IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1028 OF 2021

Cooperative Rabobank U A,
20th Floor, Tower A,
Peninsula Business Park,
Senapati Bapat Marg,
Lower Parel (West),
Mumbai – 400 013. ... Petitioner

Versus

1. Commissioner of Income Tax (IT),
Mumbai-2, having his office at
17th Floor, Air India Building,
Nariman Point, Mumbai – 400 021.

2. Union of India
Through the Secretary,
Department of Finance,
Ministry of Finance,
Government of India,
North Block, New Delhi-110. ... Respondents

Mr. Percy Pardiwalla, Senior Advocate i/by Mr. Atul Jasani, Advocates for Petitioner.
Ms.S.V. Bharucha, Advocate for Respondents.

CORAM : SUNIL P. DESHMUKH AND ABHAY AHUJA, JJ.

RESERVED ON : 24TH JUNE, 2021.

PRONOUNCED ON : 7TH JULY, 2021.

JUDGMENT : (PER ABHAY AHUJA, J.)

1. By this Petition filed under Article 226 of the Constitution of India, 1950, Petitioner is challenging the validity of Form-3, dated 28th January, 2021 and 26th March, 2021 issued under Section 5 of the Direct Tax Vivad Se Vishwas Scheme, 2020 (the "DTVSV Act") by the Designated Authority for Assessment Year 2002-2003.

2. Petitioner is a bank established in the Netherlands and it is a part of the Rabobank Group worldwide. It is submitted that Petitioner is a regular assessee under the Income Tax Act, 1961 (the "IT Act").

3. Petitioner had filed a Return of Income on 31st March, 2003 declaring nil income. The Assessment Order was passed on 28th March, 2005 assessing business profits attributable to permanent establishment (PE) at Rs.31,25,060/-. Being aggrieved by the said order, an appeal was filed before the Commissioner of Income Tax (Appeals) ["CIT(A)"] on 28th April, 2005. The CIT(A), by its order dated 15th May, 2006 deleted the addition, holding that

Petitioner does not have a PE in India. Thereafter, the assessing officer filed Appeal before the Tribunal on 11th August, 2006. The Tribunal, by its order dated 1st April, 2015, restored the issue to the file of the assessing officer. Against the said order, Petitioner filed an Appeal before this Court on 23rd September, 2015 under Section 260A of the IT Act. Petitioner also filed Miscellaneous Application before the Tribunal, which came to be rejected by an order dated 21st August, 2018. Thereafter, on 29th August, 2018, this Court in Income Tax Appeal No.1198 of 2015 with Income Tax Appeal No.260 of 2016 with Income Tax Appeal No.264 of 2016 passed an order setting aside both the orders of the Tribunal, viz., the order dated 1st April, 2015 restoring the issue to the file of the assessing officer as well as the order dated 21st August, 2018 dismissing the Miscellaneous Application filed by Petitioner. The High Court directed the Tribunal to decide the matter afresh. The following paragraphs of the order of this Court are relevant and are quoted as under :-

> *"26 In the backdrop of all this, and further facts noted, a cryptic order has been passed by the Tribunal. In fact, in paragraph 5 of the order under challenge in reference to the Income Tax Appeal No. 4632/MUM/2006 for Assessment Year 2002-2003,*

the Tribunal says that the Indian company had made payment to the Assessee for providing the advisory services to it and under the Head "Guarantee Commission" and that the Indian company was paying the Assesee more than 30% of its income. That the basic issues are, as to whether the Assesee had permanent establishment in India or not and as to whether the services rendered by the Indian company could be treated as the activities carried out by the Assessee. Yet, it says that there is nothing on record to prove that the provisions of Article 5(1) of the Agreement are applicable. That stipulates that the permanent establishment for the purpose of convention meant a fixed business through which the business of the enterprise was wholly or partly carried on. The conclusion is that the Assessee was not having fixed place of business in India. Hence, the First Appellate Authority rightly held that the provisions of Article 5 (1) were inapplicable. It is in these circumstances we are surprised that the Tribunal still deems it fit and proper to remand the case. If there was indeed no material on record, then, the above conclusion was impossible to be reached.

