

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3283 of 2001

For Approval and Signature:

**HONOURABLE MS.JUSTICE HARSHA DEVANI
HONOURABLE MR.JUSTICE H.B.ANTANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KALPESH RATILAL KALATHIA - Petitioner(s)

Versus

COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR MANISH J SHAH for Petitioner

MRS MAUNA M BHATT for Respondent

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CORAM : HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 04/03/2011

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the communication dated 5.10.1998 (Exhibit-B to the petition), whereby the petitioner has been informed that since he has not paid the tax as required under section 67(1) of the Finance Act, 1997 (the Act) in respect of the Voluntary Disclosure of Income within the stipulated time, his declaration furnished under section 65(1) of the Act, is treated as being never to have been filed under the Scheme and refusing to issue the certificate under section 68(2) of the Act.
2. The petitioner filed a declaration on 22.12.1997, disclosing income of Rs.4,74,584/- for assessment years 1969-70, 1989-90 and 1990-91. Under section 64 of the Act, the declaration in accordance with the provisions of section 65 was required to be filed on or before 31.12.1997. Section 65 of the Act made provision for the particulars to be furnished in the declaration. Section 66 of the Act which prescribed the time for payment of tax under the Scheme laid down that the tax payable under the Scheme in respect of the voluntarily disclosed income shall be paid by the declarant and the declaration shall be accompanied by proof of such tax. Section 67 of the Act, however, laid down that notwithstanding anything contained in section 66, the declarant may file a declaration without the tax under that section and may file the declaration and may pay the tax within three months from the date of filing of the declaration with simple interest at

the rate of two percent for every month or part of a month comprised in the period beginning from the date of filing the declaration and ending on the date of payment of such tax and file the proof of such payment within the said period of three months. It is the case of the petitioner that under a wrong impression that such delayed payment could be made upto 31.3.1998, he made payment of tax and interest on 27.3.1998. Thus, there was a delay of four days though interest for this delay at the rate of 2% per month had already been paid.

3. Vide the impugned communication dated 5.10.1998, the petitioner was informed that the payment was to be made within three months of filing of the declaration and his declaration was, therefore, rejected. The petitioner thereafter made an application dated 2.11.1998 to the Central Board of Direct Taxes, stating that neither at the time of receipt of the declaration nor at any later point of time, was the petitioner informed that he must make payment within 90 days of the declaration. The petitioner, therefore, represented to the Board to accept the declaration. Despite various reminders, the last being dated 21.4.2001, since nothing was heard from the Board one way or the other, the petitioner approached this Court by way of present petition challenging the above referred communication.
4. Various other contentions have been raised in the petition. However, in the light of what follows, it is not

necessary to refer to the same.

5. Heard Mr. Manish Shah, learned advocate for the petitioner and Mrs. Mauna Bhatt, learned Standing Counsel for respondent authority.
6. It is an agreed position between the parties that the controversy involved in the present case is no longer *res integra* as the same stands concluded against the assessee by the decision of the Supreme Court in the case of **Hemalatha Gargya Vs. Commissioner of Income-Tax and Another** (2003) 259 ITR 1 wherein the Supreme Court has held thus :

“We are of the view that the submissions of the Revenue must be accepted. A plain reading of the provisions of the Scheme would show that the tax payable under the Scheme “shall be paid” within the time specified is the general rule provided in section 66, namely, payment prior to the making of a declaration. The exception to this general rule has been carved out by section 67(1) which allows a declarant to file a declaration without paying the tax. This exception, however, is subject to two conditions, viz., (1) the payment of tax within three months from the date of the filing of the declaration together with, (2) the payment of simple interest at the rate of two per cent. for every month or part of a month. The period of interest is to commence from the date of filing the declaration and shall

end with the date of payment of tax. It may be noted that under section 67(1) not only must these two conditions be fulfilled within the period of three months but proof of such payment must also be filed within the same period.

*The use of the word "shall" in a statute, ordinarily speaking, means that the statutory provision is mandatory. It is construed as such unless there is something in the context in which the word is used which would justify a departure from this meaning. There is nothing in the language of the provisions of the scheme which would justify such a departure. On the other hand, the provisions of section 67(2) make it abundantly clear that if the declarant fails to pay the tax within the period of three months as specified, the declaration filed shall be deemed never to have been made under the scheme. In other words, the consequences of non-compliance with the provisions of section 67(1) relating to the payment have been provided. It is well-settled that when consequences of the failure to comply with the prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory (see *Maqbul Ahmad v. Onkar Pratap Narain Singh*, AIR 1935 PC 85, 88).*

Besides the scheme has conferred a benefit on those who had not disclosed their income earlier by affording them protection against the possible legal consequences of such non-disclosure under the provisions of the Income-tax Act. Where the assesseees seek to claim the benefit under the statutory scheme they are bound to comply strictly with the conditions under which the benefit is granted. There is no scope for the application of any equitable consideration when the statutory provisions of the scheme are stated in such plain language.

Seen from the angle of the designated authority, which is created under the Scheme, it is clear that the authority cannot act beyond the provisions of the Scheme itself. The power to accept payment under the Scheme has been prescribed by the statute. There is no scope for the Revenue authorities to imply a provision not specifically provided for which would in any way modify the explicit terms of the Scheme.”

“However, having held that the assesseees are not entitled to the benefit of the Scheme since the payments made by them were not in terms of the Scheme, we direct the Revenue authorities to refund or adjust the amounts already deposited by the assesseees in purported compliance with the provisions of the Scheme to the concerned assesseees in accordance with

law”.

7. This High Court has also followed the above decision of the Supreme Court vide order dated 17.6.2008 rendered in the case of **Hakimchand D. Chotai v. Commissioner of Income Tax** in Special Civil Application No.445 of 2000 [(2009) 221 CTR 589].
8. For the foregoing reasons, the petitioner is not entitled to the principal relief prayed for in the petition. However, following the course of action adopted by the Supreme Court in the aforesaid decision, having held that the petitioner is not entitled to the benefit of the Scheme since the payment was not made in terms of the Scheme, the respondent authority is directed to either refund or adjust the amount of Rs.4,74,584/- already deposited by the assessee in purported compliance of the provisions of the Scheme, in accordance with law.
9. In the result the petition succeeds in part and is accordingly allowed to the aforesaid extent. Rule is made absolute accordingly to the aforesaid extent with no order as to costs.

[HARSHA DEVANI, J.]

[H.B.ANTANI, J.]