

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 859 of 2012

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COMMISSIONER OF INCOME-TAX AHMEDABAD-VI, AHMEDABAD
- Petitioner(s)

Versus

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

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Appearance :

MR MR BHATT, SR. COUNSEL with MRS MAUNA M BHATT for Petitioner
MR RK PATEL for Respondents

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 15/09/2012

ORAL ORDER

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Heard the learned counsel for the respective parties for final disposal of the petition.
2. The petitioner – Commissioner of Income Tax has challenged an order dated 09.12.2011 passed by respondent No.1 – Income Tax Settlement Commission, by which the preliminary objection of the petitioner to a settlement application filed by respondent No.1 came to be turned down. We may notice the facts in brief.
3. The respondent No.2 (hereinafter to be referred to as “the assessee”) filed an application before the Settlement Commission on or around 12th October, 2011 for

settlement of his cases for assessment years 2005-06 to 2011-12. He also voluntarily paid tax of Rs.16,42,138/- as per his computation of the settlement, which included total additional tax for the said period with interest.

4. Revenue was of the opinion that such application was not maintainable for the assessment years 2005-06 to 2008-09. The Commissioner of Income Tax, therefore, addressed a letter dated 01.12.2011 to the Settlement Commission and pointed out that the position of pendency of the proceedings of assessment with respect to the assessee was as under:

<i>A. Y.</i>	<i>Particulars</i>
<i>2005-06</i>	<i>Return of income processed u/s. 143(1). No further proceedings is pending.</i>
<i>2006-07</i>	<i>Return of income processed u/s. 143(1). No further proceedings is pending.</i>
<i>2007-08</i>	<i>Return of income processed u/s. 143(1). No further proceedings is pending.</i>
<i>2008-09</i>	<i>Return of income processed u/s. 143(1). No further proceedings is pending.</i>
<i>2009-10</i>	<i>Scrutiny assessment proceeding pending time barring on 31-12-2011.</i>
<i>2010-11</i>	<i>Return of income processed u/s. 143(1). No further proceedings is pending.</i>
<i>2011-12</i>	<i>Return of income filed on 7.10.2011. Pending processing u/s 143(1).</i>

5. On the basis of such position which is not in any factual controversy before us, the Commissioner contended as under :

"2. The applicant vide Annexure II had prayed for settlement of income for A.Y. 2005-06 to 2011-12 on the basis of his total income sheets which are not made available to us, for offering comments on the adequacy of the income admitted. The Department may be permitted to submit detailed report in due course in accordance with the rules. Further, the applicant prayed for waiver of interest under various provisions of the I.T. Act for the assessment year concerned, which is not permissible as per the settled judicial view. The applicant also pleaded for immunity from prosecution under I.T. Act, W.T. Act, IPC and under all other Central enactments. As per the amendment u/s.245H immunity from prosecution for offence under IPC or under any Central Act shall not be granted by the Settlement Commission. The Department may also be permitted to furnish necessary report in due course u/s. 245D(3) on examination of complete particulars in this regard."

6. The Settlement Commission thereupon proceeded to consider the revenue's preliminary objection to the maintainability of the application for settlement. By the impugned order dated 9.12.2011, the Settlement Commission turned down such preliminary objection, making following observations :

"5. We have carefully considered the above submissions. We find that the applicant has satisfied the conditions laid down under section 245C, as there was pendency of assessment proceedings in view of the aforementioned judgment, the additional amount of income tax payable on the income disclosed in the application exceeded Rs.10 lacs, due taxes have been paid, and intimation under section 245C(4) to the Assessing Officer has been given by the assessee in Form No.34BA within the stipulated time."

7. The Commission placed heavy reliance on the decision of

the Special Bench of the Income Tax Settlement Commission in the case of **M/s Rescue Ware Corporation**, reported in 217 CTR (ITSC)(SB) 597. The revenue has, therefore, filed this petition challenging the order dated 9.12.2011.

8. Drawing our attention to the statutory provisions contained in section 245C and clause (b) of section 245A of the Income Tax Act, 1961 ("the Act" for short), Shri Bhatt for the revenue submitted that the Settlement Commission committed a grave error in holding that the application for settlement made by the assessee for the assessment years 2005-06 to 2008-09 was maintainable. In all these cases, return filed by the assessee was processed only under section 143(1) of the Act. By the time the assessee filed the application before the Settlement Commission, not only the time limit for issuing the notice under section 143(2) of the Act had expired, even the outer time limit for completing the assessments under section 153(1) of the Act had expired. He, therefore, submitted that with respect to such assessment years, the case of the assessee was not pending and that therefore, the application under section 245C of the Act was not maintainable. Counsel drew our attention to the changes brought about in the definition of the term "case" with effect from 1.6.2007 to highlight that the interpretation adopted by the Settlement Commission would run counter to such amended statutory provisions.

