and in the meantime, the department is directed to implement the judgment of the Hon'ble High Court and decide the application filed under VSVS dated 31/01/2021 and accordingly, assessee can withdraw the appeal once the department implements the order of the Hon'ble Bombay High Court.

6. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced on 9th May, 2024.

Sd/-
(RENU JAUHRI)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 09/05/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Asstt. Registrar)
ITAT, Mumbai