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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NO. 6312/2017**

Reserved on : 21st November, 2017
Date of decision: 12th March, 2018

VIRAG TIWARI ..... Petitioner
Through Mr. Balbir Singh, Sr. Advocate with Mr. Rajesh Jain and Ms. Rubal Bansal, Advocates.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-21 & OTHERS ..... Respondents
Through Mr. Zoheb Hossain, Sr. Standing Counsel for the Revenue.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J.:

The writ petitioner, an advocate by profession and a professed income-tax practitioner, has filed the present writ petition strafed by intimation F No. Pr. CIT/Delhi-21/2017-18/619 dated 28th June, 2017 of the Principal Commissioner of Income Tax, Delhi-21 rejecting his application dated 31st March, 2017 under the *Pradhan Mantri Garib Kalyan Yojna*, 2016 (PMGK Scheme, for short).

2. Rejection of the declaration under the PMGK Scheme, implies that the petitioner would forgo or forfeit without refund Rs.34,48,954/- deposited

as tax, surcharge and penalty. Similarly Rs. 60,11,500/- deposited by the petitioner as *Pradhan Mantri Garib Kalyan Cess* would be meaningless, refundable without interest after 4 years.

3. PMGK Scheme was notified in the Gazette of India dated 15th December, 2016 vide Taxation Laws (Second Amendment) Act, 2016 [Amendment Act, for short] as an aftermath and in wake of the demonetization of Rs.500 and Rs.1000 currency notes, which had ceased to be legal tender post midnight between 8th and 9th November, 2016.

4. The petitioner, like many others, stuck with unaccounted demonetized currency notes had thought that they could side-step adverse impact of demonetization by offering for tax undisclosed cash deposited in bank accounts as income for the current year, i.e. Financial Year 2016-17, at the rate mentioned in Section 115BBE of 30% plus the applicable surcharge and cess. The expectation was that they would pay normal incidence of tax and escape the rigours of penalty and prosecution. This is a matter of common knowledge of which judicial notice should be taken.

5. The petitioner accepts and admits to having deposited substantial sum of Rs.2,40,46,000/- in cash in Indian Overseas Bank, City Union Bank and Punjab National Bank between 13th November, 2016 and 13th December, 2016. The petitioner had also deposited advance tax of Rs.85,50,000/- for the Assessment Year 2017-18 on different dates between 1st December, 2016 and 15th December, 2016 i.e. on or before introduction of PMGK Scheme vide Amendment Act on 15th December, 2016.

6. The Amendment Act was enacted with a definitive purpose and objective to suppress and stifle such deception and prevent misuse of the

existing provisions by suitable substitutions and insertions of Sections 115BBE, 271AAB and 271AAC to the Income Tax Act, 1961 (Act, for short) prescribing higher rate of tax at 60%, surcharge of 25% on tax, and applicable cess. Thereby effective rate of tax on such deposits covered by section 115BBE was increased to 77.25% of the income referred to in Section 68, 69, 69A, 69B, 69C and 69D of the Act. In addition penalty of 10% could also be imposed.

7. To understand the impact and effect of the amendments made we would reproduce Sections 115BBE and 271AAC of the Act, which read as under:-

> "(1) Where the total income of an assessee,—
>
> (a) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or
>
> (b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a),
>
> the income-tax payable shall be the aggregate of—
>
> (i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent.; and
>
> (ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i)."
>
> XXX
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> "271AAC. (1) The Assessing Officer may, notwithstanding anything contained in this Act other than the provisions of

> section 271AAB, direct that, in a case where the income determined includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under section 115BBE, a sum computed at the rate of ten per cent. of the tax payable under clause (i) of sub-section (1) of section 115BBE:
>
> Provided that no penalty shall be levied in respect of income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D to the extent such income has been included by the assessee in the return of income furnished under section 139 and the tax in accordance with the provisions of clause (i) of sub-section (1) of section 115BBE has been paid on or before the end of the relevant previous year.
>
> (2) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1).
>
> (3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section."

For the purpose of the present decision, as it is not a search case, we need not refer to Section 271AAB of the Act.

8. Section 115BBE of the Act provides that where the total income declared by an assessee in his return includes income referred to in Sections, 68, 69, 69A, 69B, 69C & 69D, or is determined by the Assessing Officer to include such income, the assessee would be liable to pay tax at the rate of 60% on such income. In other words, such assessee would not get benefit of the lower rate of tax earlier prescribed. Under Section 271AAC, Assessing Officer is entitled to levy penalty of 10% of the tax payable under Section 115BBE(1)(i) in addition to the tax already payable under Section 115BBE.

This penalty is not payable where the assessee has declared such income referred to in Sections, 68, 69, 69A, 69B, 69C & 69D in his return of income furnished under Section 139 of the Act and has paid tax in accordance with Section 115BBE(1)(i) of the Act on or before end of the relevant previous year.

9. Amendment Act had also omitted the figures/letters 115BBE in the third proviso in Chapter II, in Section 2(9) of the Finance Act and inserted Seventh proviso to the said Sub-Section for imposition of surcharge @25% on the tax. Seventh proviso to Section 2(9) of the Finance Act, reads ;-

> "Provided also that in respect of any income chargeable to tax under clause (i) of sub-section (1) of Section 115BBE of the Income-tax Act, the "advance tax" computed under the first proviso shall be increased by a surcharge, for the purposes of the Union, calculated at the rate of twenty-five per cent of such advance tax;"

Thus, an assessee was also liable to pay surcharge @ 25% on tax on the income chargeable to tax under clause (i) of Section 115BBE (1) of the Act in addition to 60% tax. In addition cess under Sub-sections (11) and (12) to Section 2 of the Finance act of 2% and 1% of the income tax and surcharge was also payable.

