

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :: **26.7.2016**

CORAM:

THE HONOURABLE MR.**JUSTICE T.S.SIVAGNAM**

W.P.Nos.5553 to 5558 of 2008

R.VIJAYALAKSHMI ... petitioner

Vs

1 INCOME TAX SETTLEMENT
COMMISSION ADDITIONAL BENCH 488/489
ANNA SALAI, CHENNAI 35.

2 THE COMMISSIONER OF INCOME
TAX I COIMBATORE INCOME TAX OFFICE
Race COURSE COIMBATORE.

3 ASSISTANT COMMISSIONER OF
INCOME TAX COMPANY CIRCLE I (3)
COIMBATORE. ... respondents

Writ Petition filed under Art.226 of the Constitution of India praying for a Writ of Certiorari calling for the records of the 1st respondent Income Tax settlement commission Additional bench, Chennai, in its file settlement application No.21/CBE/52/95-IT for assessment years 1988-89 to 1994-95 quash the impugned order dated 19.1.2005.

For petitioner ... Mr.T.N.Seetharaman, Senior Counsel,
assisted by Mr.R.Kumar

For respondents ... Mr.T.Pramod Kumar Chopda,
Senior Standing Counsel

COMMON ORDER

Heard Mr.T.N.Seetharaman, learned Senior counsel appearing for the petitioner, assisted by Mr.R.Kumar and Mr.Pramod Kumar Chopda, learned Senior Standing Counsel, appearing for the respondent.

2. All the Writ Petitions arise out of the common issue with regard to the scope and power of Settlement Commissioner under the Income Tax Act to rectify its orders. Though there are six Writ Petitions, the Writ Petitions in W.P.Nos.5553, 5555 and 5557 of 2008 are to be dealt with first. This is so because, these Writ Petitions have been filed by the Assessee, questioning the orders in the miscellaneous petitions filed by the Department before the Settlement Commission on 6.2.2003, seeking for rectification of the order passed by the commission, under Section 245D (4) of the Act. The Settlement Commission, passed the order on 19.1.2005, 13.12.2004 and 19.1.2005, respectively. The petitioners did not immediately rush to this Court but filed a miscellaneous petition before the Commission stating that the order passed by the commission on an miscellaneous petition filed by the Department is time barred. In the meantime, the third respondent viz., the Assessing Officer gave effect to the order passed by the Settlement Commission dated 19.1.2005, 13.12.2004 and 19.1.2005, and after about two years, the miscellaneous petitions filed by the petitioners were dismissed by order dated 8.8.2007. These orders are challenged by the petitioners in W.P.Nos.5554, 5556, 5558 of 2008. Therefore, the result of the second set of three Writ Petitions would solely depend upon the decision to be taken in the first set of Writ Petitions viz., W.P.Nos.5553, 5555, 5557 of 2008.

3. The short issue that falls for consideration is as to whether the Settlement Commission could have entertained a miscellaneous petition at the

behest of the Department for rectifying its orders dated 16.7.1998, 15.10.1998 and 16.7.1998, under Section 245D(4) of the Act. The applications filed by the petitioners for settlement of their case under Section 245D was admitted by orders dated 28.2.1996, 18.1.1996, 29.2.1996 respectively. Thereafter, the Commission allowed the case to be proceeded with, and an order under sub Section 4 of Section 245D being the final order of the Commission settling the case of the petitioners was passed on 16.7.1998, 15.10.1998 and 16.7.1998 respectively. The Department did not question the orders passed by the Settlement Commission. Nor any other action was taken within a reasonable time. After about five years, on 6.2.2003, the respondent Department filed miscellaneous petitions before the Commission stating that Hon'ble Supreme Court in the case of ***CIT vs. Hindustan Bulk Carriers, (259 ITR 449), and CIT vs. Damani Bros. (C.A.No.7248 of 1999)*** has held that interest under Section 234B has to be charged for the period beginning from 1st of April next following the relevant financial year upto the date of Commission's order or under Section 245D (4). It is further stated that in the case of assessee, the Commission had ordered to charge interest under Section 234B for the respective assessment year, up to either date of order under Section 143(1)/143(1)(a) or under Section 143(3)/144 of the I.T. Act whichever is later. Therefore, by referring to the judgment of the Hon'ble Supreme Court, the Department contended that mistake has crept in the order, with regard to the terminal date in connection with charging of interest under Section 234(B) of the Act, which is apparent from the records. Therefore, they requested to rectify/recalling the order passed by the commission with regard to the terminal date for charging of interest under Section

234B. This application was allowed by the impugned proceedings.

4. The learned counsel for the petitioner submitted that in the decision of the Hon'ble Supreme Court in the case of ***Brij Lal and Ors. vs. Commissioner of Income Tax (2010) 328 ITR 447, (SC)***, the Hon'ble Supreme Court has categorically held that under Section 245-I of the Act, the order of the Settlement Commission is final and conclusive except in cases of fraud and misrepresentation. In which case, the matter could be reopened by way of review or recall. Therefore, it is submitted that except under those two circumstances mentioned by the Hon'ble Supreme Court, the case which has been settled by the Commission cannot be reopened. Therefore, it is submitted that Section 245D was amended and sub-section 6(B) was inserted by Finance Act, 2011, with effect from 1.6.2011. Even in terms of the said proviso, the Settlement Commission may at any time within a period of six months from the date of the order, with a view to rectify any mistake apparent from the record, amend any order passed by it under sub section 4 of Section 245D. It is submitted that this power was conferred on the Commission only with effect from 1.6.2011 and the order passed by the Commission on 19.1.2005, 13.12.2004 and 19.1.2005, being well before the said date, the commission had no jurisdiction to entertain the miscellaneous petition.

