

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION No. 20442 of 2017****M. KANTILAL AND CO.***Versus***INCOME TAX SETTLEMENT COMMISSION****Appearance :**

Mr TEJ SHAH, Advocate for the PETITIONER(s) No. 1

Mr NIKUNT RAVAL for Mrs KALPANAK RAVAL, Advocate for RESPONDENT No. 2

NOTICE SERVED(4) for the RESPONDENT(s) No. 3

UNSERVED WANT OF TIME (31) for the RESPONDENT(s) No. 1

**CORAM: HONOURABLE Mr. JUSTICE AKIL KURESHI
and****HONOURABLE Mr. JUSTICE B.N. KARIA****18th April 2018****ORAL ORDER** (PER : HONOURABLE Mr. JUSTICE AKIL KURESHI)

This petition is filed by the partnership firm whose application for settlement came to be dismissed by the Settlement Commission on two grounds viz., firstly, that since the settlement application was not disposed of within time stipulated in the statute, the same had abated, and secondly, that the petitioner had not deposited the tax on disclosed income. While issuing notice, we had *suo motu* raised a third ground which required examination. This was of the true and full disclosures by the petitioner while filing the application for settlement. We had noticed that the application for settlement was filed on 19th June 2001 admitting

undisclosed income of Rs. 75.78 lakhs [rounded off]. Such disclosure was revised on 21st September 2005 by making further disclosure of Rs. 97 lakhs. The question that occurred to us was whether in such a situation, the judgment of the Supreme Court in the case of **Ajmera Housing Corporation & Anr. vs. CIT**, reported in [2010] 326 ITR 642 would apply.

We would address these three issues, after recording the brief facts.

The petitioner is a partnership firm and is engaged in the business of import of rough diamonds, manufacturing and export of polished diamonds. A search was carried out at the premises of the petitioner on 7th January 1999. Assessing Officer had passed an order under Section 158BC of the Income-tax Act, 1961 for the Block period. The petitioner and other group assesses filed applications for settlement on 19th June 2001 in which the petitioner disclosed an additional income of Rs. 71.78 lakhs. After this settlement application passed through several stages, at the time of hearing of the settlement application, the petitioner on 21st September 2005 made further disclosure of Rs. 97 lakhs of undisclosed income. As per the total disclosure of Rs. 1.72 Crores [rounded off], the assessee's tax liability would come to Rs. 1.20 Crore [rounded off]. According to the assessee, such tax was also

paid. The Revenue, however, contended that the assessee was short by close to Rs. 66 lakhs. This difference between the assessee and the revenue arose out of the assessee's contention that the refund amount of RS. 66 lakhs [rounded off] was available in the hands of M/s. M Kantilal & Company, a limited company and the assessee had requested that the same be adjusted in the hands of the present assessee *ie.*, M/s. M Kantilal & Company – a partnership firm. The Revenue contends that such amount was already adjusted in the case of the limited company and could not be given credit gain to the petitioner.

With effect from 1st June 2007, the provisions contained in the Income-tax Act, 1961 for settlement of cases were materially amended. One of the provisions inserted was Section 245HA which envisages abatement of proceedings; if not finally disposed of within the stipulated time. The petitioner filed Special Civil Application No. 5974 of 2008 challenging validity of the said Section 245HA of the Act. In the meantime, such an issue had reached the Supreme Court in the case of **Prabhu Dayal v. Union of India** [Writ Petition (Civil) No. 113/2008] in which also, *vires* of the very same section was challenged. Division Bench of this Court, therefore, disposed of the petition of this petitioner by providing as under :-

“We further direct that till the Hon’ble Supreme Court decides the issue which is raised in the present group of petitions, the Assessing authorities and the appellate authorities under the Income Tax Act, 1961 shall not take up the matters which are to be treated as pending before the Settlement Commission and disposal of these petitions on the above ground shall not come in the way of the Settlement Commission in disposing off the matters before it in accordance with law.”

Subsequently, it appears that the petitioner before the Supreme Court – Prabhu Dayal was not interested in pursuing the litigation, and therefore, withdrew the same. In that background, the Settlement Commission was of the opinion that the abatement provisions contained in Section 245HA would apply to the petitioner and declared the proceedings having been abated accordingly.

The Settlement Commission dismissed the application for settlement on an additional that the admitted tax was not paid on the disclosed income. This was by making a brief observations which reads as under :-

“6.2 Furthermore, as per the provisions of Section 245D(2D), where an application was made under Section 245C(1) before the 1st day of June 2007 and order under Section 245D(1) as they stood prior to the amendment by Finance Act 2007 allowing the application to be proceeded with, has been passed

before the 1st day of June 2007, but no order as per the pre-amended provisions of Section 245D(4) has been passed before the 1st day of June 2007, such application shall not be allowed to be proceeded with unless the additional tax on the income disclosed in such application and the interest thereon has been paid on or before the 31st day of July 2007. In the cases before us, additional tax on the income disclosed in the settlement application and interest thereon has not been fully paid by the applicant before 31.07.2007.”

