IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 7256 of 2016

With

SPECIAL CIVIL APPLICATION NO. 7412 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

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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 or any order made thereunder ?	

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M/S SHALIBHADRA DEVELOPERS....Petitioner(s)

Versus

SECRETARY & 2....Respondent(s)

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Appearance:

MR SN SOPARKAR SR ADVOCATE WITH MR JAIMIN DAVE WITH B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

Notice served to Respondent (s) No.1

MR MANISH BHATT, SR COUNSEL WITH MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. ,2,3

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 18/10/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Rule. Learned counsel Mrs. Mauna Bhatt waived service of rule on behalf of the respondents.

2. These petitions arise in the common background. We may record facts from Special Civil Application No.7256/2016. This petition is filed by one M/s. Shalibhadra Developers who is a partnership firm and is engaged in the business of development and construction of residential complexes. On 7.1.2014, the petitioner was subjected to search operations. Notice under section 153A of the Income Tax Act, 1961 ("the Act" for short) came to be issued on 2.7.2014. The petitioner filed the return of income in response to such notice on 27.11.2014. The assessment would have to be framed latest by 31.3.2015, failing which, the same would become time-barred.

3. On 1.2.2016, the petitioner wrote to the Assessing Officer that in connection with the pending assessments of the petitioner for the assessment years 2010-2011 to 2014-2015, the petitioner is in the process of filing settlement application before the Settlement Commission for settling all tax disputes. Such application would be filed within a short time. Substantial amount of tax is already paid by

the petitioner. The partnership is facing financial crisis. Efforts are made to pay the balance amount which would be done shortly. Assessing Officer should therefore, keep the assessment proceedings in abeyance.

4. On 10.3.2016, the petitioner wrote yet another letter to the Assessing Officer and requested him to permit a correction in the payment of tax which would enable the assessee to file settlement application before the Settlement Commission.

5. Ignoring such requests of the petitioner, the Assessing Officer passed the assessment orders for five assessment years in question. When exactly were such orders passed and sought to be served on the petitioner is a matter of considerable dispute between the parties. According to the Assessing Officer, such orders were passed on 15.3.2016 and were also sought to be served on the petitioner through hand delivery on 15.3.2016. The partners of the petitioner firm however, refused to accept such orders, upon which, the Inspector who had visited the office of the petitioner personally, placed before the Deputy Commissioner i.e. the Assessing Officer his report on 16.3.2016.

6. On 16.3.2016, the assessee filed application for settlement before the Settlement Commission at Mumbai. In terms of Rule 44C(3) of the Income Tax Rules, 1962, ("the Rules" for short), the same would have to be declared before the Assessing Officer in prescribed Form 34BA. On 16.3.2016 itself, the petitioner also made such a declaration.

According to the petitioner, the orders of assessment were never communicated to the petitioner on 15.3.2016 as alleged by the department. In fact, the petitioner seriously disputes the very assertion of the department that such orders were passed on 15.3.2016. According to the petitioner, such orders came to be passed in great hurry, once the department realised that the petitioner has filed application for settlement before the Settlement Commission.

7. When the Settlement Commission took up the question of maintainability of the application of the petitioner, the Department was not party to such consideration. Before the settlement bare facts were that the order of assessment dated 15.3.2016 was served on the petitioner on 21.3.2016. With these facts, the question of maintainability of the application for settlement was discussed before the Commission. In the opinion of the Commission, date of service of the order would not be important since there is a clear distinction under the Act between the passing of the order and date of service. In the opinion of the Commission, expression "assessment is made" would not encompass the service of order of assessment. The Commission also referred to a circular of CBDT dated 17.11.2014.

8. We may briefly record the factual and legal controversies which have arisen in the background of above-noted rival versions. According to the petitioner, the application for settlement having already been filed on 16.3.2016 before even the orders of assessment were passed, such

application before the Settlement Commission was maintainable. Even if such orders were passed on 15.3.2016, as contended by the department, since the same were not served on the petitioner, the assessment proceedings would be deemed to be pending and, therefore, application for settlement would be maintainable. On the other hand, according to the department, orders of assessment were passed on 15.3.2016 and also tendered for service on the same day. Upon the petitioner refusing to accept the orders, the service thereof was complete. In any case, as soon as the orders of assessment were passed, the assessments came to a conclusion and were no longer pending with the Assessing Officer. Irrespective of dispatch of the orders of assessment or service thereof on the assessee, application for settlement after the date of orders of assessment would not be maintainable.

9. Shri S.N. Soparkar learned counsel for the assessee raised the following contentions :

1) The documents and materials on record would establish that the assessment orders were never passed on 15.3.2016 contrary to what is contended by the department. He took us painstakingly through the documents and registers on record to contend that it was highly improbable that the assessment orders which run into great length, could have been approved by the approving authority on the same day and returned to the Assessing Officer, upon which, the Assessing Officer could have passed the final orders of assessment on the very same day. The entire version of the department therefore,

that the orders were passed on 15.3.2016 is unbelievable.

2) Even if the orders of assessment were passed on 15.3.2016, the same would have no effect till the same are served on the assessee or at any rate dispatched for service. Mere passing of the orders of the assessment on the file by the Assessing Officer would not terminate the assessment proceedings and in terms of section 245C(1) of the Act, application for settlement could still be filed. Counsel further submitted that the entire version of the departmental authorities that the orders were tendered for service to the petitioner on 15.3.2016 is wholly unbelievable. Partners of the firm to whom the orders were allegedly tendered for service, have filed their affidavits denying such allegations. Counsel would highlight that when the declaration of the filing of application before the Settlement Commission was filed before the Assessing Officer, he made no endorsement that such application was not maintainable or that the orders of assessment were already passed. This would be an additional ground to indicate that till the filing of the settlement application by the petitioner, no orders of assessment were passed.