10. Amendment Act also introduced PMGK Scheme by adding Chapter IXA to the Finance Act, 2016 (Finance Act) with the heading *'Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojna, 2016*, albeit as a second option for the delinquent assessee. We begin by reproducing Sections 199A to 199G of the Finance Act enacted and introduced by the Amendment Act, which read:-

"199A. (1) This Scheme may be called the Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojana, 2016.
(2) It shall come into force on such date as the Central Government may, by notification, in the Official Gazette, appoint.

199B. In this Scheme, unless the context otherwise requires,-
(a) "declarant" means a person making the declaration under sub-section (1) of section 199C;
(b) "Income-tax Act" means the Income-tax Act, 1961;
(c) "Pradhan Mantri Garib Kalyan Deposit Scheme, 20 16" (hereinafter in this Chapter referred to as "the Deposit Scheme") means a scheme notified by the Central Government in consultation with the Reserve Bank of India in the
Official Gazette; and
(d) all other words and expressions used in this Scheme but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.

199C. (1) Subject to the provisions of this Scheme, any person may make, on or after the date of commencement of this Scheme but on or before a date to be notified by the Central Government in the Official Gazette, a declaration in respect of any
income, in the form of cash or deposit in au account maintained by the person with a specified entity, chargeable to tax under the Income-tax Act for any assessment year commencing on or before the 1st day of April, 2017.
(2) No deduction in respect of any expenditure or allowance or set-off of any loss shall be allowed against the income in respect of which a declaration under sub-section (1) is made.

Explanation.- For the purposes of this section, "specified entity" shall mean-
(i) the Reserve Bank of India;
(ii) any banking company or co-operative bank, to which the Banking Regulation Act, 1949 applies (including any bank or banking institution referred to in section 51 of that Act);
(iii) any Head Post Office or Sub-Post Office; and

(iv) any other entity as may be notified by the Central Government in the Official Gazette in this behalf.

199D. (1) Notwithstanding anything contained in the Income-tax Act or in any Finance Act, the undisclosed income declared under sub-section (1) of section 199C within the time specified therein shall be chargeable to tax at the rate of thirty per cent. of the undisclosed income.
(2) The amount of tax chargeable under sub-section (1) shall be increased by a surcharge, for the purposes of the Union, to be called the Pradhan Mantri Garib Kalyan Cess calculated at the rate of thirty-three per cent. of such tax so as to fulfil the commitment of the Government for the welfare of the economically weaker sections of the society.

199E. Notwithstanding anything contained in the Income-tax Act or in any Finance Act, the person making a declaration under sub-section (1) of section 199C shall, in addition to tax and surcharge charged under section 199D, be liable to pay penalty at the rate of ten per cent. of the undisclosed income.

199F. (1) Notwithstanding anything contained in the Income-tax Act or in any other law for the time being in force, the person making a declaration under sub-section (1) of section 199C, shall deposit an amount which shall not be less than twenty-five per cent. of the undisclosed income in the Pradhan Mantri Garib Kalyan Deposit Scheme, 2016.

(2) The deposit shall bear no interest and the amount deposited shall be allowed to be withdrawn after four years from the date of deposit and shall also fulfil such other conditions as may be specified in the Pradhan Mantri Garib Kalyan Deposit Scheme, 2016.

199G. (1) A declaration under sub-section (I) of section 199C shall be made by a person competent to verify the return of income under section 140 of the Income-tax Act, to the Principal Commissioner or the Commissioner notified in the Official

> Gazette for this purpose and shall be in such form and verified in such manner, as may be prescribed."

Any person could make a declaration under the PMGK Scheme in the form prescribed on or before the first day of April, 2017 in respect of any income in the form of cash or deposit in an account maintained by the person chargeable to tax under the Act for any assessment year commencing on or before 1st day of April, 2017. Declaration was to be made to the Principal Commissioner or the Commissioner notified in the Official Gazette and the form could be signed by the person competent to verify the return of income under Section 140 of the Act. No deduction in respect of any expenditure, allowance or set-off of any loss was allowed. As per Sub-section (1) to Section 199D tax at the rate of 30% was chargeable on the undisclosed income. In addition, as per Sub-section (2) to Section 199D, the declarant was liable to pay 33% of such tax as surcharge called *Pradhan Mantri Garib Kalyan Cess* so as to fulfil the commitment of the Government for welfare of the economically weaker sections of the society. Further, as per Section 199E, in addition to tax of 30% and the cess equal to 33% of the tax, the declarant was liable to pay penalty @10% on the undisclosed income. In other words, the total amount of tax, surcharge and penalty payable on the undisclosed income was 49.90 per cent. Lastly, the declarant under sub-section (1) to Section 199F was to deposit 25% of the undisclosed income under *Pradhan Mantri Garib Kalyan Yojna, 2016* and comply with the conditions specified in the PMGKY Scheme. The deposits made were to earn no interest and could be withdrawn only after four years. Sections 199D and 199E imposing payment of tax @ 30% and surcharge @ 33% of the tax payable and penalty of 10% began and were conferred with

non obstante primacy to override anything to the contrary contained in the Acts i.e. the Income-tax Act or the Finance Act.

