IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5997 OF 2017
WITH
WRIT PETITION NO. 2321 OF 2017
WRIT PETITION NO. 3351 OF 2017
WRIT PETITION NO. 3509 OF 2017
WRIT PETITION NO. 5752 OF 2017

Pr. Commissioner of Income Tax (Central), Pune .. Petitioner

Versus

Income Tax Settlement Commission, Addl. Bench - I, Mumbai & Anr. .. Respondents

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- Mr. Charanjeet Chanderpal a/w Ms. Pragya Chandra for the Petitioner
- Mr. Jehangir Mistri, Sr. Counsel a/w Mr. Madhur Agrawal i/by Atul Jasani for the Respondents

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : FEBRUARY 28, 2019.

ORAL JUDGMENT (Per Akil Kureshi, J.)

1. Heard learned counsel for the parties for final disposal of these petitions

2. These petitions have been filed by the Income Tax Department to challenge an order dated 31.5.2016 passed by the Income Tax Settlement Commission ('Settlement

Commission' for short) in so far as it relates to certain directions for declaring the application for settlement of the respondent assessee as invalid in terms of Section 245D(2C) of the Income Tax Act, 1961 ("the Act" for short). This litigation has longish history. We would record the relevant facts as briefly as possible. For convenience, such facts may be taken from Writ Petition No. 5997 of 2017.

3. Respondent No. 2 - assessee had applied for settlement of its cases under Section 245C of the Act. for assessment years 2008-09 to 2013-14. In such application for settlement, the assessee had not disclosed any additional income before the Settlement Commission in some of the assessment years. This settlement application passed through various stages envisaged under Section 245D of the Act, including to allow to proceed further under Section 245D(2C). The Settlement Commission had passed an order on 29.1.2015 under Section 245D(2C) of the Act in which it was held and observed as under:-

> 7. After perusal of the above 5 cases, we finally hold that the objection raised by the department was only on applicant's failure to disclose true and full income. In support of this contention, the department had not adduced any evidences or justification. The reply / rejoinder submitted by the applicant in response to rule 6

reports have adequately dealt with the issues raised by the department in the respective cases. As of now, we find that there is no information available with the department or with us to take an adverse view in respect of these five applicants not making true and full disclosure. Hence, we hold that the applicants have made a true and full disclosure. There was no objections from the department on technical issues. Therefore, we hold that all these five applicants have complied with the basic requirement as contained under Section 245C(1). We hold all these 5 applications to be not invalid and allow them to proceed further."

3.1 We may note that at that stage, the Settlement Commission records that the Department had not raised any technical objection.

3.2 It appears that despite such order of the Settlement Commission, the department had raised oral contentions urging the Settlement Commission to hold that the settlement application in which in relation to those assessment years, where no additional income was disclosed by the assessee, be treated to be invalid under Section 245D(2C) of the Act. The Settlement Commission thereupon passed the impugned order on 31.5.2016 titled as "An order under Section 245D(4) of the Act". In such order, the Settlement Commission held that the Commission would exclude from the purview of the settlement those assessment years where 'Nil' or 'No disclosure of additional

income' was made within the meaning of Section 245C(1) of the Act or where the disclosure happens to be a loss figure. While doing so, the Settlement Commission also recorded the apprehension of the counsel for the assessee that in such a view of the matter, the declaration of invalidation of the settlement application would take effect from the date of order under Section 245D(2C) and held that such position is correct. In essence, therefore, the Settlement Commission declared that in relation to the concerned assessment years, the settlement application should not be allowed to proceed further from the stage of 245D(2C) and that such declaration would take effect from 29.1.2015. We may reproduce the relevant portion of the order of Settlement Commission