3) Counsel contended that what is relevant for the purpose of maintainability of an application for settlement under sub-section(1) of section 245C of the Act is the date of service of assessment order and not the passing thereof. In this respect, counsel relied on the following decisions :

1) **Collector of Central Excise, Madras v. M/s. M.M. Rubber and Co., Tamil Nadu** reported in 1992 Supp(1)

Supreme Court Cases 471.

2) **Commissioner of Income-Tax v. Income Tax Settlement Commission** reported in (2015) 58 taxmann. Com 264 (Bombay).

3) **Yashovardhan Birla v. Deputy Commissioner of Income-tax, Central Circle-4(1) & (3)** reported in (2016) 73 taxmann.com 5 (Bombay).

4) **Qualimax Electronics Pvt ltd; Pradeep Gupta, Manju Gupta; Mohit Gupta v. Union of India** reported in 2010 (257) ELT 42.

5) **Vishnu Steels v. Union of India** reported in 2013(4) Maharashtra Law Journal 869.

10. On the other hand, learned counsel Shri Manish Bhatt for the department opposed the petitions raising the following contentions :

1) The documents on record would establish that the assessment orders were passed on 15.3.2016 and were also sought to be delivered personally on the same day through the officers of the department but the partners of the firm refused to accept the same. He pointed out that the Assessing Officer, the Inspector who had tendered the assessment orders for service and the Joint Commissioner who had approved draft orders of assessment on 15.3.2016 have all filed their affidavits. Several registers maintained by the department in course of the business, contained

corresponding entries which would further establish the version of the department.

2) The facts on record would thus establish that the assessment orders were passed on 15.3.2016 and sought to be served on the petitioner also on the same day. The application for settlement which was filed only on 16.3.2016 was therefore, not maintainable.

3) In the alternative, counsel submitted that upon passing of an order of assessment, the assessment would no longer remain pending before the Assessing Officer. It would thereafter, not be necessary to either dispatch or actually serve the order. According to him, therefore, the moment an order of assessment is passed, it would no longer be open for the assessee to apply for settlement of his case. In this context, counsel relied on the following decisions :

1) **RM P R Viswanathan Chettiar v, Commissioner of Income-tax, Madras** reported in 1954(25) ITR 79.

2) **Badri Prasad Bajoria v. Commissioner of Income-tax, Central** reported in 1967 (64) ITR 362.

3) **Commissioner of Income-tax, West Bengal, III, Calcutta v. Balkrishna Malhotra** reported in 1971(81) ITR 759.

4) **K N K Keddy v. Commissioner of Income-tax, Mysore** reported in 1974 (97) ITR 450.

11. The factual and legal controversies are closely connected and in some sense overlap. We would however, segregate the two for consideration. First, we would resolve the factual disputes. As noted, according to the department, assessment orders were passed on 15.3.2016, tendered for service to the petitioner on the same day. The department points out that the draft orders of assessment were passed on 15.3.2016, sent to Joint Commissioner for his approval on 15.3.2016, who approved the same, sent back to the Assessing Officer on the same day upon which the Assessing Officer passed the orders of assessment on 15.3.2016 itself. The petitioner however, refused to receive the orders when tendered.

12. In this context, the Assessing Officer, the Deputy Commissioner of Income-tax, Baroda, in his affidavit dated 12.7.2016 has stated that the assessment orders were getting time-barred on 31.3.2016. Though the petitioner had intimated under letter dated 1.2.2016 that he is contemplating to file settlement petition, there was no prohibition against the Assessing Officer passing the order of assessment and in any case, sufficient time passed after the said letter dated 1.2.2016 was written. He therefore, finalised the assessments in accordance with law on 15.3.2016. He has further stated that upon finalising the assessment on 15.3.2016, they were also sent for service personally, by deputing an Inspector of his office, to the partners of the assessee firm at its office on 15.3.2016, however, the partners refused to receive the orders. A report to this effect was made by the Inspector, a copy of which has been produced along with this affidavit.

Thereafter, the assessment orders were dispatched through speed post on 16.3.2016 at the last known address of the assessee which was returned as unserved with an endorsement "left". He has along with the affidavit produced a copy of envelope containing such orders and a copy of tracing record of the speed-post. Finally, according to him, the assessment orders were served personally to a partner of the assessee firm on 21.3.2016.

13. Along with this affidavit, deponent has produced a copy of the report dated 16.3.2016 by Shri Vinaykumar, Tax Assistant and Shri Suresh Kumar Senapati, Income-tax Inspector, in which it is stated that on 15.3.2016, they had gone to the office of the Bafna Panchal Group to handover the assessment orders passed in cases of four assessees which included M/s. Shalibhadra Developers, present petitioner -assessee and M/s. Shanti Buildcon, the petitioner of the connected petition. It is further stated that:

"2. When we reached there at about 6 p.m., Shri Rajesh S. Bafna (Partner of M/s. Shanti Buildcon and M/s. Shalibhadra Developers) and Shri Mahendra R. Kankaria (Partner of M/s. Shanti Buildcon) were available in the Office. Afterwards Shri Kalpen K. Doshi (Partner of M/s. Shalibhadra Developers) has arrived there. They have received the Assessment Orders in respect of Shri Shri Chetan Jogi and Sanjay Jogi. However, in the case of M/s. Shanti Buildcon and M/s. Shalibhadra Developers, they have told us to wait for some time as they wanted to talk to their other partners and C.A.before receiving the order. However, they have kept me waiting there for nearly 3 hours and finally told me at about 9 p.m that they would not accept the Assessment Orders in these two cases as

they are going to file a petition before the Hon'ble Settlement Commission, Mumbai."