11. Sections 199H, 199I, 199K and 199M are relevant and, therefore, are being reproduced below:-

> "**199H.** (1) The tax and surcharge payable under section 199D and penalty payable under section 199E in respect of the undisclosed income, shall be paid before filing of declaration under sub-section (1) of section 199C.
>
> (2) The amount referred to in sub-section (1) of section 199F shall be deposited before the filing of declaration under sub-section (1) of section 199C.
>
> (3) The declaration under sub-section (1) of section 199C shall be accompanied by the proof of deposit referred to in sub-section (1) of section 199F, payment of tax, surcharge and penalty under section 199D and section 199E, respectively.
>
> **199-I**. The amount of undisclosed income declared in accordance with sub-section (1) of section 199C shall not be included in the total income of the declarant for any assessment year under the Income-tax Act.
>
> **199K.** Any amount of tax and surcharge paid under section 199D or penalty paid under section 199E shall not be refundable.
>
> **199M.** Notwithstanding anything contained in this Scheme, where a declaration has been made by misrepresentation or suppression of facts or without payment of tax and surcharge under section 199D or penalty under section 199E or without depositing the amount in the Deposit Scheme as per the provisions of section 199F, such declaration shall be void and shall be deemed never to have been made under this Scheme."

As per Section 199H of the Finance Act, tax and surcharge payable under Section 199D, and penalty payable under Sections 199E had to be

paid before filing of the declaration. Deposit in the Deposit Scheme was also to be made before filing the declaration. Every declaration as per mandate of Sub-section 3 to Section 199H was required to be accompanied with proof of payment of tax, surcharge and penalty and proof of deposit under the Deposit Scheme. As per Section 199-I the amount of undisclosed income declared was not to be included in the total income of the declarant for any assessment year. In terms of Section 199K, no amount of tax and surcharge paid under Section 199D and penalty paid under Section 199E was refundable. Section 199M states that where a declaration has been made by misrepresentation or suppression of facts or without payment of tax, surcharge and penalty or without depositing the amount in the Deposit Scheme, such declaration shall be treated as void and shall be deemed to have never been made under the Scheme.

12. A reading of the aforesaid provisions introduced and enacted vide the Amendment Act, would indicate that the guilty and remiss assessees had two separate and distinct options. They could declare unaccounted cash deposited in the bank accounts in the return of income filed under section 139 of the Act and pay tax, surcharge and cess as per Section 115BBE of the Act and Section 2 of the Finance Act post amendment at the effective rate of tax of 77.25%. Penalty @ 10% under the Section 271AAC could be imposed by the assessing officer on conditions being satisfied. Alternatively, the assessees could as a second option file a declaration under Section 199C, which would require them to deposit tax at the rate of 30%, surcharge at the rate of 33% on tax deposited and penalty of 10% on the undisclosed income i.e. total of 49.9%. In addition the declarants were required to deposit 25%

of the undisclosed income as per Sub-section (1) to Section 199F for a period of four years under the Deposit Scheme, to be repaid without interest.

13. Obviously the intention was to tax persons or assessees, who had tried to circumvent and minimize consequences of demonetization by depositing advance tax on the unaccounted for cash in the bank accounts, as a separate class to be taxed differently. Such assessees could opt for the PMGK Scheme by paying tax, surcharge and penalty under Sections 199D and 199E and deposit under Section 199F of the Finance Act, and thereafter seek refund of the advance tax paid in accordance with law. PMGK scheme did not envisage adjustment or credit of advance tax paid as tax, surcharge and penalty paid under the PMGK Scheme.

14. Distinction between the two options, real or effective rate of taxation under the two options and the manner in which more beneficial PMGK Scheme option could be exercised, appears to be clear and apparent with benefit of hindsight and on in-depth and intricate interpretative examination. However, facts of the present case exposit confusion and uncertainty that had prevailed for the difference between the two options and the manner in which PMGK option could be exercised was not appreciated and understood by the petitioner and even by the enforcers i.e. tax authorities. This has resulted and is the cause of the present litigation. It is important, at this stage, to refer to the facts.

15. In the evening of 2[4th] March, 2017 a team of income tax officers from Range-61, being aware of the cash deposits made by the petitioner had visited his office at Laxmi Nagar, Delhi. As the petitioner had by then left his office, he was followed and traced at his colleague's office in Safdarjang

Enclave. The petitioner was asked to give details of his PAN, sources of income, bank accounts etc. and his statement under Section 131 of the Act was partly recorded at Safdarjang Enclave and continued at the office of the petitioner at Laxmi Nagar till 3.a.m. on 25.3.2017. Relevant portion of the statement reads:-

> "Q.16. Please explain the source of cash deposit of Rs.2,40,46,000/- in your different bank accounts after demonetization.
>
> A.17 Actually, the cash deposited indifferent bank accounts are my uncounted (sic) cash income which were deposited before the announcement of scheme PMGKY, 2016. Hence, I had no option except declare amount as my professional receipts, hence I deposited advance tax also at this income.
>
> Q.17. Now what do you want to say?
>
> A.17. Since cash deposit of Rs.2,40,46,000/- is my uncounted (sic) income, hence I would like to declare this income under the scheme PMGKY, 2016 with request to adjust the advance tax amount with this scheme which is approx Rs. 1 crore which I have already deposited.
>
> Q.19. Do you want to say anything else?
>
> A.19. Nothing specific once again, I repeat cash deposited of Rs.2,40,46,000/- is my uncounted (sic) income and I surrender the same in PMGKY, 2016 for the guarantee of the same. I am submitting the following mentioned post dated cheques.

Sr. No.	**Cheque No.**	**Bank**	**A/c no.**	**Amount**

1.	001475	City Union Bank Ltd, Janakpuri	208001000627453	1,19,98,954/-
2.	001476	Do	Do	60,11,500/-

"

Though I have given the above two cheques for the total amount but on the amount of Rs.2,40,46,000/- I have deposited the advance tax to approx Rs. 1 crore and request to allow the credit of the same for the scheme."