9. On the other hand, learned counsel Shri R. K. Patel for the

assessee opposed the petition contending that the Settlement Commission has rightly applied the law laid down in the case of **M/s Rescue Ware Corporation** (supra). He further drew our attention to the CBDT circular dated 12.3.2008 explaining the amended provisions of section 245A of the Act. Counsel submitted that the assessee had made voluntary disclosures. Pursuant to such disclosures, he had also voluntarily paid additional tax. If on the basis of the disclosures made in the application before the Settlement Commission, now the revenue were to proceed further against the assessee on the ground that such application was not maintainable, the assessee would put to undue hardship.

10. To appreciate the rival contentions, we may notice statutory provisions applicable. Chapter XIX-A pertains to settlement of cases. Section 245B of the Act provides for Income Tax Settlement Commission. Section 245BA lays down the jurisdiction and powers of Settlement Commission. Section 245C pertains to application for settlement of cases. Portion of sub-section (1) thereof which is relevant for our purpose, reads as under:

“245C Application for settlement of cases. (1) – An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be

disposed of in the manner hereinafter provided :"

11. Since sub-section (1) of section 245C of the Act thus permits an assessee at any stage of a case relating to him to make an application for settlement. Therefore, the term "case" assumes significance for our purpose. Such term is defined in section 245A(b) of the Act, which reads as under :

"245A (b) - "case" means any proceeding for assessment under this Act, of any 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 is made."

12. The definition in the present form was introduced with effect from 1.6.2007. Prior to its substitution, such term was defined in the following manner :

"(b) "case" means any proceeding under this Act for the assessment or reassessment of any person in respect of any year or years, or by way of appeal or revision in connection with such assessment or reassessment, which may be pending before an income-tax authority on the date on which an application under sub-section (1) of section 245C is made."

13. From the statutory provisions noted above, one can immediately gather that with effect from 1.6.2007, significant changes were made in the definition of the term "case" defined under section 245A(b) of the Act. Previously, the definition of such term was much wider and included vast number of situations where not only the original assessment would be pending before the

Assessing Officer, but would also cover the cases of assessment or re-assessment under section 147 of the Act and included the proceedings which would be pending by way of appeal or revision in connection with such assessment or re-assessment which may be pending before an income-tax authority on the date on which the application under section 245C(1) of the Act was made. After 1.6.2007, such definition was made more restrictive. After such amendments, the term "case" would cover any proceedings for assessment under the Act in respect of an assessment year or years which may be pending before an Assessing Officer on the date on which the application under section 245C(1) is made. Thus, large number of other proceedings, such as, arising out of assessment or re-assessment under section 147 of the Act or appeal or revision pending before the income-tax authorities would no longer be governed by the newly introduced definition of the term "case".

14. To our mind, therefore, the newly introduced definition of the term "case" would cover only those situations where an assessment is pending before the Assessing Officer or it is still possible for him to pass any order of assessment. Undoubtedly, acceptance of the return filed under section 143(1) of the Act cannot be categorized as an order of assessment. Under such a situation, obviously mere acceptance of the return under section 143(1) of the Act would not exclude an assessee's case from the definition contained in section 245A(b) of the Act. However, to contend that till the final order of assessment is passed, whether the revenue takes a particular case in scrutiny or

not, the assessment should be deemed to be pending, in our view, would be stretching the language used in the definition, as also providing something which is not stated in the language. Accepting such a contention would lead to strange results. In a given case, if the assessment of an assessee is not taken in scrutiny and the revenue never desired to take the same in scrutiny, for long number of years, the assessee could contend that since no final order of assessment has been passed, his case for assessment can be stated to be pending before the Assessing Officer within the meaning of clause (b) of section 245A of the Act. Surely, the legislature never desired to bring about such anomalous situation.

15. It is true that such legislative changes came to be explained by the CBDT in its circular dated 12.3.2008. While explaining the amendments, it was stated that, “....
.....*It is further clarified that (a) since intimation under section 143(1) is not an assessment order, there will be no bar in filing an application for settlement subsequent to receipt of an intimation under section 143(1). It is not material whether time limit for issue of notice under section 143(2) has expired or not; (b) the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant.*”.

16. The sentence “*It is not material whether time limit for issue of notice under section 143(2) has expired or not*” would *prima facie* create some confusion. However, such sentence cannot be read in isolation and the entire circular of the CBDT has to be seen to appreciate its

effect. In the later portion of the same circular, it was further clarified as under :

“61.3 The provisions have further been amended to exclude the following proceedings of assessment during which an assessee shall not be allowed to make the application before the Commission -

(a) assessment/reassessment proceedings in response to a notice under section 148. These proceedings shall be deemed to have commenced on the date on which notice under section 148 was issued.