> "5.8 Under the Income-tax Act, the words "income" and 'tax' have no meaning nor validity if these are divorced from the fundamental concept i.e. the assessment year. Whenever we speak of income disclosed in a settlement application it would certainly mean income in respect of an assessment year or assessment years as included in the settlement application. Divorced from the fundamental concept of the assessment year, the words "income" and "tax" can have no meaning. When the Act says income not disclosed before the authorities, its meaning would be income in respect of an assessment year not any other meaning. Hence, when an application includes assessment year with nil or no disclosure of income, such assessment year fails the fundamental test / condition laid down in the provision of 245C(1). In that eventuality the Commission

certainly cannot assume jurisdiction in respect of that assessment year with nil or no disclosure of additional income within the meaning of section 245C(1) This basic intent is very clear from the amended form 34B which requires disclosure of additional income, tax payable, interest payable, manner of deriving additional income to be stated assessment year-wise. This amended form was on the statute book w.e.f 2007. In this way the entire settlement scheme make harmonious sense. It is the statutory requirement that there should be disclosure of some undisclosed income for each assessment year included in the settlement application. To reiterate, in the absence of such disclosure in the assessment year, the ITSC cannot assume jurisdiction in respect of that assessment year. In view of this position, we decide to exclude from the purview of settlement the 23 assessment years vide para No 5 above included in the five applications where there is nil or no disclosure within the meaning of section 245C(1) or the disclosure happens to be a loss figure. In arriving at this decision, we draw inspiration and support from the words of the Hon'ble Supreme Court i.e. while over turning their own decision in the case of Cloth Traders P. Ltd. (111 ITR 243) in a subsequent decision in the case of Distributors Baroda (P) Ltd. (155 ITR 120). These words are: "To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience". In view of the above extract, the citation of instances from the recent past of settlement of cases with facts similar to the applicants' does not at all assist the claim or contention of the applicants. As regards the applicants written request to the Chairman, ITSC i.e. the applicants' letter dated 16.05.2016 we would like to record the observation here that the said letter contained significant serious omissions and distortions. Under para No.2 of their letter, while extracting para 3.3 from the order u/s 245D(2C) dated 29.01.2015 the following crucial but inconvenient fact recorded by the Bench was omitted :-

"As already observed in the order u/s. 245D(1), we feel that the claim of additional income for A.Y. 2008-09 to 2013-14 on

account of alleged defective return cannot be treated as additional income for the purpose of section 245C(1)" Under para no 4 of their letter they made further misrepresentation and distortion of the fact relating to the order u/s.245D(3) in saying that: the AO has "commented points for all assessment years from A.Y. 2008-09 to 2014-15. All these proves that the Department is also of the understanding of the fact that the applications of the applicants are admitted and held to be "not valid for all assessment years of the applications." It is in place to refer to the extract from para No. 6 of the order u/s. 245D(3) above i.e. under para No. 4 in view of such omission and distortion on the part of the applicants a 14 page letter with Annexure was addressed by the VC of the Additional Bench -I to the present Chairman of the ITSC who was a signatory to the order u/S. 245D(2C) dated 29.1.2015 i.e in his erstwhile capacity as a Member of the Additional Bench -I, Mumbai. The other contentions advanced by the Ld. AR have no relevance in the light of the foregoing discussion. **The apprehension expressed by the Ld. AR regrading the invalidation of the assessment years with nil or no disclosure of additional income w.e.f date of order u/S. 245D(2C) is correct in as much as the invalidation had occurred under Section 245D(2C) dated 29.1.2015**."

3.3 In relation to those assessment years where the Settlement Commission held that the application for settlement was invalid, the Assessing Officer passed separate orders of assessment in second and third week of July, 2017. We are informed that in some cases, the Assessing Officer himself has not made any additions. In

assessments where the Assessing Officer has made additions, the assesssee has filed appeals.

4. In such background, the issue arises before us in relation to the order of the Settlement Commission, invalidating the settlement application by passing the order dated 31.5.2016 but relating it back to the original order of Section 245D(2C) dated 29.1.2015. In plain terms, this dispute has direct relation to the period of limitation available with the Assessing Officer for completing the assessment in such cases. It would appear that if the effective date of such order is taken as 29.1.2015, the Assessing Officer would have left 6 days to complete the assessment after the Settlement Commission passed the impugned order. In the present case, since he has passed the orders of assessment on 14.7.2016, his action would be plainly barred by limitation. If, on the other hand, the effect of Settlement Commission's said order invalidating the settlement application of the assessee, is taken as 31.5.2016 i.e the actual date of passing the order, the Assessing Officer would have the benefit of exclusion from limitation period

from the date of filing the application till passing of the impugned order by the Settlement Commission.