Thus, the petitioner had confirmed having deposited Rs.2,40,46,000/- in demonetized notes in cash in his bank accounts and having paid Rs.1,00,00,000 approximately as advance tax with the intent to declare unaccounted money as income in his income return for the current year. Notwithstanding payment of advance tax, the petitioner had issued cheques of Rs.1,19,98,954 and Rs.60,11,500/- towards 49.90% payable as tax, surcharge and penalty and 25% to be deposited in the Bond Ledger Account. The cheques were handed over and accepted by the officers. As per the petitioner, he was told and directed by the officers to make declaration under the PMGK scheme and pay taxes, surcharge etc. under the said scheme. Petitioner had requested or rather pleaded that he should be given credit of the advance tax and the same should be treated as tax paid under the PGMK scheme. Officers did not inform and state that this was impermissible.

16. Petitioner professes that as directed he had visited the office of the second respondent, namely, Income Tax Officer, Ward-61 (3) on 27th March, 2017 and was then supplied certified copy of his statement. The petitioner thereafter wrote letter dated 29th March, 2017 to the Assessing Officer requesting that he should be extended credit of advance tax of

Rs.85,50,000/- deposited in the month of December, 2016, as deposit under PMGK Scheme. Copy of the said letter was also forwarded to the Principal Commissioner of Income Tax-21 with a request to the said authority to resolve the issue as the PMGK Scheme was going to close on 31st March, 2017. In the letter dated 29th March, 2017 addressed to the Income-tax Officer, Ward No.61(3), the petitioner had referred to his predicament and had requested for guidance in the following words:

> "On 24.3.2017, the team of officers of Income Tax Department visited my office at G-19, 2nd Floor, Vijay Chowk, Laxmi Nagar, Delhi-110092 and as well as office of my colleague at A-142, GF, S.J. Enclave, New Delhi-110029. During that visit, my statement was recorded and I was suggested to declare that income under PMGKY Scheme, 2016. As per that scheme, tax, cess and penalty makeup to 49.9% and declarant is also required to deposit 25% of the declared amount in separate Bank account in the shape of F.D. which is to remain locked up for four years without bearing interest thereon. To this applicant agreed and filed the Declaration also in Form h. However, during the course of proceedings, the applicant asked for giving credit of amount of tax to the tune of Rs.85.5 Lakhs out of the total 49.9% which is required to be deposited by 31.03.2017. Once the amount of Rs.85.5 Lakhs is adjusted, the applicant would be required to deposit differential amount which works out to be Rs. 34,48,954/-. In the event, this proposal is not acceptable then the applicant would have to deposit 49.9% of the declared amount which is not only huge, double taxation but is also practically impossible to comply at this fag end of the closer of this scheme. For this purpose when the applicant appeared before your good self on 27.3.2017 and reiterated that this much accommodation be extended to him and he be allowed the credit of sum deposited prior to 17.12.2016. On 28.3.2017 also, the applicant visited your office making same request which you had considered

> sympathetically with an assurance that the matter would be put-up for consideration before the Ld.CIT.
>
> Madam, you would appreciate that each passing day, the window to deposit the amount is going to close soon and given the practical difficulty, the applicant is in no position to deposit this huge amount of Rs.1,19,98,954/- after deposit of Rs.85.5 Lakhs in December, 2016. The applicant will left with no choice but to withdraw his declaration in case credit of Advance Tax deposited before 17.12.2016 not extended to him. It is relevant to mention here that this fresh deposit of Rs.1,19,98,954/- would tantamount to double taxation which is not permissible in law."

17. The petitioner thereafter wrote letter dated 31st March, 2017. This letter is detailed one and refers to antecedent facts and meeting of the petitioner with the Joint/Additional CIT, Range-61 on 28th March, 2017, when his case was discussed. The petitioner was required to visit the Assessing Officer on the next day. Faithfully, on 29th March, 2017 the petitioner met the Assessing Officer and submitted another letter. On the same day he had a meeting with Joint/Additional CIT, Range-62, and was asked to come again on 30th March, 2017 at about 11.30 A.M. On 30th March, 2017, the petitioner had once again visited the office of the Joint/Additional CIT, Range-62 and had pointed out difficulties in case the petitioner was asked to deposit full amount of Rs.1,19,98,954/- under the PMGK Scheme, as he had already deposited Rs.85,50,000/- as advance tax on or before 15th December, 2016. It was highlighted that Rs.85,50,000/- was deposited before the PMGK Scheme was notified. In the letter dated 31st March, 2017 written to the Principal Commissioner of Income-tax, Range 21, the petitioner had stated as under:-

"6. Thereafter, a summon under section 131 of Income Tax Act 1961 was issued on 25.03.2017 to appear before the Assessing Officer on 27.03.2017. Applicant had appeared on 27.03.2017 but because of your goodself being pre-occupied, he could not get audience. On 28.03.2017 the applicant again visited the office when he had the occasion to meet Shri Farhat Khan, Join / Addl. CIT, Range-61. He explained that he had already discussed the case with your goodself and issue would be resolved soon. The applicant was asked to visit the office of the Assessing Officer on the next day who will arrange a meeting with your good self. Appreciating the concern raised and given the fact that hardly 3 days are left when the Scheme is going to close, the Joint / Addl. CIT, assured that all efforts would be made to resolve this issue.

7. On the next day, i.e. 29.03.2017, applicant met the Assessing Officer and filed a letter with a copy marked to your goodself. The Assessing Officer as per your instructions arranged a meeting with Shri Vijay Choudhary Joint / Addl. CIT, Range-62 as Shri Farhat Khan was on leave. Shri Choudhary asked the applicant to come again on 30.03.2017 around 11.30 A.M. as he was hopeful that the matter would be resolved in a positive way.