27 Be that as it may, we do not wish to express any opinion on the rival contentions for it may prejudice both sides. In fact, resorting to such

shortcuts, results in wastage of precious judicial time of the Tribunal as also Higher courts and delaying the collection and recovery of Revenue, if any. It only enables the parties to postpone the inevitable. It also results in uncertainty and chaos. Judicial decisions have to be consistent and all the more there should be no confusion. There ought to be some predictability and when given facts and circumstances give rise to certain legal principles which parties assert are applicable, then, as a last fact finding authority, the Tribunal could have summoned all records and thereafter should have arrived at a categorical conclusion whether the First Appellate Authority was right or the Assessing Officer. This having admittedly not been done, we are of the firm opinion that the Tribunal failed to act as a last fact finding authority. It failed to discharge its duty and function expected of it by the law. We have no hesitation, therefore, in answering question nos.1 and 2 as reproduced above in favour of the Assessee and against the Revenue.

28 Having thus answered these substantial questions of law, we set aside the order of the Tribunal. We cause no prejudice to the parties but balance their rights and equities. We restore the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits and in accordance with law.

29 Needless to clarify therefore, that the initial order dated 1st April, 2015 and the order on the Miscellaneous Applications for rectification are quashed and set aside There shall be no order as to costs.

30 All the three Appeals are disposed of accordingly."

4. With the enactment of the DTVSV Act on 17th March, 2020, Petitioner made declaration in Form-1 along with Undertaking in Form-2 according to the provisions of the DTVSV Act and the Rules thereunder indicating that an Appeal No.4632/MUM/2006 was pending in the Tribunal, which was filed by the Department and there was no application pending on behalf of Petitioner. In the said declaration, Petitioner had indicated an amount payable under the DTVSV Act as Rs.7,50,014/-, which was 50% of the disputed tax. Thereafter, on 28th January, 2021, Form-3 was issued by the Designated Authority indicating the amount payable as Rs.15,00,029/-, which was 100% of the tax arrears, whereas the amount payable indicated by the tax payer was Rs.7,50,014/-. The said Form also refers to the same Appeal

Reference No.4632/MUM/2006 as was contained in Form-1. Even, the corresponding column pertaining to Schedule number refers to the pendency of Appeal of the Department before Income Tax Appellate Tribunal (the "ITAT") as on 31st January, 2020.

5. Thereafter, on 19th March, 2021, Petitioner filed rectification application before the Designated Authority explaining as to how the Appeal, that was pending before the ITAT, was the Revenue's Appeal and not Petitioner's Appeal. Once again on 26th March, 2021, a revised Form-3 was received determining the amount payable at 100% of the tax arrears, instead of 50% as claimed by Petitioner.

6. Being aggrieved by the same, Petitioner is before us for the following reliefs :-

> *"a. to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof, quash and set aside the Impugned Forms No.3 dated 28th January*

2021 (Exhibit "J") and 26th March 2021 (Exhibit "L") issued by Respondent No.1 for the assessment year 2002-03;

b. *to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India, ordering and directing Respondent No.1 to forthwith withdraw and cancel the Impugned Forms No.3 dated 28th January 2021 (Exhibit "J") and 26th March 2021 (Exhibit "L") issued by Respondent No.1 for the assessment year 2002-03 and further ordering and directing Respondent No.1 to issue Form No.3 treating the Petitioner as the Respondent and consequently determining the amount payable under the VSV Act at 50% of the tax arrears;"*

7. Respondent-Revenue has filed its affidavit in reply dated 14th June, 2021. It is submitted on behalf of Revenue that Revenue had filed an Appeal before the ITAT and ITAT directed restoration of the issue back to the assessing officer for fresh adjudication and that the said decision of the ITAT was accepted by the Revenue. He submits that the assessee thereafter filed an Appeal before the

Bombay High Court against the said order of the ITAT. The Bombay High Court has restored the matter to the ITAT for fresh consideration. He submits that ITA No.4632/MUM/2006 has been restored on the assessee's Appeal and, therefore, the dispute pending before the ITAT is assessee's Appeal and not of the Revenue; the Appeal currently in adjudication being assessee's Appeal, it justifies levy of 100% tax as per the DTVSV Act and not 50% of the disputed tax.

