

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.2896 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MR.JUSTICE Z.K.SAIYED Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

SAHITYA MUDRANALAYA & 10 - Petitioner(s)

Versus

INCOME TAX SETTLEMENT COMMISSION & 2-Respondent(s)

Appearance :

MR KH KAJI for Petitioner(s) : 1-10

MR BB NAIK for Respondent(s) : 1-3

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 03/03/2008

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

(1) This petition has been preferred by as many as
11 petitioners challenging orders dated

28.03.1995 and 11.09.1995 made by the Settlement Commission (hereinafter referred to as 'the Commission').

(2) The following reliefs have been prayed for:

"22. The petitioners therefore, pray :-

A) that this Hon'ble Court be pleased to issue an appropriate writ, direction or order under Article 226 and 227 of the Constitution of India quashing and setting aside the order of the Special Bench of the Settlement Commission dated 20-3-1995 to the extent it holds that the petitioners are liable for interest u/s. 234B(1) read with sub-section (4) of the Income-tax Act for asst. years 1989-90 and 1990-91 in cases where no interest was as such leviable u/s.234B(1) and quashing the consequential directions for levy of such interest given by Additional Bench Bombay of the Settlement Commission by its order dated 11-9-1995.

B) that this Hon'ble Court be pleased to issue an appropriate writ, direction or order under Article 226 and 227 of the Constitution of India quashing the order of the Additional Bench Bombay of the Settlement Commission to the extent it

holds that the 2nd and 3rd respondents are not bound to adjust Rs.11 lakhs being the seized amount in March, 1990 against the advance-tax dues of petitioners Nos.1, 2, 6 and 9 for asst. year 1990-91 and that they were entitled to levy interest against the said petitioners for the said assessment year u/s. 234A and 234B of the Income-tax Act.

C) that this Hon'ble Court be pleased to issue an appropriate writ, direction or order under Article 226 and 227 of the Constitution of India quashing the order of the Additional Bench Bombay of the Settlement Commission dated 11-9-1995 to the extent it directs the 2nd and 3rd respondents to levy interest on the petitioners in respect of reopened assessments for asst. years 1985-86 to 1988-89 u/s. 139(8), 215 and 217 of the Income-tax Act.

D) that this Hon'ble Court be pleased to issue an appropriate writ, direction or order under Article 226 and 227 of the Constitution of India quashing the notices of demand issued by the 2nd and 3rd respondents to the aforesaid extent and permanently restraining from issuing any such notices of demand on the petitioners as regards the levy of interest as indicated above.

E) that pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to restrain 2nd and 3rd respondents from enforcing any notices of demand against the petitioners or issuing fresh notices of demand against the petitioners and from recovering any amount from the petitioners on such terms as this Hon'ble Court thinks fit and proper.

F) that this Hon'ble Court be pleased to grant any other relief as the nature and circumstances of the case may require."

Broadly the reliefs prayed for can be divided into two issues:

(i) Whether the petitioners are liable to be charged interest for Assessment Years 1989-1990 and 1990-1991 under Section 234B of the Income-tax Act, 1961 (the Act) in cases where under Section 234B(1) of the Act, no interest was leviable? AND

(ii) Whether the petitioners, whose assessment have been re-opened in exercise of powers under Section 245E of the Act by the Commission, are liable to pay interest for Assessment Years 1985-1986 to 1988-1989 under Sections 139(8),

215 and 217 of the Act ?

- (3) Undisputed facts are that the petitioners preferred settlement applications on 01.02.1991 under Section 245C of the Act. On 18.10.1991 the Commission permitted the applications moved by the petitioners to be proceeded with in exercise of powers under Section 245D(1) of the Act. On 26.02.1993 the Commission passed final order under Section 245D(4) read with Section 245E of the Act. Vide orders made between 26th to 28th July, 1993, the Assessing Officer (AO) raised various demands giving effect to the consolidated order of the Commission dated 26.02.1993. On 14.09.1993 the petitioners moved the Commission seeking rectification / modification / clarification of the order dated 26.02.1993 in relation to the aforesaid two issues alongwith other issues.
- (4) In relation to the first issue, namely, whether interest was chargeable under Section

234B of the Act, the Bench referred the matter to a Larger Bench. Ultimately, on 28.03.1995 the Larger Bench passed an order holding that interest was leviable under Section 234B of the Act even in a case where the conditions stipulated by provisions of sub-section (1) of Section 234B of the Act were not fulfilled. The Commission, for recording such a finding, relied upon provisions of sub-section (4) of Section 234B of the Act by stating that when sub-section (4) of Section 234B of the Act uses the phrase 'increased or reduced' the same can be in context of increase or reduction from NIL also and it need not necessarily be a positive figure.