14. The Assessing Officer has filed an affidavit in reply dated 1.9.2016 to the rejoinder of the petitioner in which he has stated inter-alia that draft orders for the assessment years in question were sent to the Joint Commissioner on 15.3.2016 along with a covering letter. The Joint Commissioner gave his approval for passing the assessment orders also on 15.3.2016. The forwarding of the draft orders to the Joint Commissioner and receipt of the approval by the Joint Commissioner have been entered in the relevant registers, extracts of the relevant pages of the register have been produced along with this affidavit. Pursuant to the orders of the assessment, the same were also entered in the Demand and Collection register on 15.3.2016. Such orders were sent with an Inspector along with two assessment orders passed earlier in case of other assessees. As per the Inspector's report, the partners of the firm requested the officers to wait. After prolonged conversation with the authorised representatives, they refused to receive the orders late at night. The petitioner also refused to accept the envelope sent through speed post.

15. Along with this affidavit, the Assessing Officer has produced a letter dated 15.3.2016 written by him to the Joint Commissioner of Income-tax forwarding the draft assessment orders in respect of the present petitioner firm for the assessment years 2010-2011 to 2014-2015. He also produced the extract of the register of Additional CIT, Central Range, Baroda, in which at serial no.2793, one

would find the entry regarding draft assessment orders in case of M/s. Shanti Buildcon, the petitioner of connected petition and at serial no. 2794, one would find similar entry pertaining to M/s. Shalibhadra Developers, i.e. the present petitioner. He has also produced a register of Assessment Approval under section 153D for the financial years 2012-2013, to 2015-2016. At serial no.194, one would find the entry pertaining to M/s. Shanti Buildcon, and at serial no.195 concerning M/s. Shalibhadra Developers. As per this register, both were received by the approving authority on 15.3.2016 and approved also on the same day. Yet another document produced along with this affidavit is a copy of letter dated 15.3.2016 written by the Joint Commissioner of Income-tax to the Assessing Officer, the Deputy Commissioner, under which he conveyed his approval to the draft assessment orders in case of M/s. Shalibhadra Developers. This is followed by the register of DCIT CC-1, Baroda for financial year 2015-2016 starting from 3.3.2016. At serial no.2975, there is a reference to the approval in case of M/s. Shanti Buildcon and at serial no.2976, there is a reference to the approval in case of M/s. Shalibhadra Developers. Both these entires, according to the register, were made on 15.3.2016.

16. In addition to such documents and other materials, the department would also refer to the notice of demand under section 156 of the Act which was issued against the petitioner on 15.3.2016 and a notice for penalty proceedings under section 271(1)(c) of the Act which was also issued on the same date. The department has produced before us, for our perusal, two registers, one is

Current Demand and Collection register for the financial year 2015-2016 which contains a corresponding entry of assessment orders in case of M/s. Shanti Buildcon at serial no. 118 to 120 for the assessment under section 153A of the Act and in case of M/s. Shalibhadra Developers at serial no.121 to 124. Likewise, at serial no. 51 and 52, we find reference to assessments in case of M/s. Shanti Buildcon and M/s. Shalibhadra Developers respectively for the assessments under section 143(3) of the Act for one of the years. In both the cases, the entries are found sequentially i.e. these entries are preceded by an entry pertaining to order of assessment dated 11.3.2016 and followed by the order of assessment passed in case of some other assessee on 16.3.2016. This register does not contain any column for the date on which such entries were made. In that sense, therefore, this register is neutral. Counsel for the petitioner with whom we had shared this original register would however, draw our attention to a column pertaining to the date of service of notice of demand which in the present case was shown to be 21.3.2016. According to him, therefore, this would establish that the orders of assessment were served only on 21.3.2016 and not before. We would advert to this contention later.

17. The department has also produced for our perusal a penalty register for the year 2015-2016 in which at serial nos.51 to 54, there are four entries concerning M/s. Shanti Buildcon of the penalty notice having been issued. Likewise, at serial nos. 55 to 58, we find a similar reference in case of M/s. Shalibhadra Developers.

18. Against such documents and materials on record, the petitioner relies on contents of the petition, but more importantly on the further affidavits filed in the present proceedings. At page-404 of the compilation is the affidavit of one Kalpen K Doshi, partner of the petitioner firm, in which he has stated that the application for settlement was filed before the Commission on 16.3.2016 before 1:00 pm. On 15.3.2016, in the evening, the officers of the department had come to serve assessment orders of Shri Chetan Jogi and Shri Sanjay Jogi and the same were accepted. No orders concerning M/s. Shalibhadra Developers and M/s. Shanti Buildcon were brought by them. He had personally visited the Deputy Commissioner at about 1:00 pm on 16.3.2016 and served the declaration in Form 34BA. He was not informed by the said officer that the assessment orders in case of the petitioners were already passed on 15.3.2016. He did not even tender such orders for service, if they were otherwise ready. A similar affidavit has been filed on 20.8.2016 by Rajesh S. Bafna, partner of the petitioner firm. Another partner of the firm Mahendrakumar Kankaria has also filed affidavit dated 20.8.2016 along the same lines. In the affidavit in rejoinder dated 20.8.2016 sworn by Shri Kalpesh Kishorbhai Doshi, partner of the firm, same stand has been taken in more elaborate manner.

