(2014) 02 GUJ CK 0048

In the Gujarat High Court

Case No : Special Civil Application No''s. 16249, 16250 and 16531 of 2013

C.M. Smith and Sons APPELLANT

Vs

Assistant Commissioner of Income Tax RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:
Income Tax Act, 1961 — Section 143(1)(a) 143(3) 215 217 234B

Citation : (2014) 367 ITR 701

Hon'ble Judges : Sonia Gokani, J;Akil Kureshi, J

Bench : Division Bench

Advocate : J.P. Shah with Mr. Manish J. Shah, for the Petitioner No. 1, for the Appellant; M.R. Bhatt, with Mrs. Mauna M. Bhatt, Advocate for the Respondent No. 1, for the Respondent

Judgement

Akil Kureshi, J.—These petitions arise out of common background. They have therefore, been heard together for final disposal and would be disposed of by this common order. We may notice the facts arising in Special Civil Application No. 16249/2013. The petitioner assessee for the assessment years 1988-1989 to 1995-1996 applied for settlement of the assessment to the Settlement Commission ("the Commission" for short) in terms of provisions contained in the Income Tax Act, 1961 ("the Act" for short). Such application was entertained and the Commission passed order dated 11.10.2002 assessing the tax liability of the petitioner. In such order, the Commission gave the following directions for charging interest:

(C) Interest u/s 215 / 217, 234B and 234C shall be charged according to law except in respect of ASST. Year 1993-94 in the case of the firm for the reasons mentioned below:

The assessment u/s 143(3) for assessment year 1993-94 in the case of M/s. Smith and Sons was completed by A.O. After the submission of the settlement application but before the same was admitted. In view of the Special Bench decision in case of Damani brothers (238 ITR 36 (AP)), the assessment completed would have to be considered as non-est. In the circumstances, the interest chargeable in respect of assessment year 1993-94 in the case of M/s. T.M. Smith and sons would have to be restricted upto the date of the order u/s 143(1) (a).

It is not in dispute that the petitioner paid up the remaining tax as per the order of the Settlement Commission within the time permitted.

2. Based on such order of the Commission, the Assessing Officer passed a consequential order dated 4.2.2003. In the said order, he calculated the interest u/s 234B and 234C of the Act upto the stage of the Settlement Commission passing the final order of settlement as envisaged u/s 245D(4) of the Act. He observed that such interest would be chargeable as per the directions contained in para. 26(c) of the Commission''s order which has been produced here-in-above. Contending that the interest u/s 234B and 234C could not have been charged beyond the stage of section 245D(1) of the Act, the petitioner moved an application for rectification before the Commission on 19.6.2003. In such an application, the petitioner prayed inter-alia that:

(a) The Hon''ble ITSC may be pleased to hold that no interest u/sec. 234B is chargeable in respect of A.Y. 1988-89.

(b) The interest u/sec. 234B be ordered to be calculated only upto the date of the order of the Hon''ble ITSC u/sec. 245D(1).

3. This application for rectification remained pending before the Commission for number of years. In the meantime, the petitioner also filed written statement. In such statement, the petitioner relied on the decision of the Supreme Court in case of Brij Lal and Others Vs. Commissioner of Income Tax, Jalandhar, to contend that interest beyond the stage of section 245D(1) was not permissible.

4. The Settlement Commission passed its impugned order dated 17.9.2013 in which in addition to holding that the Commission has no power to rectify its own order, also observed that there was no mistake apparent on the record in the order passed by the Commission on 11.10.2002. It was observed that in such order, necessary directions were given for charging interest under different sections as applicable in accordance with the provisions of the Act. The contention of the petitioner that newly introduced subsection (6B) of section 245D permitting the Commission to rectify its own order in the present case was also rejected on the ground that such provision was prospective and that in any case in view of time limitation provided in the said provisions, the proceedings would be time barred. This order of the Commission was challenged by the petitioner in the present writ petition.

5. During the pendency of the petition, the petitioner also amended the petition to include the challenge to the order dated 4.2.2003 passed by the Assessing Officer. The respondents have filed reply including reply to the amended petition and opposed the petition.

6. Having heard the learned counsel for the parties and having perused the documents on record, the following scenario emerges:

a) The petitioner contests the interest charged by the Revenue in terms of the order passed by the Settlement Commission beyond the stage of section 245D(1) of the Act.

b) Such challenge the petitioner kept alive all through out right from the stage, Settlement Commission passed its order u/s 245D(4).

c) The Assessing Officer levied such interest on the premise that Settlement Commission''s order so permits.

d) When the petitioner filed the rectification application before the Commission, the Commission informed him that the only order passed by the Commission was to charge interest as per law. In other words, there was no direction specifically providing for interest from the petitioner beyond the stage of section 245D(1).

e) Such application for rectification remained pending before the Commission all along for number of years. There is nothing on record to suggest that the petitioner was responsible for such delay nor any ground has been raised by the Revenue before us.

f) In the meantime, the Supreme Court clarified the legal position and held in its judgment in case of Brjlal and others (supra) that interest beyond the stage of section 245D(1) u/s 234B and 234C, cannot be charged. In the same judgment, the Supreme Court also laid down that the Settlement Commission has no power of rectification.

7. Sum total of the above sequence of events is that the petitioner had all along kept its application to the interest being charged u/s 245D(1) alive. It may be that under mistaken bona fide belief that Settlement Commission has power of rectification, he filed such application before the Commission and such application came to be dismissed. We have noticed that application remained pending before the Commission for long number of years. Had such an application been terminated shortly after being filed, either on merits or on the ground that the Commissioner has no power of rectification, the petitioner would have taken his steps as may be available in law. Now that the Commission has rejected the application on both counts, namely, that there was no error in the original order and also that it does not have the power of rectification, in our opinion the petitioner cannot be precluded from questioning the Assessing Officer''s interpretation and implementation of the Commission''s order. It is not in dispute that if law is applied as laid down by the Supreme Court in case of Brjlal and others (supra), such consequential direction of the Assessing Officer would not be valid. Counsel for the Revenue however, vehemently contended that the challenge of the petitioner to the Assessing Officer''s order is highly belated. We must however, see the entire sequence of events in light of the developments noted above. The petitioner had approached the Settlement

Commission raising the grievance that the Commission''s order permitting the Assessing Officer to charge interest gave rise to a dispute and that such order therefore, should be clarified or rectified. Even while holding that the Commission has no power of rectification, it did in the same order clarify that its previous order was only for charging interest as per the statute. In other words, the Commission never required the Assessing Officer to charge interest de-horse the statutory scheme. It was therefore, that the petitioner had no choice but to question the very base order of the Assessing Officer misapplying the directions of the Settlement Commission. When such challenge comes before us, we must apply the law as presently prevailing.

8. Had the petitioner abandoned his cause and accepted the directions of the Settlement Commission, as understood and implemented by the Assessing Officer of charging interest even beyond the stage of section 245D(1) and thereafter, many years later relied on the decision of the Supreme Court in case of Brjlal and others (supra), we would have certainly considered the Revenue''s objection to such a challenge on the ground that only on delay and latches such challenge should be terminated. In the present case, the petitioner all along kept his challenge alive. He cannot be penalised for his application before the Settlement Commission remaining pending nearly for a decade. In the result three separate orders passed by the Assessing Officer dated 4.2.2003 giving effect to the orders passed by the Settlement Commission are quashed to the extent such order provides for charging interest from the respective petitioners u/s 234B and 234C of the Act beyond the stage of section 245D(1) thereof. To this extent, petitions are allowed and disposed of.