5. The learned counsel referred to a decision of the Hon'ble Division Bench of the Andhra Pradesh High Court in the case of ***U.Narayanamma vs.***

Government of India, (2013) 352 ITR 598 (AP) wherein the Hon'ble Andhra Pradesh High Court held that the earlier order of the Settlement Commission though contrary to the Board Circular and considered in the light of the decision of the Supreme Court, was an error within the jurisdiction of the Commission and not an error that goes to the root of its jurisdiction. The appropriate course of action for the revenue ought to have been to challenge the order of the Commission by way of certiorari and an application for rectification under Section 154 was however impermissible and beyond the jurisdiction of the settlement commission and the revised order passed by the commission could not be sustained.

6. The learned Standing counsel appearing for the Revenue contended that the power of the Settlement commission under Section 245F confers all powers which are vested in an Income Tax Authority under the Act and therefore, the authority was well within the jurisdiction to apply before the commission for rectification of the mistake which was apparent from the face of the order. Further, by virtue of the said provision, since the settlement Commission can exercise all powers of an Income Tax Officer, the said power cannot be curtailed by referring to Section 245-I of the Act. It is further submitted that when an error which has been committed by the Settlement Commission was brought to the notice of the Commission, as the Hon'ble Supreme Court had held that interest under Section 234B has to be charged for the period beginning from the 1st April of the next following relevant financial year up to the date of Commission's order under Section 245D (4) of the Act. Therefore, it is submitted

that the order passed by the commission on 19.1.2005, 13.12.2004 and 19.1.2005, was perfect and the consequential order which came to be passed on 8.8.2007 on an miscellaneous petition filed by the petitioners/assesseees is also perfectly legal.

7. After hearing the learned counsel for the parties and perusing the materials placed on record, the first issue to be answered is with regard to the power of the Commission to reopen its proceedings. Section 245-I of the Act states that any order of the Commission passed under Section 245 shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in that Chapter, be reopened in any proceeding under the Act or under any other law for the time being in force. The said provision does not confer the power of review on the commission. It is settled legal position that power of review is to be specifically conferred on the authority by the statute and power of review is not inherent with the authority. However, when the statute does not provide power of review with the authority and if it is done, it has to be termed as wholly without jurisdiction. Sub section (1) of Section 245(F) which states that Settlement Commission shall have all powers which are vested in Income Tax Authority under the Act cannot be read in isolation but it should be read in tandem with Section 245(I) and if it is done, then it is to be held that there is no power of review conferred on the Commission to reopen the proceedings. This position held the field till an amendment was inserted under Section 6(b) of Section 245D by Finance Act 2011 with effect from 1.6.2011. Even the said provision is not a power of review.

But the phraseology used by the legislation is “rectification” and such rectification can be done on any mistake apparent from the record. Therefore, such power exercisable under sub Section 6D of Section 245D can be exercised only to rectify a mistake and such mistake should be apparent from the record. Thus, even as per the amendment made by Finance Act, 2011, power of review is not conferred on the Settlement Commission.

8. In the case of **Smt.U.Narayanamma**, Writ Petitions were filed challenging the orders passed by the Settlement Commission on the ground that the Commission has no power to rectify its earlier order even under Section 245D of the Income Tax Act, 1961. The Hon'ble Division Bench of the Andhra Pradesh High Court after taking into consideration the decision of the Hon'ble Supreme Court in **Brij Lal**, held that the order passed by the Settlement Commission rectifying its earlier order cannot be sustained and must perish. In the said case, rectification was sought for by the commission on the ground that the order passed by the Commission was contrary to the Board's circular. The Court held that even otherwise, it is an error within the jurisdiction of the Commission and it was not an error which went to the root of its jurisdiction and held that if at all revenue had to question the same, it should be by a writ of certiorari. The said decision squarely applies to the facts of the present case.

9. One more observation that is required to be made in the instant case is that the Revenue while rectification/recalling of the order passed by the Commission, referred to a decision of the Hon'ble Supreme Court in the case of

Hindustan Bulk Carriers and **Damani Bros**, with respect to the terminal date for charging of interest under Section 234B. Admittedly, these decisions were rendered by the Hon'ble Supreme Court much after the final order was passed by the Commission under Section 245D(4).

10. Rudimentary legal principle is that subsequent development of law cannot be a ground to exercise review jurisdiction and that cannot be taken into consideration as an error apparent on the face of the record. Hence, on that ground also, the Department should be non suited. Hence for all the above, order of the Settlement Commission is held to be unsustainable and it is accordingly quashed. Consequently, the orders dated 19.1.2005, 13.12.2004 and 19.1.2005 and order dated 14.7.2005, 4.2.2005, insofar as it relates to the computation of terminal date for charging the interest under Section 234B alone and the order passed by the Settlement Commission dated 8.8.2007 are quashed.

11. After the above order was dictated, the learned Standing Counsel for the respondent Department submitted that if the order passed by the third respondent is quashed, then it would amount to setting aside the rate of interest as ordered by the Commission. The Revenue need not have any apprehension in this regard and this Court has held that the order passed by the Commission dated 16.7.1998, 15.10.1998 and 16.7.1998 under Section 245D(4) has become final and the Department will be entitled to interest only as ordered by the commission.

12. The Writ Petitions are accordingly allowed. No costs.

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Index: Yes/no
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T.S.SIVAGNANAM, J.

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