IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 4939 of 2015

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MAHESHBHAI SHANTILAL PATEL....Petitioner(s)

Versus

INCOME TAX SETTLEMENT COMMISSION & 1....Respondent(s)

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Appearance:

MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 2

NOTICE SERVED for the Respondent(s) No. 1

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

Date : 14/06/2016

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged an order dated 26.11.2013 passed by the Income Tax Settlement Commission ['the Settlement Commission' for short] terminating the petitioner's application for settlement on account of non-compliance with the provisions of Section 245D(2D) of the Income Tax Act, 1961 ['the Act' for short].

2. Briefly stated the facts are that, search operations were carried out concerning the petitioner between 15.09.1993 and 20.10.1993. Besides other valuable articles, things and documents, a cash of Rs. 10,000/- was sized from the premises

of the petitioner and Rs. 1,50,000/- was recovered from the premises of the neighbour of the petitioner, one Vikram Pandya. On 10.01.1994, the petitioner wrote to the Assistant Commissioner of Income Tax, Mehsana Circle, and conveyed that, a total of Rs. 1,60,000/- seized during search operation is covered under disclosure statement made by the petitioner in terms of Explanation 5 to Section 271(1)(c) of the Act. He requested the Assistant Commissioner to adjust the cash seized against the tax liability in his case as well as in cases of AOPs in which he has interest. In fact, he urged that since the cash seized during the course of search is requested to be applied against the taxes, the order for retention of such cash under Section 132(5) of the Act need not be passed as the title of the cash would vest in the department. He stated as under:

> "As regard the seizure of cash, there is seizure of cash amounting to Rs. 10,000/-as well as Rs. 1,50,000/- aggregating to Rs. 1,60,000/-. The said cash are covered under the disclosure pursuant to Explanation 5 to Section 271(1)(c) read with Section 132(4) of the Income Tax Act. It is urge upon your honou to adjust the cash seized during the course of search against the tax liability in my case as well as in the cases of AOPs in which I am interested. As the cash seized during the course of search is requested to be applied against the payment of taxes the order for retention thereof u/s. 132(5) of the Act need not be passed as the titles of the cash has been vested to the Department."

3. The Assistant Commissioner of Income Tax passed an order dated 17.01.1994 in terms of Section 132(5) of the Act, in which, with respect to the seized cash of Rs. 10,000/- and

Rs. 1,50,000/- respectively, he provided as under:

“12. On 20.09.1993, assessee was having cash of Rs. 14,740/- at his residence, out of which cash of Rs. 10,000/- was seized. Assessee was asked to explain source out of which the cash has been acquired. Assessee vide his reply dated 1.10.1994 has not given any explanation regrading source of acquisition of this amount. Assessee has stated that the cash of Rs. 10,000/- seized may be adjusted against the tax liability in his case and in the case of A.O.Ps. in which he is interested. In view of the above facts, it is clear that assessee is not in a position to explain source of cash of Rs. 10,000/- seized during the source of search. Therefore, the sum of Rs. 10,000/- is treated as unexplained and added to the total income of the assessee for A.Y. 1994-95.

13. Cash of Rs. 1,50,000/- was seized from the residence of Shri Vikramrai P. Pandya on 15.9.1993. Shri Vikramrai P. Pandya stated that the cash belongs to Shri Maheshbhai Shantitlal Patel. Shri Maheshbhai Shantilal Patel was asked vide this office letter dated 10.12.1993 to explain the source out of which the cash of Rs. 1,50,000/- was acquired. Assessee vide his letter dated 10.1.1994 has stated that cash of Rs. 1,50,000/- may be adjusted against the tax liability which may arise in his case. In view of the above explanation of the assessee, it is clear that assessee is not in a position to give any explanation regarding source of acquisition of Rs. 1,50,000/- seized from the residence of Shri Vikramrai P. Pandya which has been claimed to be belonging to Shri Maheshbhai Shantilal Patel. In view of the above facts, the sum of Rs. 1,50,000/- is included in the total income of the assessee as income from undisclosed sources for A.Y. 94-95. This amount is added in the case of the assessee without prejudice to any action which may be taken by the Department in the case of Shri Vikramrai P.Pandya.”

4. On 27.10.1995, the petitioner applied for settlement of his case

in terms of the provisions contained in Chapter XIX-A of the Act. Section 245D (2D) of the Act was amended w.e.f. 01.06.2007 imposing liability for payment of certain taxes on the persons applying for settlement. With respect to those applications which are already made before the amendment, it was provided that, shortfall, if any, in depositing the tax as per the amended provisions, would be made good latest by 31.07.2007. In this context, the question of the petitioner having depositing a tax on admitted liability came-up for consideration before the Settlement Commission. The department contended that the assessee was in shortfall of tax by Rs. 17,174/- with interest of Rs. 30,912/-, total shortfall of the assessee would come to Rs. 48,086/-. This was canvassed by the Revenue before the Settlement Commission, upon which, the assessee deposited such amount with the department on 18.08.2008. Since, however, such deposit was after the date of 31.07.2007, the Settlement Commission, by the impugned order, decided to terminate the settlement proceedings. It was held that:

"3. In the case of Shri Mahesh S. Patel, the Commissioner of Income Tax, Central I, Ahmedabad has reported that the applicant had paid tax of Rs. 16,44,539/- against Rs. 16,61,713/-. It was reported by the Commissioner of Income Tax that the short payment of Rs. 17,174/- was made good by making other payments alongwith interest on 18.8.2008. It was reported by the Commissioner of Income Tax that the applicant had failed to pay taxes and interest prior to 31.7.2007."