8. On 30.03.2017, the applicant again visited the office of the Assessing Officer as well as of Shri Vijay Choudhary, Joint / Addl. CIT, Range-62. After meeting him, the Joint / Addl. CIT was kind enough to appreciate the difficulty faced by the applicant if he is once again asked to deposit the entire amount of Rs.1,19,98,954/- when he had already deposited Rs.85,50,000/- on or before 15.12.2016. The Joint / Addl. CIT was also of the opinion that the applicant cannot be taxed twice on the same income. He also appreciated that when the tax of Rs.85,50,000/- was deposited, the Scheme had not been notified and when it has been notified and the applicant on being asked, has agreed to file the declaration,

then he should not be made to suffer for no fault of his own as he has deposited the entire amount of tax, surcharge and cess.

9. Resultantly, understanding the concern of the applicant, the Joint / Addl. CIT asked the applicant to deposit the differential amount of tax which works out to be Rs.34,48,954/-. This was deposited immediately on 30.03.2017 for which photocopy of challan is enclosed. So far as 25% of the declared income is concerned i.e. Rs.60,11,500/-, it may please be taken on record that a separate Bond Ledger Account had already been opened in the Indian Overseas Bank, Janakpuri, New Delhi vide Bond Ledger/Application Receipt No. IOB 054400000250 Dated 31.03.2017. The same has been issued and the photocopy of which is enclosed for your ready reference and necessary compliance in the matter. It is also submitted that Rs.60,11,500/- debited to my Bank Account today.

10.All this is being stated to demonstrate that the applicant has taken all necessary steps as told to him in all the meetings which took place between 24.03.2017 to 30.03.2017.

You are therefore, requested to take these documents, challans, annexure, Bond Ledger Account / application receipt etc. on record as compliance of the applicant towards the Scheme and issue the declaration in Form No.2 as is envisaged under the Scheme.

For this act of your goodself, the applicant will be deeply obliged.

As in duty bound applicant prays accordingly."

Thus, the petitioner in letter dated 31st March, 2017 had referred to extensive previous discussions and understanding with the officers on tax to be paid under the PMGK Scheme. Accordingly, the petitioner had paid and enclosed Form No.1 challan for deposit of Rs.34,48,954/- towards tax,

surcharge and penalty, and receipt for deposit of Rs.60,11,500/- in a separate Bond Ledger Account under the PMGK Scheme.

18. No reply or answer to the letters was received. On the other hand, on 31 March, 2016 the Principal Commissioner accepted the said Form and challans, which were not returned or rejected on the ground that the petitioner had not paid and deposited full amount of Rs.1,19,98,954/- towards tax, surcharge and penalty and had made part deposit of Rs.34,48,954/-. It took the respondents nearly three months to discuss and examine the case as vide letter dated 28th August, 2017, the declaration made by the petitioner was rejected recording as under:-

> "In this regard, It is communicated that your application dated 31.03.2017 regarding giving the credit of Advance Tax paid of Rs. 85,50,000/- (paid before the implementation of PMGKY-2016 Scheme which was effective from 17.12.2016) was forwarded to the Pr. Chief Commissioner of Income Tax, Delhi for directions / clarifications.
>
> In response to this letter, the clarification has been received from 0/o Pr. CCIT, Delhi vide letter F. No. Joint CIT(Hq) (Co-ord)/PMGKY/2017- 18/3143 dated 05.06.2017 which is requoted as under:
>
> > "No credit for advance tax paid, TDS or TCS shall be allowed under the Scheme."
> >
> > It is further communicated that the said clarification is in reference of clarification on the taxation and investment regime for the Pradhan Mantri Garib Kalyan Yojana, 2016 issued by the Board vide circular no. 2 F. No. 142/33/2016-TPL(Part) dated 18.01.2017 (copy enclosed).
> >
> > In view of the above clarification, your application filed under PMGKY -2016 is hereby rejected."

This communication accepts that the issue regarding credit of advance tax of Rs.85,50,000/- paid before implementation of the PMGK Scheme had been forwarded to the Principal Chief Commissioner for directions and clarifications. Response received on 5th June, 2017 had opined that credit of advance tax paid, TDS or TCS was not to be allowed under the PMGK Scheme. In other words in view of the said clarification, the petitioner's declaration was rejected.

19. The petitioner submits that he should be given credit of the advance tax of Rs.85,50,000/- under the PMGK Scheme. He has relied on judgment of this Court in ***Kumudam Publications Pvt. Ltd. Acting Through Its Managing Director Mr. P. Varadarajan Vs. Central Board of Direct Taxes and Ors***., (2017) 393 ITR 599 (Del). The petitioner and the tax officers had understood that the ratio declared would equally apply to Rs.85,50,000/- paid by the Petitioner as advance tax.

20. ***Kumudam Publications Pvt. Ltd.(supra)*** holds that the assessee or declarant under the Income Disclosure Scheme, 2016 was entitled to credit of advance tax deposited relating to the assessment years or periods for which the assessee seeks benefit under the said scheme. Contention of the Revenue that the Income Disclosure Scheme was self-contained and a complete code and, therefore, provisions relating to advance tax and credit thereof were in-applicable was rejected in this decision. Judgment had commented on the language of the Income Disclosure Scheme, for unlike *Kar Vivad Samadhan* Scheme, 1998, the former scheme did not

debar/prohibit adjustment or credit of the amounts paid in the past. Contextually, it was observed that the basis of the two schemes were different. It was held as under:-