19. In addition to the affidavits of the Assessing Officer noted above, in which the stand of the department is stated and reiterated, we have several other documents supporting such stand. First of all, the draft orders were sent by the

Assessing Officer to the Joint Commissioner for approval along with a covering letter dated 15.3.2016. The Additional CIT Central Range, Baroda, register from 1.4.2016 contained entries in case of M/s. Shanti Buildcon, and M/s. Shalibhadra Developers at serial nos. 2793 and 2794 respectively. This register also contains continuous sequential entries. Yet another register, copy of which is produced on record and original for our perusal, is the register of Assessment Approval under section 153D. This register contains various approvals granted by the approving authority from the financial year 2012-2013 onwards. At serial nos. 194 and 195, in this register, we find, entries pertaining to M/s. Shanti Buildcon, and M/s. Shalibhadra Developers respectively. The years of assessment for which such approval was granted are mentioned. The date of receipt of the draft orders and the date of approval, both have been recorded as 15.3.2016. This register also contains chronological sequential entries of various draft orders which were received and in respect of which approvals were granted. The DCIT CC-1 register Baroda, contained corresponding entries of forwarding of two sets of orders for approval in case of M/s. Shanti Buildcon, and M/s. Shalibhadra Developers respectively at serial nos. 2975 and 2976. These entries were made on 15.3.2016. The register contains sequential entries date wise and contains several other entries for a period before and after 15.3.2016.

20. These registers which are maintained by the department in the ordinary course of business, thus contain various entries contemporaneously made concerning the present

case. The outward movement of the draft orders, the receipt of such draft orders by the approving authority, the approval by the approving authority and forwarding and receipt of such approvals by the Assessing Officer are all thus documented. In addition to the affidavits filed by the Assessing Officer and the Joint Commissioner as approving authority, we therefore, have considerable supporting evidences from the registers maintained by department establishing the movement of the assessment proceedings and the events closely connected with it. The assertion of the petitioner therefore, that no orders of assessment were passed on 15.3.2016 therefore, cannot be accepted. It is true that the events seem to have moved rather swiftly. Even according to the department, draft orders were passed on 15.3.2016, forwarded for approval to the Joint Commissioner on the same day, the Joint Commissioner approved the draft orders also on the same day, upon which, the Assessing Officer passed his orders of assessment on 15.3.2016. This may exhibit a certain anxiety or urgency shown by the department in passing orders of assessment and may also have the angle of thwarting the petitioner from approaching the Settlement Commission. However, this would not necessarily mean that no orders of assessment were actually passed and in fact, the department had predated such orders. Had there been any attempt of predating the orders, there would have been some trace of such attempt in some register or the other betraying the truth which despite minute scrutiny, we have not detected. In so far as approval is concerned, we find from the register that in large number of cases approval is granted on the same day or at best in a day or

two. We must therefore, accept the department's version that the orders of assessment were actually passed on 15.3.2016.

21. If that be so, there is no reason why we should disbelieve the department's version that the same were also tendered for service on 15.3.2016. Even according to the petitioner, the department wanted to prevent the petitioner from applying for settlement. The petitioner also agrees that the two officers of the department, the Tax Inspector and the Tax Assistant personally visited the office of the petitioner and tendered two sets of assessment orders in case of Chetan Jogi and Sanjay Jogi. Admitted position therefore, is that the departmental officers from the unit of Assessing Officer, did visit the petitioner for tendering the two sets of assessment orders. There was thereafter, no reason why the same officers should not have carried the assessment orders in case of the present petitioner, if the orders were already passed as we have believed. If the department was keen on preventing the petitioner from applying for settlement as the petitioner has vehemently averred, the most natural and logical step would be to serve the orders through same personal messengers who were carrying other assessment orders. We have in support of such version, the affidavit of the Inspector concerned who had personally visited the office of the petitioner firm and who even according to the petitioner had tendered the assessment orders in case of other assessees.

22. We also have on record a report made by such visiting officers of having attempted to tender the orders of

assessment which the petitioner refused to accept. This report of-course is dated 16.3.2016, since in the report itself it is mentioned that officers were made to wait for long time and it was only at about 9 O' clock at night that they were informed that the petitioner would not be accepting the assessment orders. In case of the present petitioner, documents on record and preponderance of possibilities would convince us that the department is correct on both counts that the assessment orders were actually passed on 15.3.2016 and were sought to be served on the petitioner through personal messengers on the same date. The fact that the register referred to the date of service of the assessment order as 21.3.2016 would not be a clinching factor. It is not in dispute that the orders were actually delivered on the petitioners on 21.3.2016. Earlier attempt on part of the departmental authority to serve the orders did not materialise, since according to the department, the petitioners did not accept such service. The speech post dispatch also returned unclaimed upon which it was finally served personally on 21.3.2016. An entry in the register therefore, referring to 21.3.2016 as the date of service of the orders would not per-se falsify the department's stand that no previous failed attempts of serving the orders were made.

23. Counsel for the petitioner however, drew our attention to section 282 of the Act pertaining to service of notice generally. Sub-section(1) thereof provides that a service of notice or summon or requisition or order or any other communication under the Act may be made by delivering or transmitting a copy thereof, to the person

therein, in different modes provided in clauses (a) to (d) of the said sub-section. Clause (b) pertains to the manner as provided in Code of Civil Procedure for the purpose of service of summons. This in turn would lead us to Order V Rule 17 of the Code of Civil Procedure which pertains to a situation where defendant refuses to accept service or cannot be found. In essence, this rule provides that where the defendant or his agent or such other person refuses to sign the acknowledgment or where despite exercise of reasonable diligence, the defendant cannot be found, etc., the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house where the defendant ordinarily resides or carries on business and return the original to the Court from which it was issued with a report stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person by whom the house was identified and in whose presence the copy was affixed. According to the counsel this procedure was not followed by the visiting officials of the department. It is true that the Inspector of Income-tax and his colleague Tax Assistant did not follow with precision, requirement of Rule 17 Order V of the Code of Civil Procedure. This however, would not alter the position that they had visited the office of the petitioner and tendered the copies of the assessment orders. If the petitioner refused to accept the same, mere failure on part of the serving officer to thereafter, follow the procedure would not alter this factual position. It is perhaps not even the case of the petitioner that since these follow-up actions were not taken, the order should not be taken to have been served.