- (5) Mr.K.H.Kaji, learned advocate appearing on behalf of the petitioners, has submitted that under Section 234B(1) of the Act interest is leviable only on the amount of tax which is the difference between the amount of total advance tax paid and the assessed tax as per assessment under Section 143(1) of the Act or

regular assessment, but, in the event, the advance tax paid is 90% or more than the figure of assessed tax, no interest is chargeable. That in case of the petitioners as per chart available at Page No.96 there was no shortfall and hence, no interest was chargeable. According to Mr.Kaji, the term 'assessed tax' has to be read as per Explanation 1(b) to Section 234B(1) of the Act to mean that the tax has to be as per total income determined either sub-section (1) of Section 143 of the Act or on regular assessment; and regular assessment only where both the intimation under Section 143(1) of the Act and assessment order by way of regular assessment have been framed. That the definition of "Regular Assessment" as provided under Section 2(40) of the Act makes it clear that order of the Commission is not an order of regular assessment and, therefore, cannot be projected for ascertaining applicability or otherwise of Section 234B of the Act.

Referring to Explanation 2 to Section 234B(1) of the Act it was submitted that where the Legislature intended to give a different meaning to the term 'regular assessment' a specific provision had been made by referring to re-assessment under Section 147 of the Act and, therefore also, the order of the Commission could not be termed to be an order of regular assessment. That under sub-section (3) of Section 234B of the Act, in a case where there is increase in the amount of assessed tax due to re-assessment under Section 147 of the Act, the Legislature has provided for increase in the interest levied under sub-section (1) qua the difference between assessed tax as per regular assessment and re-assessment. However, sub-section (4) of Section 234B of the Act only refers to increase or reduction as a result of an order under any of the provisions mentioned in the said sub-section when the amount on which interest was payable either under sub-section

(1) or sub-section (3) is varied by way of increase or reduction, but the said provision does not permit levy for the first time and, therefore, the Commission cannot derive any powers to levy interest in absence of stipulated conditions under sub-section (1) of Section 234B of the Act being satisfied. In support of the submissions made, reliance has been placed on Calcutta High Court decision in the case of Commissioner of Income-tax Vs. Haripada Khatua, [1998] 230 ITR 560 as well as Apex Court decision in the case of Modi Industries Ltd. & Ors. Vs. Commissioner of Income-tax & Anr., [1995] 216 ITR 759. Reliance was also placed on the Apex Court decision in the case of Commissioner of Income-tax Vs. Anjum M.H. Ghaswala & Ors., [2001] 252 ITR 1, to submit that the Apex Court has recorded an opinion that the Commission does not have powers to waive interest but converse therefrom cannot be deduced to mean that the Commission has powers

to fasten a liability to pay interest if no liability exists. In other words, liability to pay interest cannot arise for the first time by virtue of the order made by the Commission.

(6) On behalf of the respondent, Mr.B.B.Naik, learned Senior Standing Counsel for the Revenue, submitted that in the case of Commissioner of Income-tax Vs. Hindustan Bulk Carriers, [2003] 259 ITR 449 the order of Special Bench of the Commission dated 28.03.1995 has been reversed by the Apex Court and it has been held that the order of the Commission can be treated as the second terminus for computing interest leviable under the provisions of the Act, including Section 234B of the Act. It was further contended that the Apex Court has held that the order of the Commission has to be treated as regular assessment for the purposes of levy of interest.

(7) In relation to issue No.1, the contentions raised on behalf of the petitioners may have

merited consideration if the Apex Court decision had not categorically dealt with the issue, though in a different context. The question posed before the Apex Court in the case of **Commissioner of Income-tax Vs. Hindustan Bulk Carriers (supra)** was what would be the second terminus for the purposes of computing the amount of tax or arriving at the figure of tax for the purposes of levy of interest under Sections 234A, 234B and 234C of the Act. In that context the Apex Court has come to the conclusion that the order of the Commission made under Section 245D(4) of the Act is in relation to the additional income-tax payable on the undisclosed income, namely, income which was not disclosed in the return of income filed by an assessee. Hence, for the purposes of computing the interest which is chargeable under the provisions of the Act the contention that the second terminus (the first being already provided in the Act and there being no dispute as to the same) would not be the terminus normally provided by the

provisions of the Act but the order of the Commission which deals with that component of income which came up for assessment / settlement before the Commission for the first time. In this context the following observations of the Apex Court may be usefully reproduced:

“ Sub-section (1) of section 245C makes it clear that at any stage of a case relating him an assessee may make an application to the Commission disclosing fully and truly his income which *has not been disclosed before the Assessing Officer.* (underlined* for emphasis). To put it differently, an assessee cannot approach the Commission for settlement of his case in respect of an income which has already been disclosed before the Assessing Officer. The income disclosed as contemplated is in the nature of voluntary disclosure of concealed income.