5. At the outset, we would like to refer to two things. Firstly, learned counsel for the assessees pointed out that in Writ Petition Nos. 2321 of 2017 and 3351 of 2017, the cases involved are such where even in the orders of assessment passed by the Assessing Officer on in July, 2016, no additions have been made and such assessments are not taken in revision by the Commissioner. Going by such statement, it would immediately appear that the entire issue has become academic in relation to these petitions. **These petitions, therefore, stand disposed of without any further orders or directions**. The second aspect which emerges is that drafting of the petition by the department was; to put it mildly completely jumbled up.

6. However, we have with the assistance of the learned counsel for the parties gathered necessary facts and the grievance of the department in relation to the said order passed by the Settlement Commission. A short question,

therefore, to be decided in this petition is, was the Settlement Commission justified in giving retrospective effect to the order invalidating the settlement application of the assessees in relation to certain assessment years.

7. In this context, learned counsel for the department submitted that the order passed by the State Commission left in all six days for the Assessing Officer to complete the assessment which was humanly impossible. This Court, therefore, should appropriately mould the relief and pass an order which will protect the interest of the Revenue.

8. On the other hand, Mr. Mistri, learned senior counsel for the assessees strongly opposed this petition and contended as follows:-

> (i) The order under Section 245D(2C) invalidating the application can be passed at that stage and not thereafter. In the present case, the Settlement Commission had passed the order on 29.1.2015 allowing the settlement application to proceed further. Once having done that, the Settlement Commission could not have passed the fresh order that too at the stage of Section 245D(4);

(ii) The prayer of the department is wholly untenable. The statute envisages important stages of settlement proceedings and also makes specific provisions for recommencement of the assessment if application for settlement is declared either invalid or having abated. Matching provisions for limitation have been made which simply cannot be extended.

(iii) In any other view would amount to (a) recognizing two separate orders of Settlement Commission under Section 245D(2C) and (b) the impugned order would be one passed under Section 245D(2C) as well as under Section 245D(4) which the legislature simply does not envisage.

(iv) Our attention was drawn to the provisions contained in Section 245D with particular focuss on sub-section (1), sub-section (2B), sub-section (2C), sub-section (2D), sub-section (4) thereof and Section 245HA and Section 153 with special reference to clause (vii) of explanation 1 to the said Section.

9. As is well known, Section 245D of the Act makes detail provisions in respect of procedure on receipt of an application under Section 245C. As per sub-section (1) of Section 245D, on receipt of an application under Section 245C, the Settlement Commission shall, within seven days from the date of the receipt of the application, issue a notice to the applicant requiring him to explain as to why the

application made by him be allowed to be proceeded with, and upon hearing the applicant, the Settlement Commission would pass order within fourteen days. Under sub-section (2) of Section 245D in respect of an application which is allowed to be proceeded with under sub-section (1), the Settlement Commission would call for a report from the Revenue Authorities within the specified time. Sub-section (2C) of Section 245D provides that where a report of the Revenue Authority has been furnished within the prescribed time, the Settlement Commission may, on the basis of the report, within 15 days of the receipt thereof, by an order in writing declare the application in question as invalid and shall send the copy of such order to the applicant and to the Revenue Authority. If the Settlement Commission does not make such a declaration of invalidity of the application, the procedure envisaged under sub-section (3) would be followed after which the Settlement Commission would pass order on such settlement application as envisaged under sub-section (4) of Section 245D.

10. Section 245HA(1) inter alia provides that where an application made under Section 245C has been declared as invalid under sub-section (2C) of Section 245D, the proceedings before the Settlement Commission shall abate on such date. Sub-section (4) of Section 245HA provides that for the purpose of time limit, under besides other provisions, Section 153, the period commencing on and from the date of the application to the Settlement Commission under Section 245C and ending with specified date referred to in sub-section (1) shall be excluded. We may also notice that clause (vii) of Explanation 1 to Section 153 of the Act contains explanation, for the purpose of computing period of limitation under the said provision. Clause (vii) reads as under:-

> (vii) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of Section 245Q and ending with the date on which the advance ruling pronounced by it is received by the Principal Commissioner or Commissioner under sub-section (7) of Section 245R,or"

11. In view of above statutory provisions, it was perhaps open for the assessee to argue before the Settlement Commission that previously an order, that too a reasoned

order having already been passed by the Settlement Commission on 29.1.2015 allowing the application to cross the stage of Section 245D(2C), it was thereafter not open for the Settlement Commission to entertain any request of the department and to pass a fresh order declaring that in respect of certain assessment years, the settlement application was invalid. It was also perhaps open for the assessee to argue that in any case, the above combined order, one purported to be under Section 245D(2C) and another under Section 245D(4) could not have been passed.