5. On 19.03.2012, the petitioner had pointed out to the Settlement

Commission that, a sum of Rs. 1,60,000/- of the petitioner was in the custody of the department, for which, no credit was given. It was, therefore, requested that the question of shortfall of tax of Rs. 48,086/- be re-examined in light of such facts. The Settlement Commission, however, did not advert to such issue.

6. Having heard learned counsel for the parties and having perused the documents on record, it clearly emerges that a cash of total of Rs. 1,60,000/- was found during search operation by the departmental authority and seized. Rs. 10,000/- were found from the premises of the petitioner. Rs. 1,50,000/- from his neighbour Vikram Pandya. At the very outset, the petitioner made a disclosure that the entire sum of Rs 1,60,000/- belonged to him. He, in fact, in his letter dated 10.01.1994 after referring to his disclosure statement conveyed to the department that, such sum of Rs. 1,60,000/- be adjusted towards any tax liability which may arise in his case or in the case of AOPs, in which, he has interest. In this background, he in fact, suggested that with respect to seized cash of Rs. 1,60,000/-, no order under Section 132(5) of the Act is needed to be passed since he concedes to such amount vesting absolutely in the department. Even in the order under Section 132(5) of the Act passed by the Assistant Commissioner on 17.01.1994, he took cognizance against all these disclosures of the petitioner. He also noted that in the letter dated 10.01.1994, the assessee had requested that such cash be adjusted against the tax liability which may arise in his case. It was, in this background, he

recorded that in view of the explanation of the assessee, it is clear that he is not in a position to give any explanation regarding the source of acquisition of Rs. 1,50,000/- seized from the residence of Shri Vikram Pandya which is claimed to be belonging to the assessee. He, therefore, included such sum of Rs. 1,50,000/- in the total income of the assessee as income from undisclosed source for the assessment year 1994-95.

7. Few things, therefore, emerged from such factors. Firstly, that the assessee immediately owned up the entire seized cash of Rs. 1,60,000/- though substantial part thereof i.e. Rs. 1,50,000/- was seized from the premises of his neighbour. Secondly, the department had also accepted such disclosure statement insofar as it related to the assessee owning up such seized cash. The Assistant Commissioner found that the assessee had offered no explanation for the source of the cash and therefore, at the stage of seizure of the cash under Section 131(5) of the Act, treated it as undisclosed income of the assessee for the assessment year 1994-95. He also recorded that the assessee's concession that such amount be retained and adjusted against his tax liability and the tax liability of the AOPs, in which, the assessee has interest. One more thing that can be seen from the record is, said Vikram Pandya never staked his claim over such seized cash either with or without explaining source of acquisition of such amount.

8. Many years later, therefore, when the question of undeposited tax of the assessee in terms of the amended provisions of Section 245B came up for consideration, the assessee was well within his right to rely on the said sum of Rs. 1,60,000/- which is still lying with the department. The assessee, in the year 2012, brought these facts, ofcourse not in such elaborate terms, to the notice of the Settlement Commission and requested that the question of shortfall of Rs. 48,086/- be examined in light of such facts.

9. In our opinion, the department was not correct in raising shortfall of Rs. 48,086/- in case of the assessee. The assessee, way back in the year 1994, had surrendered the entire amount of Rs. 1,60,000/- unconditionally and had also authorized the department to adjust the same against any of his tax dues. The contention of the counsel for the Revenue, that the order passed by the Assistant Commissioner under Section 132(5) of the Act does not partake character of assessment though the assessee was willing to surrender the amount, would not change the position insofar as the petitioner's liability to deposit tax is concerned. We are referring to the said order only for the purpose of recording the Assistant Commissioner's views on the declaration made by the assessee concerning such amount. Far more fundamental fact is the declaration itself made by the assessee in his letter dated 10.01.1994. The contention that since no final assessment was framed, there was no question of adjustment of the amount towards any assessed income tax

liability of the assessee also would not change the position. The question of depositing the tax in the context of the settlement proceedings arose by virtue of amended Section 245D of the Act. The amount of Rs. 1,60,000/- lying with the department had to be adjusted towards such liability.

10. In the result, impugned order dated 26.11.2013 is quashed. The Settlement Commission shall proceed further with the offer of the settlement made by the petitioner.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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