> "15. Does the expression (the) "tax and surcharge payable under section 184 and penalty payable under section 185 in respect of the undisclosed income, shall be paid on or before a date to be notified by the Central Government in the Official Gazette" mean only amounts paid immediately prior to the declaration count, thus precluding any amounts paid for the relative or corresponding period, or does it include all such payments? Thereby hangs a tale. In the opinion of this court, there is no bar, express or implied, which precludes the reckoning or taking into account of previously paid amounts which have nexus with the periods sought to be covered by the scheme.
>
> 16. Granted, such schemes are to be seen as containing special dispensations, etc and interpreted in a "stand alone" or sui generis manner. Equally, those who seek its benefits are to go by it. But there should be something which provides a clear insight that Parliament wished that such past amounts are not to be reckoned at all, for purposes of payments. All that the words of the statute enjoin are that the tax and surcharge amounts under the scheme "shall be paid on or before a date to be notified". These words necessarily refer to all payments. They are not limited in their meaning to only what is paid immediately before, or in the proximity of the declaration filed.
>
> 17. The provision of Section 182 itself states that for the purposes of the IDS, undefined terms and expressions shall be in terms of the Income Tax Act, by incorporating those into the Finance Act and the scheme. "Undisclosed income" which is the foundational provision to be invoked by declarants, thus is based on the definition under the Income Tax Act (Section 132 (1) (c)) the provision reading as to include "money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property [which has not been, or would not be,

disclosed] for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property)". Undisclosed income is also defined in Section 158B (for the purposes of the chapter in which that provision is located) and Section 271 (for the purposes of that section). That apart, the only bar discernable under the scheme in question is evident from Section 189 is that no person declaring under the Act shall not be entitled to "claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment." Also, under that provision the person so declaring shall not be entitled to " to re-open any assessment or reassessment made under the Income-tax Act or the Wealth tax Act, 1957 (27 of 1957)". Therefore, the court is of the opinion that there is no bar for an assessee or declarant to claim credit of advance tax amounts paid previously relative to the assessment years or periods for which it seeks benefits under the scheme. This interpretation is in no way inconsonant with the ratio of the Supreme Court's rulings, relied upon by the Revenue.

18. The decision in Shelly (supra) is decisive that advance tax is a mode of tax recovery, which the assessee is bound to pay under the scheme of the Income Tax Act. The court, after considering Section 140A, Section 4, Section 139 and Section 240 of the Income tax Act, observed as follows:

> "Section 4 of the Act creates the charge and provides inter alia for payment of tax in advance or deduction of tax at source. The Act provides for the manner in which advance tax is to be paid and penalises any assessee who makes a default or delays payment thereof. Similarly the deduction of tax at source is also provided for in the Act and failure to comply with the provisions attracts the penal provisions against the person responsible for making the payment. It is, therefore, quite apparent that the Act itself provides for payment of tax in this manner by the assessee. The Act also enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self-assessment and to compute the tax payable on such income and to pay the same in the manner provided by the

> Act. Thus the filing of return and the payment of tax thereon computed at the prescribed rates amounts to an admission of tax liability which the assessee admits to have incurred in accordance with the provisions of the Finance Act and the Income Tax Act. Both the quantum of tax payable and its mode of recovery are authorized by law. The liability to pay income tax chargeable under Section 4 (1) of the Act thus, does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. The assessee is himself required to compute his total income and pay the income tax thereon which involves a process of self-assessment."

19. Furthermore, the court also is of the opinion that the clarification by the Revenue, that credit for TDS paid, can be enjoyed for availing the benefit (under the scheme in question) precludes any meaningful argument by it that advance tax payments relative for the assessment years covered by the declaration cannot be taken into consideration as payments under and for purposes of availing the benefits of the scheme."

21. The petitioner relying upon the said decision had also drawn our attention to the concept of advance tax as elucidated in ***Modi Industries Ltd. Vs. CIT***, (1995) 6 SCC 396. Reference was made to the judgment in ***Delhi Chartered Accountants Society (Regd.) Vs. Union of India***, (2013) 29 STR 461 (Del) on the question of taxable event or point of taxation and judgment of the Supreme Court in ***Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries***, (2008) 231 ELT 22 (SC) on the effect of the circulars issued by the department and ***Ahmed Ibrahim Sahigra Dhoraji Vs. Commissioner of Wealth Tax, Gujarat***, (1981) 3 SCC 77 on the question of tax liability.

22. Counsel for the Revenue, on the other hand, had submitted that the PMGK Scheme was a complete and self contained code that had required payment of full tax, surcharge and penalty and deposit under the Deposit Scheme. PMGK Scheme did not envisage benefit of prior payment of taxes, advance tax or the TDS.

23. We are in agreement with the counsel for Revenue that the PMGK Scheme in the form of Sections 199A to 199R is a self-contained complete code. The scheme did not envisage grant of benefit or credit of advance tax paid at any stage; before, during the pendency of the Scheme or thereafter. Reliance placed by the petitioner on the judgment of this High Court in ***Kumudam Publications Pvt. Ltd.*** (supra) is inappropriate. Revenue has rightly pointed out that the scheme under consideration in the case of ***Kumudam Publications Pvt. Ltd.*** (supra) had provided and allowed credit of TDS, but had denied credit of advance tax. However, under the PMGK Scheme, credit of neither TDS nor advance tax was postulated and envisaged. Advance tax is treated as tax paid under the Act, whereas undisclosed income declared under the PMGK scheme is not to be taxed under the Act i.e. Income Tax Act. Section 199-I states that undisclosed income was not to be treated as a part of the total income taxable under the Act i.e. Income Tax Act. Provisions of the PMGK Scheme had created a new and separate charge and had postulated payment of tax, surcharge, penalty and requirement to make a deposit. We would be rewriting provisions of Chapter IXA of the Finance Act if we direct grant of benefit of advance tax paid under the Act i.e. the Income Tax Act for payment to be made under PMGK scheme. The *challans* for payment under the Act and PMGK

Scheme were separate. In ***Kumudam's case***, as noticed above, there was an anomaly and contradiction as benefit of TDS was available but credit of advance tax was denied, though both were in nature of tax paid in advance. Thus, the Division Bench had held that the distinction of TDS and advance tax was congruous, as both were in the nature of pre-paid taxes. Further, there was no express or implied provision that had precluded reckoning or taking into account the previously paid amount. In view of the aforesaid position, we would not accept the prayer of the petitioner to treat payment of advance tax of Rs. 85,50,000/- as deposit of tax, surcharge and penalty under Sections 199D and 199E of the Finance Act. Wide latitude is required and available in matters relating to fiscal and economic regulations and classification of objects, persons and things for the purpose of formulation of taxation policy. Validity and vires of the statutory provisions is not under challenge in the present writ petition. Interpretation of the provisions is in question and examination.