8. We have heard Shri Pardiwalla, learned Senior Counsel, on behalf of Petitioner and Ms. Bharucha, learned Counsel for Respondents and with their able assistance, we have perused the papers and proceedings in the matter.

9. Petitioner has filed Form-1 stating that it is eligible for payment of 50% of disputed tax as according to Petitioner the pending appeal is Revenue Appeal, whereas department has treated the same as dispute due to Assessee Appeal, requiring Petitioner to pay 100% of disputed tax. There being no other dispute, the issue at hand is whether the Appeal pending before the ITAT is a Revenue Appeal or an Assessee Appeal. Before answering this question, it

would be apposite to refer to Section 3 of the DTVSV Act to appreciate the cause of this conundrum. Section 3 of the DTVSV Act is quoted as under :-

> *"3. Subject to the provisions of this Act, where a declarant files under the provisions of this Act on or before the last date, a declaration to the designated authority in accordance with the provisions of section 4 in respect of tax arrear, then, notwithstanding anything contained in the Income-tax Act or any other law for the time being in force, the amount payable by the declarant under this Act shall be as under, namely:—*

Sl. No.	*Nature of tax arrear.*	*Amount payable under this Act on or before the 31st day of March, 2020.*	*Amount payable under this Act on or after the 1st day of April, 2020 but on or before the last date.*
(a)	*where the tax arrear is the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax.*	*amount of the disputed tax.*	*the aggregate of the amount of disputed tax and ten per cent. of disputed tax:* *Provided that where the ten per cent. of disputed tax exceeds the aggregate amount of interest chargeable or*

			charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act.
(b)	*where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search under section 132 or section 132A of the Income-tax Act.*	*the aggregate of the amount of disputed tax and twenty-five per cent. of the disputed tax: provided that where the twenty-five per cent. of disputed tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such*	*the aggregate of the amount of dispute tax and thirty-five per cent. of dispute tax:* *provided that where the thirty-five per cent. of dispute tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such dispute tax, the excess shall be ignored for the*

		disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act.	*purpose of computation of amount payable.*
(C)	*where the tax arrear relates to disputed interest or disputed penalty or disputed fee.*	*twenty-five per cent. of disputed interest or disputed penalty or disputed fee.*	*thirty per cent. of disputed interested or disputed penalty or disputed fee:*

Provided that in a case where an appeal or writ petition or special leave petition is filed by the income-tax authority on any issue before the appellate forum, the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided further that in a case where an appeal is filed before the Commissioner (Appeals) or objections is filed before the Dispute Resolution Panel by the appellant on any issue on which he has already got a decision in his favour from the Income Tax Appellate Tribunal (where the decision on such issue is not reversed by the High Court or the Supreme Court) or the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-

half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided also that in a case where an appeal is filed by the appellant on any issue before the Income Tax Appellate Tribunal on which he has already got a decision in his favour from the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed."

10. Plain reading of the table in the above Section of the DTVSV Act suggests that in the case of an eligible Appellant, if it is a non search case, then the amount, that is payable would be 100% of the disputed tax, if it is a search case, then it would be 125% of the disputed tax. However, in a case where the Appeal is filed by the Income Tax authority, the amount payable shall be one-half of the amount calculated. The question is whether Petitioner is eligible for payment of 50% of disputed tax or 100%.