Section 245F dealing with powers and procedure of the Settlement Commission provides that in addition to the powers conferred on the Settlement Commission under Chapter XIX-A, it has all the powers which are vested in the income-tax authority under the Act. Sub-section (2) is of vital importance and provides that where an

application made under section 245C has been allowed to be proceeded with under section 245D, the Commission shall, until an order is passed under sub-section (4) of section 245D, subject to the provisions of sub-section (3) of that section have exclusive jurisdiction to exercise the powers and perform the functions of the income-tax authority under the Act in relation to the case. In essence, the Commission assumes jurisdiction to deal with the matter after it decides to proceed with the application and continues to have the jurisdiction till it makes an order under section 245D. As noted by the Constitution Bench in Anjum's case [2001] 252 ITR 1 (SC), section 245D(4) is the charging section and sub-section (6) prescribes the modalities to be adopted to give effect to the order. It has to be noted that the language used in section 245D is "order" and not "assessment". The order is not described as the original assessment or regular assessment or reassessment. In that sense, the Commission exercises a plenary jurisdiction. The assessee's stand before the Special Bench of the Commission was that there is no charging section for levy of interest. Such a plea did not find acceptance by the Constitution Bench in Anjum's case [2001] 252 ITR 1 (SC). The further plea that there is no requirement to pay interest as no points of terminus have

been fixed is equally untenable because the Constitution Bench held that the levy is mandatory. Equally without substance is the plea taken that the terminus has to be as provided in relation to disclosed income. It cannot be even countenanced that no interest is chargeable for that portion of the income forming part of the total income as determined by the Commission which was not earlier disclosed before the Assessing Officer."

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" There is another way of looking at the issue. Section 234B(3) provides differently for regular assessment and reassessment. In a reassessment, ordinarily income assessed is more than what was determined originally. If two different periods are provided to meet such a situation, it is inconceivable that the Legislature intended to totally give a go by to interest on the income which for the first time is disclosed before the Commission. By analogy and harmony, the period has to be till the date of the Commission's order.

To put it differently, the interests charged in terms of sections 234A, 234B and 234C become payable on the income already disclosed in the returns filed, together

with the income disclosed before the Commission. The concerned interest as aforesaid shall be on the consolidated amount of income, i.e. both disclosed and undisclosed. As indicated above, such interests shall be charged till the Commission acts in terms of section 245D. Thereafter, the prescription relating to charging of interests, etc., becomes operative, after the Commission allows the application for settlement to be proceeded with. In such event, there is no further charge of interest in terms of sections 234A, 234B and 234C. The interest charged in terms of section 245D is a separate levy and not in terms of interest chargeable under sections 234A, 234B and 234C. Therefore, the apprehension that there is scope for charging of interest on interest is without any basis.

To sum up, the inevitable conclusion is that interest has to be charged for the period beginning from the first day of April next following the relevant financial year up to the date of the Commission's order at the rate applicable, on interest chargeable under section 234B, when an order under section 245D(4) is passed, followed by quantification under section 245D(6)."

- (8) Therefore, it becomes more than abundantly clear that while passing an order under Section 245D(4) of the Act the Commission exercises powers of an income-tax authority as provided under Section 245F of the Act and the Commission cannot be precluded from fastening liability to pay interest for that portion of income forming part of the total income as determined by the Commission which was not earlier disclosed before the AO, even if no interest could have become leviable if originally disclosed income is considered in isolation by operation of Section 234B(1) of the Act.
- (9) Hence, the petitioners cannot succeed on the first issue. The impugned order of the Commission dated 28.03.1995 is not required to be interfered with, but for different reasons as recorded hereinbefore and the reasons stated by the Special Bench of the Commission are not accepted.

(10) In relation to the second issue, the learned advocate for the petitioners having not pressed the same, it is not necessary to record any finding in this regard nor set out the facts and contentions in detail.

(11) The petition accordingly stands rejected. RULE discharged. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[Z.K. SAIYED, J]

Bhavesh*

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THE HIGH COURT
OF GUJARAT

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