12. In the present petition, we are not concerned with such contentions. The assessee has not challenged this order of the Settlement Commission. We are, therefore, not called upon to judge the correctness of this part of the order of the Settlement Commission. What is however, clear is, once the Settlement Commission did pass an order, whether legally permissible to do so or not, the Settlement Commission simply did not have the authority or jurisdiction to predate such order. The Settlement Commission could have rejected the request of the Revenue to go back to the stage of

passing the order under Section 245D(2C) and proceed further to pass final order of settlement under Section 245D(4), but under no circumstances, the Settlement Commission could have made a declaration of invalidity on 31.5.2016 giving it a retrospective effect of 29.1.2015. The Settlement Commission exceeded its jurisdiction in doing so. When the Settlement Commission had no jurisdiction to give retrospective effect to its order, whether the Revenue requested for the same or the assessee, would be wholly inconsequential. In essence, the Settlement Commission could either have refused the request of the department or accepted it but under no circumstances could it have passed the order of invalidation with retrospective effect. For better understanding on this aspect, we reproduce Section 245D(2) as under:

> "(2C) Where a report of the [Principal Commissioner or] Commissioner called for under sub-section (2B) has been furnished within the period specified therein, the Settlement Commission may, on the basis of the report and within a period of fifteen days of the receipt of the report, by an order in writing, declare the application in question as invalid, and shall send the copy of such order to the applicant and the [Principal Commissioner or] Commissioner:
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> **Provided** that an application shall not be declared invalid unless an opportunity has been given to the applicant of being heard:

Provided further that where the [Principal Commissioner or] Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the [Principal Commissioner or] Commissioner."

This provision can be analyzed as under:-

(i) Where a report called under sub-section (2B) is furnished within time specified therein, the Settlement Commission on the basis of such report pass an order in writing declaring application for settlement as invalid;

(ii) such order shall be passed within 15 days of receipt of the report;

(iii) application shall not be declared invalid unless opportunity is given to the applicant of being heard;

(iv) If report has not been furnished within the prescribed time, the Settlement Commission would proceed further without the report.

Under Section 245D(2C), thus the Settlement Commission could declare an application for settlement invalid, but such order has to be passed within prescribed time. In the present case, the Settlement Commission to overcome such time limit, passed an order giving it retrospective effect. If we recognize the powers of the Settlement Commission to pass such retrospective orders, the time limits envisaged by the legislature at various stages of settlement proceedings would be destroyed.

13. In the present case, the order passed by the Settlement Commission left six days to the Assessing Office to complete the assessments. We wonder what would be the situation if the Settlement Commission had passed such an order six days later than it has done. Be that as it may, we are clearly of the opinion that the Settlement Commission, while giving retrospective effect to its order of invalidation, it acted wholly without jurisdiction.

14. Mr. Mistri, may be justified in wondering if the Settlement Commission while passing order under Section 245D(4) of the Act, in the same order could have given the declaration of invalidity of the application. Two things are however, clear. One, the Settlement Commission has done it and we cannot undo it; uncalled for. Second, though it is a combined order of Settlement Commission, in relation to the concerned assessment year, the Settlement Commission has clearly exercised powers under Section 245D(2C) of the Act.

15. Another important aspect of the matter is, that the portion of the order of Settlement Commission giving

retrospective effect to the declaration of invalidity of the settlement application is clearly severable from the main order of invalidity. While therefore, striking down this illegal, severable portion of the order, we need not disturb the principle declaration made by the Settlement Commission.

16. Under the circumstances, we hold that the observation / direction of retrospective effect of the order is set aside and the order passed by the Settlement Commission on 31.5.2016 would take effect from such date. Before closing, we recognize that previously though the order invalidating the settlement application was adverse to the assessee, the assessee may be justified in not challenging it. However, when by this judgment, the entire basis has undergone a fundamental change, we would not preclude the petitioner from raising any such challenge independently. With these observations, all the petitions are disposed of.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**