11. In this case, assessing officer had made addition with respect to permanent establishment in the case of Petitioner and consequently denied it benefits of the double taxation avoidance

agreement. The entire income was taxed at 40% instead of 10% as declared by Petitioner. Then the matter was appealed to CIT(A). The additions were deleted. Against the said deletions, the Department filed an Appeal before the ITAT being ITA No.4632/MUM/2006 against the order of CIT(A). The Tribunal restored the matter back to the assessing officer for fresh examination. It is stated that the Department had accepted this order of the ITAT. However, Petitioner challenged this order before this Court by way of an Appeal raising the following two questions :-

> *"(i): Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in not concluding that the Appellant does not have a Permanent Establishment in India and instead setting aside the order of the CIT (A)?*
>
> *(ii):Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in remanding the matter back to Assessing officer for fresh consideration when the Assessing officer has not discharged the burden of proving that the Appellant had a PE in India?"*

12. This Court, by its order dated 29th August, 2018, answered the substantial questions of law in favour of the assessee and against the Revenue and set aside the order of the Tribunal.

This Court restored the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits and in accordance with law.

13. The matter is, therefore, pending before the ITAT for fresh adjudication and this is the dispute, which Petitioner is desirous of settling under the DTVSV Act. Relevant factual aspects are not in dispute. Against order of departmental assessing officer at first rung, appeal under Section 246 of the IT Act had been preferred by the assessee/petitioner to the CIT(A) and the same was decided in its favour. Aggrieved by the decision of CIT(A), the Revenue-Respondent preferred an Appeal bearing No. 4632/MUM/2006 before ITAT as provided under Section 253 of the IT Act. Against order of remand passed by ITAT, Petitioner preferred appeal before this Court under Section 260A of the IT Act. The substantial questions of law in appeal before this Court were tested and the matter resulted in setting aside order of ITAT, restoring the Appeal No.4632/MUM/2006 before ITAT for decision pursuant to aforementioned orders of this Court. What had been revived in the process, is the matter before ITAT which was preferred by the Revenue. The Appeal before ITAT was not filed by the assessee against order of CIT(A). Here it is the Revenue which

went to ITAT against order of CIT(A). This Court had sent back the matter to ITAT and what was before ITAT is a matter by Revenue. Factually as well as in law it was Revenue's matter which stands revived. It is also not the Revenue's case that they have not accepted the said decision of this Court. Going by the above discussion, to our mind, there is no doubt that Appeal No.4632/MUM/2006, which is pending, is Revenue's Appeal, which has also all along in Form-1 as well as in Form-3 been referred to as an Appeal by the department. Moreover, this fact is also clearly borne out by the oral judgment of this Court dated 29th August, 2018. This would leave nothing more for us to say except that the Revenue has completely misunderstood the facts. In the whole process, what is resurrected under orders of High Court is not the proceeding in ITAT by Petitioner, but of the Revenue preferred under Section 253 of the IT Act bearing No. 4632/MUM/2006, where the Revenue is Appellant. May be the Appeal by the Revenue is revived at the instance of Petitioner because of its proceedings in the High Court, but that would by no stretch of imagination make the appeal bearing No. 4632/MUM/2006 before ITAT, an appeal by Petitioner under Section 253 of the IT Act. Setting aside of order of the ITAT in the Appeal by Revenue and remand to ITAT postulates

revival of appeal by the Revenue. It would therefore not be correct to say that the matter bearing Appeal No.4632/MUM/2006 under Section 253 of the IT Act before the ITAT in the present case becomes an Appeal by Petitioner, as ITA No. 4632/MUM/2006 has been restored to the ITAT on the Assessee's Appeal to High Court and not of the Revenue. Considering that the objective of the Scheme is to not only benefit the tax payer, but also the Revenue's collection, we do not wish to say any further.

14. Having observed that the pending Appeal No. 4632/MUM/2006 is a Revenue Appeal, the first proviso of Section 3 of the DTVSV Act would become applicable and, accordingly, the amount payable by the Petitioner would be 50% of the amount, viz., 50% of the disputed tax.

15. Accordingly, we quash and set aside Form-3 dated 26th March, 2021 issued by Respondent No.1 for Assessment Year 2002-2003. We, further direct Respondent No.1 to issue fresh Form-3 in accordance with our above discussion within two weeks from the date of pronouncement of this judgment.

16. Petition is allowed in the above terms. There shall be no order as to costs.

(ABHAY AHUJA, J.) **(SUNIL P. DESHMUKH, J.)**