Taking up the objection as to the maintainability of the settlement application, we find that under the identical situation in the case of **M. Kantilal & Exports v. Income Tax Settlement Commission**, this Court by its judgment dated 13th March 2018 in Special Civil Application No. 20443 of 2017 and connected petitions, held and observed as under :

“2. After this order was passed by the High Court, two important developments took place. The Supreme Court disposed of the case of **Prabhu Dayal** (supra) by an order dated 11.03.2011 allowing the petitioner to withdraw the petition. Thus, the proceedings before the Supreme Court in case of **Prabhu Dayal** (supra) came to be disposed of without a decision on the controversy at hand. The second important development was that the Bombay High Court in case of **Star Television News Ltd. v. Union of India & Ors.**, reported in [2009] 317 ITR 66 (Bom)

considered a similar challenge to the same statutory provisions providing for abatement of settlement proceedings. The Court read down the provisions and declared that it is a statutory duty of the Settlement Commission to dispose of an application which is filed before it unless due to any reasons attributable to the applicant, the Settlement Commission has been prevented from fulfilling the said duty and only in such a case the proceedings would abate on the date specified under section 245HA(1)(iv) of the Act. The Court required that the Settlement Commission should consider whether the proceedings had been delayed on account of any reasons attributable to the applicant. If the conclusion is that it was not so, the application for settlement would not abate. We may record that this judgment of the Bombay High Court in case of *Star Television News Ltd.* (supra) was carried by the Revenue to the Supreme Court and the Supreme Court *vide* its judgment in case of **Union of India v. Star Television News Ltd.** reported in [2015] 373 ITR 578 (SC) approved the judgment of the Bombay High Court.

3. With this background, when the proceedings were taken up by Settlement Commission for hearing, both sides made their arguments on the question of abatement. The Settlement Commission by the impugned order declared that all the proceedings had abated on the ground that the petitioners had earlier approached the High Court and agreed to abide by the judgment of the Supreme Court in case of *Prabhu*

Dayal (supra) and no relief was granted by the Supreme Court in such case. This was the only ground on which the applications have been closed.

5. In the present group of petitions, we are of the opinion that the Settlement Commission has committed an error in disposing of the proceedings as having abated. It is true that the petitioner had earlier approached this Court on the issue of applicability of the abatement provisions and such petition was disposed of, the petitioners to abide by the judgment of the Supreme Court in case of *Prabhu Dayal* (supra). However, the Supreme Court did not have occasion to decide the case of *Prabhu Dayal* (supra) on merits. By virtue of interim order passed by the Supreme Court in the said case or for any other reason, it appears that, by the time the Supreme Court took up the case for final hearing, the issues were no longer alive. The petitioner Prabhu Dayal therefore withdrew his case. This disposal of the proceedings before the Supreme Court without expression of the opinion on merits, cannot be allowed to extinguish the petitioner's rights and contentions. From the outset, the petitioners had taken a stand that the abatement proceedings are not valid and cannot apply so harshly as to terminate their proceedings for no fault of theirs. By the time the commission took up the applications for settlement for further hearing, the law was made sufficiently clear by virtue of declaration by Bombay High Court in case of *Star Television* (supra) and approval of such view of

Bombay High Court by the Supreme Court. When the Settlement Commission was therefore taking up the applications for settlement for further hearing, it was obliged to apply such law. If the proceedings were delayed due to the reasons attributable to the applicants, the provision for abatement would apply but not otherwise. The Settlement Commission has not recorded any such finding. The department has not brought any facts to our notice to permit any further inquiry in this respect by the Settlement Commission. In plain terms therefore there is no material before us to hold that the application for settlement of the present petitioners were belated due to the reasons attributable to the petitioners.

6. In the result, the *impugned* order of the Settlement Commission is set aside. The proceedings are revived and placed back before the Settlement Commission for disposal in accordance with law.”

Under the circumstances, the declaration of abatement of the proceedings in case of the present petitioner is also set-aside.

Coming to the question of inadequacy of the tax deposited by the assessee; as noted, the Settlement Commission has not cited any reasons for coming to such a conclusion. We have noticed that both the sides have placed materials in support of their rival contentions. We request the Settlement Commission to examine such material and come to a conclusion – whether the assessee had

deposited the tax or was short in doing so. For such purpose, we would place the matter back before the Settlement Commission.

While doing so, we would request the Settlement Commission to examine the implication of the judgment of Supreme Court in the case of *Ajmera Housing Corporation & Anr.* [Supra] in light of the fact that the assessee's initial disclosure was for Rs. 75.78 lakhs and further disclosures made nearly four years later were of additional sum of Rs. 97 lakhs.

Petition stands disposed of accordingly.

[Akil Kureshi, J.]

[B.N Karia, J.]

Prakash