24. With this factual conclusions, we may assess the legal position. Chapter XIX-A of the Act pertains to settlement of cases. Under sub-section(1) of section 245C of the Act, an assessee at any stage of a case relating to him can make an application for settlement in the prescribed manner. The term 'case' has been defined in clause(b) of section 245A as to mean any proceedings of assessment under the Act of a person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section(1) of section 245C of the Act is made. Explanation clause (iiia) which is relevant in this context reads as under :

"As per this clause thus a proceeding for assessment or reassessment under section 153A or 153C shall be deemed to have commenced from the date of issue of notice initiating such proceeding and concluded on the date on which assessment is made."

25. We are thus concerned with the issue of conclusion of an assessment since, as noted, an assessee can file an application for settlement at any stage of a case relating to him. In other words, if a case as defined in clause(b) of section 245A has concluded, application for settlement would not be maintainable. As per explanation (iiia) below the definition of term 'case', the assessment under section 153A would be deemed to conclude on the date on which the assessment is made. In plain terms, the language used is the date on which the assessment is made. The date of

conclusion thus is related neither to the date on which the assessment order is served nor to the date on which it is dispatched for service. If one therefore, were to give the plain meaning interpretation to this expression, the assessment would be deemed to be concluded on the date on which such order of assessment is passed.

26. As is well known, all assessments under the Act come with time-frame beyond which the assessments would become time-barred. Such time limit is laid down under section 153 of the Act. For example under sub-section(1) of section 153, it is provided that no order of assessment shall be made under section 143 or section 144 at any time after the expiry of twenty-one months from the end of the assessment year in which the income was first assessable. Under sub-section(2) of section 153, it is provided that no order of assessment, reassessment or re-computation shall be made under section 147 after the expiry of nine months from the end of the financial year in which the notice under section 148 was served. These provisions are thus framed in negative covenant providing that no order of assessment shall be made beyond a certain date. Nevertheless, these provisions use the expression "assessment shall be made", an expression similar to one used in explanation (iiia). In context of such time limit provisions, the issue of when an assessment can be said to have been made, has come up before various Courts.

27. In case of **R M P R Viswanathan Chettiar** (supra), a Division Bench of Madras High Court considered a question whether the Tribunal was right in holding that the

assessment in case was made within the period of limitation prescribed under section 34(2) of the Income Tax Act, 1922. This provision provided that no order of assessment or reassessment shall be made after expiry of four years from the end of the year in which the income, profits or gains were first assessable. In this context, the Court held as under :

“10. Sub-section (2) of Section 34 itself, in our opinion makes it clear that the expression "no order of assessment shall be made" hay to be given an identical meaning, whether the assessment is under Section 23 or whether the assessment is under Sub-section (1) of Section 34 of the Act. what we have stated above with reference to the provisions of Section 23 of the Act should make it clear that the order of assessment provides for a stage that precedes the communication of the tax due under Section 29 of the Act, that is, the sum payable by the assessee on the basis of the assessment of the income within the meaning of Sub-sections (1), (3) or (4) of Section 23. The assessment and the order of an assessment are steps to be taken by the Income-tax Officer. There is no question of anything further that has to be done by the assessee himself at that stage. As pointed out in ' (B)' itself, there could be no occasion to apply to such a case, the rule enunciated in '34 Mad 151 (D)' or 'AIR 1930 Mad 490 (A)', and extended to application under Section 33-A of the Income-tax Act, which has designed to protect the interests of the assessee when he had to do something, that is, when he had to take steps within the period of limitation allowed by the law to avoid the order with which he felt aggrieved.

11. In 'Barlow v. Vestry of St. Mary Abbotts, Kensington', (1886) 11 AC 257 (P), the expression to be construed was "an order made in writing on the person", who is directed to take the building down etc. Lord Watson observed at

page 236:

"But it is admitted that, although the Magistrate announced the terms of his judgment on the 24th of January, the order itself was not reduced to writing or subscribed by him until the 21st of March following. It was never served upon the person to whom it is directed; and the fact of a written order having been made did not come to his knowledge before the expiry of the day upon which it was issued. I am of opinion that an order verbally intimated by the magistrate is not in any sense an order 'in writing' within the meaning of the Act; and further, that in proceedings like these of a harsh and penal character a written order cannot be regarded as made 'on' the defendant until it has been duly served upon him or otherwise brought to his knowledge."

12. The necessity to bring the terms of the order to the knowledge of the person affected therefore turned on the expression "on" and not so much as on the necessity to have the order in writing. There is no such provision in Section 23(3) of the Act, though, it requires an order of assessment to be in writing.

13. As we have already pointed out, the time limit of four years for which Sub-section (2) of Section 24 provided was the period within which the Income-tax Officer had to complete one stage of the proceedings, that is, the assessment of the income and the determination of the tax payable, and that stage could be completed by the Income-tax officer himself, even if the terms of the order of assessment were not communicated within that period of foiir years to the assessee. The rights of the assessee aggrieved by such an order of assessment have been specifically provided for by other sections of the Act."