24. The effect of the above finding as per the Revenue is that Petitioner would completely lose right to credit and benefit of Rs. 34,48,954/- under PMGK Scheme. This amount would get forfeited without corresponding tax benefit (Rs.60,11,500/-, though not clearly stated by the respondents, it appears would be refunded after four years without interest). Petitioner would be liable to pay 60% rate of tax as per the provisions of Section 115BBE amounting to Rs.1,44,27,600/- plus surcharge @ 25% on the tax of Rs.36,06,900/- and cess of Rs.5,41,035. In other words, petitioner would therefore land up paying tax, surcharge and cess of Rs.1,85,75,535/- towards undisclosed income of Rs.2,40,46,000/- under Section 115BBE of the Act,

and tax, surcharge and penalty of Rs. 34,48,954/- which as per the respondents stands forfeited and deposit of Rs. 60,11,500/- under the Deposit Scheme that would be possibly refunded without interest after four years. We would now examine the said position and whether the petitioner would be entitled to some benefit in view of the confusion and on interpretation of the provisions.

25. The writ petition exposits that notwithstanding economic complexities and exceptional skills required for drafting tax provisions, it is imperative to have simple and clear tax legislations on tax implications and procedures which should be explicit and easily understood by commoners. The need and advantage of having two schemes or options being a policy matter could be beyond and outside the scope of judicial review. As recorded above statutory provisions are not under challenge. Nevertheless as an adjudicator we have to find a just, fair and equitable answer to the conundrum. The petitioner must be penalised as a transgressor yet as long as the purpose behind legislation is not incapacitated and impaired, the petitioner should not be persecuted for the mistake in making the wrong choice when the authorities were equally confounded. As an interpreter we need to believe and accept as a principle that no legislation would like to penalise their subjects for inoffensive and credulous mistakes given the complexities and uncertainties that could prevail at the given point of time on interpretation, provided the purpose and objective of the legislation is not sacrificed and undermined. Legislations do not and cannot deal with all circumstances with abstract symmetry. When interpretation and understanding of legal provisions and applicability in a peculiar factual matrix was ambiguous and

nebulous at the given point of time and confusion had prevailed, the Courts should provide succour to the party who would suffer an infelicitous and odious harm, subject to purpose of the legislation not being defeated and subdued. In ***Shailesh Dhairyawan Vs. Mohan Balkrishna Lulla*** (2016) 3 SCC 619, referring to the principle of constructive interpretation or construction, the Supreme Court observed that the court is supposed to attach that meaning to the provision which serves the purpose behind the provision and should ascertain what the provision is designed to accomplish. This means examination of three components i.e. language, purpose and discretion. Language though restrictive can reveal range of possibilities given the semantic use. Therefore purpose is the core of the text. Within the language which is designed to effectuate the purpose there is scope for the court to exercise discretion. It is in this context we have interpreted PMGK Scheme.

26. In ***Parisons Agrotech (P) Ltd. v. Union of India***, (2015) 9 SCC 657 after quoting and referring to ***R.K. Garg v. Union of India and Others***, (1981) 4 SCC 675, the Supreme Court had observed:-

> "The Court must always remember that 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; 'that exact wisdom and nice adaption of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses."

27. On the question of confusion and doubt, respondents submit and rely upon circular No.2 of 2017 issued by the Central Board of Direct Taxes dated 18th January, 2017, wherein in response to question No.6, it was clarified:

> "Question No. 6: Whether credit of advance tax paid, tax deducted at source (TDS), tax collected at source (TCS), in respect of an income declared under the Scheme would be available?
>
> Answer. No credit for advance tax paid, TDS or TCS shall be allowed under the Scheme."

28. In the present case we have rejected the petitioner's contention that the advance tax paid should be treated as payment under the PMGK Scheme. The said circular in question No.9 had also dealt with the issue if a person does not disclose his undisclosed income under PMGK Scheme, whether the undisclosed deposit would attract tax under Section 115BBE.Question 11 had dealt with adjustment of cash seized during search operations. Answer to question 9 and 11 and clarifications given to the same circular are as under:

> "Question No. 9: If a person does not declare undisclosed cash deposited in an account between 01.04.2016 to 15.12.2016 under the Scheme, then whether such undisclosed deposit shall attract tax at the rate provided in the Taxation Laws (Second Amendment) Act, 2016?
>
> Answer: The amended provisions of section 115BBE of the Income-tax Act, 1961 shall apply to A.Y.2017-18, relating to F.Y. 2016-17. Hence, undisclosed deposits between 01.04.2016 to

15.12.2016 shall also attract tax at the rate provided in the Taxation Laws (Second Amendment) Act, 2016."

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"Question No.11: Whether the cash seized during a search and seizure action of the Department and deposited in Public Deposit Account is allowed to be adjusted against the payments required to be made under the Scheme?

Answer: The adjustment of cash seized by the Department and deposited in the Public Deposit Account may be allowed to be adjusted for making payment of tax, surcharge and penalty under the Scheme on the request of the person from whom the cash is seized. However, the said amount shall not be allowed to be adjusted for making deposits under the Pradhan Mantri Garib Kalyan Deposit Scheme."

Thus, in case of seized cash/money deposit adjustment for payment of tax, surcharge and penalty was permitted.