(b) assessment or reassessment proceedings under section 153A for each of six assessment years preceding the assessment year relevant to the previous year in which a search under section 132 was conducted or a requisition under section 132A was made; and also the assessment or reassessment proceedings in case of such persons for the assessment year relevant to the previous year in which the search under section 132 was conducted or the requisition under section 132A was made. These proceedings shall be deemed to have commenced on the date on which the search under section 132 was initiated or the requisition under section 132A was made;

(c) proceedings of making fresh assessment where original assessment was set aside under section 254 by the Appellate Tribunal or under section 263 or section 264 by the Commissioner. Such proceedings shall be deemed to have commenced from the date on which the order setting aside the original assessment was passed;”

17.If we read the circular of the CBDT as a whole, it nowhere brings about a situation where even when by virtue of efflux of time, it is no longer possible for the Assessing Officer to pass any order of assessment with respect to

an assessee for a particular assessment year, his case for assessment should be deemed to be pending before the Assessing Officer in terms of amended clause (b) of section 245A of the Act simply because such a case was not taken in scrutiny and was accepted under section 143(1) of the Act without passing any order of assessment. In fact, the decision of the Special Bench of the Settlement Commission in the case of **M/s Rescue Ware Corporation** (supra) also did not stretch the meaning of the term "case" to such an extent. Before the Settlement Commission, the counsel for the assessee also agreed that such pendency cannot be perennial. It was in this background that the Special Bench made the following observations :

*"..... On the other hand, it has also been argued that this interpretation may lead to an absurd situation where proceedings may be deemed to be pending before the AO for certain years although, under the Act, the AO may not be empowered to take any action in respect of those years. In the circumstances, we are more impressed with the view, strongly propounded by the CIT-Departmental Representative **and endorsed by Dr. Debiprosad Pal, senior advocate, appearing for the applicant, that proceedings for assessment can be said to be pending for particular assessment years only upto such time till the AO has power to take action in respect of those assessment years.** Therefore, we are of the view that the meaning and scope of 'date of conclusion of proceedings' under clause (iv) of the Explanation to the s. 245A(b) is that the proceedings for assessment can be said to be pending before an AO in respect of those assessment years only for which the AO can still take action/initiate the proceedings under the Act."*

18. We may notice that the learned Single Judge of the Calcutta High Court in the case of **Director of Income Tax (International Taxation), Kolkatta and others**, in the decision dated 1.8.2011, had an occasion to construe such amended provision of section 245A(b) of the Act, wherein it was held and observed as under :

*“In the case of **Rambhai Jethabhai Patel vs. CIT** reported in 108 ITR 771, the Gujarat High Court held that it could safely be said that a matter could be said to be pending in a Court of Justice when any proceedings could be taken in it and that was the test which was required to be applied.*

If the aforesaid test is applied proceedings could only be said to be pending for as long as any proceedings could be taken, excluding proceedings under section 147 which have consciously been excluded by Parliament in its wisdom.

An application appended to a section, to explain the meaning of words contained in that section, should normally be read to harmonize with and clear up any ambiguity in the main section and should not be construed to widen the ambit of the section.

It is difficult to accept the submission that Explanation (iv) to section 245A(b) is to be construed to provide that proceedings for assessment could only conclude with the passing of an assessment order of assessment and if no order of assessment was made, such proceedings would be deemed to continue for a period of six years and nine months from the end of the relevant assessment year, within which period an assessment could be made under section 147 after issuing a notice under section 148.”

19. We are in respectful agreement with the view expressed above. To our mind, accepting the proposition that even

where by efflux of time, it is not open for the Assessing Officer to pass an order of assessment, merely because the return was accepted under section 143(1) of the Act, the case of the assessee should be deemed to be pending for assessment only because the final order of assessment under section 143(3) was not passed, would run counter to the statutory amendments made in section 245A(b) of the Act.

20. In the present case, the facts are not in dispute at all. For the assessment years 2005-06 to 2008-09, assessments had become time barred without any notice under section 143(2) of the Act. Even final time limit for passing the orders even if such notices were issued had expired by the time the assessee filed his application for settlement before the Commission. The assessee's application qua these years, therefore, was not maintainable, ought not to have been accepted. In our opinion, the Settlement Commission erred in holding to the contrary in the impugned order. The impugned order to such an extent is, therefore, set aside.

21. Request of the assessee that the material disclosed along with the settlement application should not be used in the normal assessments, cannot be accepted without full examination of such a request. There is no formal prayer made by the respondent on record. In any case, we are not inclined to examine such a request in the petition filed by the revenue. We, therefore, do not pass any order in this respect.

22.In the result, the petition is allowed and disposed of accordingly.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]

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