28. This view was approved by the Supreme Court in case of **Balkrishna Malhotra** (supra) making following observations :

"6. It has been stated over and over again by this Court as well as by the Judicial Committee that the words "assessment" and the "assessee" are used in different places in the Act with different meaning. Therefore in finding out the true meaning of those words in any provision, we have to see to the context in which the word is used and the purpose intended to be achieved. It is true that sub-ss. 1, 3 and 4 of s.23 require the Income-tax Officer to "assess the total income of the assessee and determine the sum payable by him". In other words in those provisions the word "assess" has been used with reference to computation of the income of the assessee and not the determination of his tax liability. But in s.34(3) the word used is not "assess" but "assessment". The question for decision is what is the meaning of that word ? As long back as September 24, 1953, the High Court of Madras in Viswanathan Chettiar's case, 25 ITR 79 = (AIR 1954 Mad 928) (supra) came to the conclusion that the word "assessment" in proviso to s.34(3) means not merely the computation of the income of the assessee but also the determination of the tax payable by him. No other High Court has taken a contrary view. The Revenue must have in all these years acted on the basis of that decision of the Madras High Court. Interpretation of a provision in a taxing statute rendered years back and accepted and acted upon by the department should not be easily departed from. It may be that another view of the law is possible but law is not a mere mental exercise. The courts while reconsidering the decisions rendered long time back particularly under taxing statutes cannot ignore the harm that is likely to happen by unsettling law that had been once settled. We may also note that the Act has been repealed by the Income-tax Act, 1961. The corresponding

provisions of the1961 Act are materially different from the provisions referred to earlier. Under these circumstances we do not think that we would be justified in departing from the interpretation placed by the Madras High Court in Viswanathan Chettiar's case, though a different view of the law may be reasonably possible."

29. In case of **K N K Keddy** (supra), Division Bench of Karnataka High Court considered a question whether within the meaning of section 275 of the Act, penalty order must not only be made within two years of the completion of proceedings for the imposition of penalty but also communicated to the assessee within the said period of limitation. In this context, it was observed as under :

"14. The expression used in this section is "made". It is in regard to such an order that is going to be "made" that section 275 prescribes the time limit. It provides that no order imposing a penalty (under Chapter XXI) shall be passed after the expiration of two years. Therefore, the subject-matter under reference under both section 274 and 275 is the same and the expression used in section 274 is "made" and the expression used in section 275 is "passed". It is, therefore, obvious that no special significance need be attached to the use of the expression "passed" and that it is synonymous with the expression "made". We, therefore, reject the contention urged for the assessee that the expression "passed" should be construed differently from the expression "made".

17. This court in Esthuri Aswathiah v. Commissioner of Income-tax considered a similar point. In that case, the assessment was completed under section 23(3) of the Indian Income-tax Act, 1992, on 29th February, 1960. The assessment order was sent by registered post to the assessee and it was received by him on 4th April, 1960.

The assessment was for the year 1955-56, the relevant accounting year being one ended 31st March, 1955. In the appeal before Appellate Assistant Commissioner, against a reassessment it was contended that the assessment was barred by limitation as the order was not communicated to the assessee within four years from the end of assessment year and the order can be said to have been made only when the order was communicated to the assessee. That was not accepted. In the reference to the High Court, a similar argument was reiterated. This court rejected the contention referring to the ruling of the High Court of Madras in Viswanatha Chettiar v. Commissioner of Income-tax This court held that section 34(3) did not speak of any communication and what was of the essence was the making of the order and not its communication and the assessment had been made within the time prescribed and the date of the communication could not be taken as the date or making of the order. It transpires that certain decisions in which it had been held that for purposes of filing the appeal or revision against the order made, the relevant date was the date of the knowledge of the order or the date on which it was communicated had been relied upon. But the learned judges held that those cases were not apposite for deciding the matter in issue. It is, therefore, seen that, so far as the Income-tax Act is concerned, the expression "making of an order" has been construed as implying the signing of the order and not its communication and this view has been taken by this court as well as the High Courts of Madras and Calcutta. We have earlier held that no distinction is possible to be made between the use of the expression "made" and "passed". Therefore, the principle that has been applied by more than one court in the matter of construction of such expression in the Income-tax Act should be upheld as the enactment has to be administered throughout the territory of India, though as the matter of general principle it seems to us that to be an effective order the order imposing liability on a party should communicated to him and there

does not appear to be any difficulty in passing such an effective order within the time prescribed in section 275.

18. Having regard to the view taken in the three cases referred to above, we hold that passing of the order imposing penalty was on 31st March, 1965, within two years as prescribed in section 275 of the Act and the communication of the order subsequently did not affect the validity of the order imposing penalty. We, therefore, answer the question referred to us thus :

"The order imposing penalty under section 271(1)(c) should be passed within two years from the date of the completion of the proceedings in the course of which the proceedings for the imposition of penalty had been commenced and it is not necessary that the communication of the same to the assessee should also be within the said period of two years.""

30. In case of **K U Srinivasa Rao v. Commissioner of Wealth Tax** reported in 1985(152) ITR 128, Division Bench of Andhra Pradesh High Court considered a question whether the assessment order which was passed on 30.3.1979 but served on the assessee on 20.4.1979 would be deemed to have been passed on 20.4.1979 and, therefore, barred by limitation. In this context it was held and observed as under :

"4. The word to be noticed is "made". It must be remembered that an order of assessment is not an administrative order, but a quasi-judicial order. It is true that an order of assessment may not have been made in the presence of the assessee and that it requires to be communicated, but still, its character as a quasi-judicial

order must be kept in mind while interpreting the word "made". The Act merely requires that an order of assessment shall be made within the prescribed period. It does not further require that it should be communicated within the period prescribed. Mr. Dasaratharama Reddy relied upon the decision of the Supreme Court in CWT v. Kundan Lal Behari Lal [1975] 99 ITR 581, where the word " issued " occurring in Section 18(2A) of the W.T. Act was construed as synonymous with the word " served". Section 18(2A) confers a right on the assessee to seek waiver or reduction of the penalty if he files a return before the WTO " issues" the notice. We are afraid, the principle of the said judgment can have no application here for more than one reason, that not only the expression construed is different, but that there is also a distinction between a notice and an order of assessment. Mr. Dasaratharama Reddy then relied upon the decision of the Supreme Court in State of Punjab v. Khemi Ram. There the expression which fell for construction was the word " communicate ". The question was, when does an order of suspension pending enquiry passed against a Government servant take effect ? It must be remembered that an order of suspension pending enquiry is not a quasi-judicial order but an administrative order. Even there, the Supreme Court held that the word " communicate " cannot be interpreted to mean that the order would become effective only on its receipt by the concerned Government servant. It was held that the communication is complete once the order is put in the course of transmission and thus goes out of the control of the authority passing it. Be that as it may, the said principle applicable in the case of administrative orders cannot be extended to or applied in the case of quasi-judicial orders passed by the authorities in exercise of their quasi-judicial function. Indeed, we may refer to a decision of this court in Kodidasu Appalaswamy & Suryetnarayana v.CIT [1962] 46 ITR 735, in this behalf. There the order of assessment had to be made on or before March 31, 1957. It was purported to be made on March 29, 1957, but was