29. Despite the circular, facts narrated in some detail do show that the Amendment Act had equally puzzled and flummoxed the tax law enforcers with whom the petitioner was in constant interaction and had sought guidance and assistance. Tax officers certainly had failed to appreciate and understand the difference between the two options and the procedure, and have substantially contributed to the muddle. The petitioner we would accept was prompted, if not clearly directed to file declaration and make deposits as made under the PMGK Scheme as the right course and option. Role of an assessing officer or the Income-tax authorities has been described as that of solicitude to the public exchequer with the inbuilt fairness to the

assessee. Respondents as tax authorities being law enforcers and having acted as facilitators should have explicated doubts, when they had counselled the petitioner to make taxes etc. under the PMGK Scheme. On the question of official guidance and proprietary of the officers' conduct, reference can be appropriately made to Lord Browne-Wilkinson in ***Regina v. Inland Revenue Commissioners*** [1994] 1 WLR 334;-

> '…taxpayers frequently need to know the tax consequences of a transaction before carrying it through. To meet this need, the Revenue are prepared in certain circumstances to give advance assurances as to the tax repercussions of a transaction so that the parties can proceed with confidence. This practice is of the greatest benefit to taxpayers and it would not be in the public interest to discontinue it…… If the Revenue have made it known that in particular categories of transaction advance clearance can only be given effectively at a particular level and clearance is not obtained from that level, there is in my judgment no abuse of power if the Revenue seek to extract tax on a basis different from that contained in the assurance. If the taxpayer either knows or (by reason of Revenue circulars) ought to have known that a binding clearance can only be obtained in a particular way and a purported clearance has been obtained in a different way, there is nothing unfair if the Revenue say that the purported clearance (being to the knowledge of the taxpayer given without authority) is of no effect and does not bind them.'

30. In the present case we perceive that an equitable resolution is possible on interpretation of the provisions without undermining the object and purpose behind the Amendment Act. Thus while we have rejected the argument that advance tax of Rs.85,50,000/- can treated as payment of tax, surcharge and penalty under PMGK Scheme, we would hold that the declaration made under PMGK Scheme should not have been entirely

rejected in view of the peculiar and specific factual background in the present case. We have given the aforesaid direction and finding keeping in mind and being sensitive to the petitioner's predicament and adverse consequences propounded by the respondents though the law enforcers were equally responsible in the lapse occasioned.

31. In the aforesaid factual matrix, we would direct as under:-

(i) Deposit of Rs.34,48,954/- will be treated as payment of tax, surcharge and penalty under the PMGK Scheme in respect of undisclosed income of Rs.69,11,731.46. Rs.34,48,954/- is 49.9% of Rs.69,11,731.46.

(ii) In respect of the balance undisclosed income of Rs.1,71,34,268.54, the petitioner would take recourse to the first option under Section 115BBE. The petitioner would accordingly pay tax @ 60% on the aforesaid amount under Section 115BBE, surcharge @25% of the tax and cess as applicable. Rs.85,50,000/- paid as advance tax would be counted.

(iii) The petitioner would be also liable to pay interest on the late payment of taxes, surcharge, cess and late filing of return.

(iv) Rs.60,11,500/- deposited by the petitioner under Section 199F of the Finance Act will be refunded to the petitioner without interest after a period of four years in accordance with the deposit scheme.

We perceive and believe that by giving the aforesaid directions, we have not interfered with the provisions of the Amendment Act. We have not directed refund of Rs.34,48,954/-, which would be contrary to Section 199K of the Finance Act. We have also not directed that the advance tax of Rs.85,50,000/- paid by the petitioner should be treated as payment of tax, surcharge and penalty under the PMGK Scheme, which as held above, is impermissible. It is possible to argue that we have interfered with the declaration made by the petitioner in terms of Sections 199A and 199C of the Finance Act, but on the said aspect flexibility and tolerance can be exercised as we would read the contents of the declaration alongwith and harmoniously with the letters written by the petitioner quoted above. Violation of Section 199M on account of misrepresentation or suppression of facts in the declaration is not alleged. Requirement of Section 199M of payment of tax, surcharge and penalty under Sections 199D and 199E is not violated when we treat the declaration as valid in respect of undisclosed income of Rs.69,11,731.46 on which tax, surcharge and penalty was paid. For the balance undisclosed income of Rs.1,71,34,268.54 the petitioner must exercise first option and pay 60% tax, 25% surcharge on tax and cess under Section 115BBE read with Section 2(9) of the Finance Act. No provision prohibits or bars an assessee, who had made true and correct disclosure, to partly take benefit of the option under Section 115BBE and partly exercise the second option in the form of declaration under PMGK Scheme. The sections do not prohibit part declarations under both options, provided entire undisclosed income has been accounted for in the declaration made under PMGK Scheme and Section 115BBE. Such recourse to both or any option was available to the petitioner on or after the Amendment Act was notified

on 15th December, 2016. Of course, if the petitioner does not make payment as stipulated under Section 115BBE and applicable surcharge in respect of the aforesaid undisclosed income of Rs.1,71,34,268.54/-, it will be open to the respondents to treat the declaration under PMGK Scheme as invalid or void on the ground of misrepresentation or suppression of facts. Similarly if subsequently the declaration is found to be bad on account of suppression of facts or misrepresentation. In case tax, interest etc. are paid we believe a fair minded assessing officer would not initiate penalty proceedings under Section 271AAC of the Act. We have made these observations in view of the facts and to stall another round of unnecessary litigation.

32. In view of the aforesaid discussion and observations, the writ petition is partly allowed in terms of directions in paragraph 31 above. There would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(PRATHIBA M. SINGH)
JUDGE

MARCH 12th, 2018
NA/VKR /ssn