actually served on April 6, 1957. The contention raised there was identical to the one raised here, viz., it must be deemed to have been made only on April 6, 1957, the date on which it was served upon the assessee. This contention was rejected and it was held that the order must be deemed to have been made on the date on which it purports to have been made. Mr. Dasaratharama Reddy contended that this decision requires reconsideration in the light of the decisions of the Supreme Court in CWT v. Kundan Lal Behari Lal [1975] 99 ITR 581(SC) and State of Punjab v. Khemi Ram. We are not prepared to agree for the reasons already assigned. In CWT v. Kundan Lal Behari Lal (1975) 99 ITR 581 (SC), the language was different and the other decision of the Supreme Court pertains to administrative orders which has no relevance to quasi-judicial orders. For the above reasons, these two W.T.Cs. are dismissed. No costs."

31. It can thus be seen that in context of the limitation for passing the assessment or penalty orders, the Courts have consistently taken a view that it would be sufficient for the assessing authority to pass the order of assessment or penalty. Neither its dispatch nor service would be needed to save the order from being treated as time-barred. The Courts have emphasized on the expression "assessment made" and equated with the order of assessment being passed. In context of the settlement proceedings, identical expression has been used. An assessment would be deemed to be concluded on the date on which the assessment is made. We do not see any reason to interprete this expression any differently. It is true that

both the expressions are used in different context. Nevertheless, there are other reasons why even otherwise, we would not depart from what has been adopted by the Courts in the context of time limit provisions for assessment contained in the Act. As noted under sub-section(1) of section 245C of the Act, an assessee can file an application for settlement at any stage of a case relating to him. A case means any proceeding for assessment or reassessment which may be pending before the Assessing Officer on the date of making an application for settlement. Thus pendency of assessment proceeding is of vital importance for maintaining an application under sub-section(1) of section 245C of the Act. Upon an application for settlement being filed, the same would pass through various stages envisaged in section 245D of the Act. Under sub-section(2) of section 245F, where an application made under section 245C has been allowed to be proceeded with under section 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of section 245D, have exclusive jurisdiction to exercise the powers and perform the functions of an income-tax authority under the Act in relation to the cases. Proviso to sub-section (2) provides that where an application has been made under section 245C on or after the 1st day of June, 2007, the Settlement Commission shall have such exclusive jurisdiction from the date on which the

application was made. Thus, upon making of an application before the Settlement Commission, the Assessing Officer would be, divested of his jurisdiction over the case which would vest exclusively in the Settlement Commission. Sub-section(7) of section 245D however, provides that where a settlement becomes void, proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage where the application was allowed to be proceeded with by the Settlement Commission and the income-tax authority concerned, may, notwithstanding anything contained in the provisions of the Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

32. The statutory provisions noted above manifest intention of the legislature to vest the jurisdiction to process a case of the assessee either in the Settlement Commission or in the Assessing Officer. No sooner an application for settlement is filed under sub-section(1) of section 245C of the Act, the Assessing Officer would be divested of his jurisdiction to assess the return further. The jurisdiction would vest solely and exclusively in the Settlement Commission. If for some reason as envisaged under section 245D of the Act,

proceeding for settlement becomes void, under sub-section(7) thereof, the proceedings before the Assessing Officer would be deemed to have revived upon which he would complete the assessment within the extended time frame provided therein. The overwhelming intention of the legislature thus is that there can be only one order concerning an assessment, be it by the Assessing Officer termed as order of assessment or by the Settlement Commission termed as settlement order. There cannot be one order of assessment by Assessing Officer for the same period for which the Commission would also pass the order of settlement. Accepting the contention of the petitioner that even if the order of assessment has been passed by the Assessing Officer, his case may still be deemed to be pending since such order was not dispatched or served, would lead to a conflicting situation. For the purpose of settlement, assessment would be deemed to be pending. For the purpose of section 143 or section 147 as the case may be, the order of assessment would be deemed to have been passed. The Settlement Commission thereafter, would be authorised to proceed and process the application for settlement and as a natural consequence, pass an order of settlement. There is no provision, to our mind, under which the order of assessment already passed by the Assessing Officer under such a situation would be obliterated. Surely, the legislature would never bring about

a situation where an order of assessment would remain on record in respect of same period for which the Settlement Commission would pass a settlement order.

33. We are conscious that the situation has been viewed somewhat differently by some of the High Courts. The Bombay High Court in case of **Income Tax Settlement Commission** (supra) considered a situation where the order of assessment was signed on 18.3.2013 and was also dispatched to the assessee on the same day in the morning. Such post returned as unserved as refused. However, such refusal was after the date on which the application for settlement was presented before the Commission. In such background, the Court upheld the view of the Settlement Commission that the word 'issued' should be interpreted as served and that delivery of envelope to the postal authority on 18.3.2013 cannot be termed as service to the applicant. One of the factors which weighed with the Bombay High Court in the said decision was a circular of CBDT dated 12.8.2008, in which it was clarified that the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant. We may record that subsequently the circular was superseded by a circular of the Board dated 17.11.2014, in which it was clarified that the assessment

shall be deemed to have been completed on the date on which the assessment order is passed.

34. When the case again arose before the Bombay High Court in case of **Yashovardhan Birla** (supra), after issuance of the circular by CBDT dated 17.11.2014, the Revenue contended that earlier decision in case of **Income Tax Settlement Commission** (supra), would not hold good. Such contention was rejected by the Bombay High Court inter-alia on the premise that the Board circular cannot overrule the High Court judgement. It was also observed that the decision of the Court did not rest on the circular dated 12.8.2008.

35. In case of **Vishnu Steels** (supra), Bombay High Court again in context of Central Excise Act held that the expression "before adjudication" must be given a purposive interpretation. The Court disapproved the view of the Settlement Commission which had held that the moment the order of adjudication was signed by the adjudicating officer, no application for settlement would be maintainable. It was observed that such an interpretation would defeat the object and purpose of the statute. The expression "before adjudication" must be given purposive

interpretation.

36. In case of **Mohit Gupta** (supra), Division Bench of Delhi High Court was examining a similar question in the background of settlement provisions contained in the Central Excise Act, wherein a case would be pending if the adjudicating authority has not adjudicated the proceedings. In the said case, the adjudicating authority had passed an order on 24.12.2009 and was served on the petitioner on 8.1.2010 which was the date on which the petitioner had filed the application for settlement. The High Court considered the date on which the order of adjudication was dispatched for service as a crucial date for consideration of pendency of the case. It was observed as under :

"Thus, the date of receipt of the order-in-original is not a relevant circumstance. What is of prime importance is the date on which the order-in-original was despatched from the office of the adjudicating authority (in this case, the Commissioner of Central Excise & Customs, Ghaziabad). As we have seen, the order in original dated 24.12.2009 had left the office of the said Commissioner on 31.12.2009 and was beyond his reach and control. Consequently, the adjudication becomes effective and complete on that date, i.e. 31.12.2009. That being so, the necessary pre condition of a case pending adjudication on the date of the settlement application is not satisfied. As such, the Settlement Commission had no jurisdiction to entertain the

plea of settlement. Because, it is only a "case" as defined in section 31(c) which could be the subject matter of settlement. Section 31(c) defines "case" to mean any proceeding for the levy, assessment and collection of excise duty, "pending before an adjudicating authority on the date on which an application under sub section (1) of section 32E is made". Once, the order leaves the hands of the adjudicating authority in the sense explained above, the "case" can no longer be said to be pending before him. Conversely, the proceeding would be regarded as pending before an adjudicating authority till the order does not go out of his control. In the present case, this happened on 31.12.2009. Thus, on 08.01.2010, when the settlement applications were filed by the petitioners, the matter before the adjudicating authority had already been adjudicated."

37. Thus between the views of Bombay High Court and Delhi High Court also there is divergence. Bombay High Court holds, the date of service of assessment order is the crucial date only after which application for settlement could not be filed. According to Delhi High Court the crucial date would be the date of dispatch of the order and not the date of its service. Even for the sake of consistency and comity, we would have persuaded ourselves to follow the line adopted by either of the High Courts in above noted decisions, our own reading of the situation differently notwithstanding. However, in our opinion, if such interpretation is accepted, it would lead to grave conflict. As noted, in a situation where an order of assessment is already passed, but neither dispatched nor

served to the assessee, application for settlement would be maintainable, upon which, the Settlement Commission would have the exclusive jurisdiction to pass appropriate order in terms of section 245D and other provisions of the Act. At the same time order of assessment which has been passed would survive without any mechanism for either annulling such order or providing for primacy of the order of Settlement Commission. The legislature cannot and has not intended to give rise to two parallel orders pertaining to the same period of assessment by two authorities, both may be competent at the time when they were passing the orders.

38. Shri Soparkar submitted that the CBDT circular cannot alter the correct legal position. We have not based our conclusions on the CBDT circular dated 17.11.2014. Prior to this, earlier circular dated 1.6.2007 provided that the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant. In the circular dated 17.11.2014, it has been provided that the assessment shall be deemed to have been completed on the date on which the assessment order is passed. At best, this circular neutralised the earlier clarification of the Board that assessment shall be deemed to be complete only upon the order of assessment being

served on the applicant.

39. The decision in case of **M/s. M.M. Rubber and Co., Tamil Nadu** (supra) of the Supreme Court relied upon by the petitioner was however, rendered in very different background. The question before the Court in the said case was of computation of period of limitation for revision under the Income Tax Act, 1922, an order of assessment could be subject to revision either by the Commissioner or also at the hands of assessee. In context of limitation of such proceedings, it was held that for the Commissioner to take an order in revision, the period would commence from the date, the assessment is made. However, in context of limitation concerning the assessee's revision it was held that the period of limitation would commence from the date of communication of the order. In paragraph 18, the Court observed as under :

"18. Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of suo moto power over the subordinate authorities' orders, the date on which such power was exercised by making an order are the relevant dates for

determining the limitation. The ratio of this distinction may also be found- ed on the principle that the Government is bound by the proceedings of its officers but persons affected are not concluded by the decision."

40. Our conclusions in facts and law can be summarized thus :

1) The orders of assessment were passed by the Assessing Officer on 15.3.2016.

2) They were also tendered for service to the partners of the petitioner firm on the same day who refused to receive them and thus service was complete.

3) For the purpose of application under section 245C(1) of the Act, a case would be pending only as long as the order of assessment is not passed. Once the assessment is made by the Assessing Officer by passing the order of assessment, the case can no longer be stated to be pending. Application for settlement would be maintainable only if filed before the said date. Date of dispatch of service of the order on the assessee would not be material for such purpose.

41. The petitions are dismissed.

42. At the request of counsel for the petitioners, stay granted previously which continued during the pendency of these petitions, shall continue till 15.12.2016.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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