

(2009) 08 GUJ CK 0028

In the Gujarat High Court

Case No : Special Civil Application No. 10109 of 2008

Mahavir Rolling Mills Pvt. Ltd.

APPELLANT

Vs

Income Tax Settlement Commission and Another

RESPONDENT

Date of Decision : 17-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Income Tax Act, 1961 — Section 132, 139, 143(2), 143(3), 145A

Citation : (2009) 3 GLH 362 : (2010) 191 TAXMAN 358

Hon'ble Judges : K.A. Puj, J;A.L. Dave, J

Bench : Division Bench

Advocate : RK Patel, for the Appellant; Mauna M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

K.A. Puj, J.—Rule. Mrs. Mauna M. Bhatt, waives service of notice of rule. With joint request of parties, petition is taken up for final hearing.

2. The petitioner has filed this petition under Articles 226 and 227 of the Constitution of India praying for quashing and setting aside the orders of Settlement Commission dated 24.1.2007 and 2.1.2008 at Annexure-B and I to the petition and further praying for the direction to the Settlement Commission to pass de-novo order u/s 245(D)(4) of the Income Tax Act, 1961 after considering the ratio of decision of this Court in the case of N.R. Paper and Board Limited and Others Vs. Deputy Commissioner of Income Tax, and after giving adequate opportunity of hearing to the petitioner as well as the Revenue. The petitioner has also prayed for the direction to the Settlement Commission to pass appropriate orders in consonance with the orders of Directors on the similar facts and circumstances of the case.

3. This Court has issued notice on 7.8.2008. By an order dated 20.7.2009 the petitioner was permitted to join Assessing Officer as party respondent No. 2 and notice was issued to the newly joined respondent. Mr. M.R.Bhatt, learned Senior

Counsel with Mrs. Mauna M. Bhatt, learned advocate appears on behalf of the respondent.

4. The brief facts giving rise to the present petition are that the petitioner had filed Settlement Application on 27.9.1996 pertaining to Block period from 20.8.1992 to 20.9.1995. The petitioner Company was incorporated on 28.8.1992 and took over the proprietary running business of Shri K.K. Bansal on 1.9.1992. The petitioner Company is engaged in the business of trading and manufacture of hot rolled steel products, namely, angles, channels, bars etc. The Settlement Commission after hearing the petitioner as well as the Revenue passed final order on the issues raised by the petitioner in the Settlement Application. The petitioner is mainly aggrieved with the following findings and conclusions arrived at by the Settlement Commission in the impugned orders.

- (i) Excess stock due to inflated burning loss.
- (ii) Unaccounted sale on basis of weightment slips of third parties.
- (iii) Under valuation of closing stock of finished goods and raw material.
- (iv) Unaccounted cash advances to employees out of cash available in books.
- (v) Interest u/s 220(2) of the Income Tax Act, 1961.

5. Before filing the present petition, the petitioner approached the Dy. Commissioner of Income Tax by way of Rectification Application dated 16.3.2007 preferred u/s 154 of the Act, 1961. The petitioner also filed Misc. Application / Rectification Application before the Settlement Commission on 4.4.2007 for rectifying the mistakes apparent on record. The Settlement Commission rejected the application of the petitioner vide its order dated 2.1.2008 which is also being challenged in the present petition.

6. Mr. R. K. Patel, learned advocate appearing for the petitioner, has submitted that on the issue of excess stock due to inflated burning loss, there is disparity of treatment of telescoping in the case of the petitioner and the Director on the similar facts though in both the cases excess burning loss of 0.90% has been accepted by the Settlement Commission. He has further submitted that telescoping in the case of the Director Shri K. K. Bansal is granted and only separate addition of unexplained investment in Vasantkunj Society is made whereas in the case of the petitioner entitlement of benefit of telescoping is only partially granted. He has further submitted that the entire approach and finding of the Settlement Commission is contrary to the provisions of Section 158BB(1) of the Act, 1961 relating to the computation of undisclosed income of the block period. The undisclosed income has to be computed only on the basis of evidence found as a result of search or such material or information as are available with the Assessing Officer and relatable to such evidence. No such evidence of the excess stock arising out of trading activity has been found during the course of search proceedings. He has further submitted that no evidence is found during the course of search proceedings on the basis of which an inference can be

drawn that the stock so found is other than what can be relatable on the excess burning loss claimed by the petitioner Company. Such excess stock is on account of trading activity is merely a presumption of the Assessing Officer and the same does not fall within the ambit of undisclosed income as inferred by the Assessing Officer.

7. Mr. Patel has further submitted that on adjudicating upon the issue of unaccounted sales based on weighment slips of third parties the Settlement Commission has grievously erred in not considering the fact that the sales as recorded in the weighment slips were identified in the sales register of the third parties. On the issue of under valuation of closing stock of finished goods and raw material the finding given by the Settlement Commission is erroneous on facts and in law, since there was no change in the method of valuation of raw materials/closing stock and the same was uniformly and consistently followed as in earlier years and the issue of valuation of closing stock as per the regular books of accounts should be taken up in regular assessment proceedings and not in block assessment proceedings. He has further submitted that the method of valuation of closing stock was duly accepted in the regular assessment proceedings for accounting years 1995-96 and 1996-97. The Assessing Officer had adopted average cost of the material which is contrary to the principles of valuation of closing stock. He has, therefore, submitted that the decision on this issue is clearly in violation of the ratio laid down by this Court in the case of N.R. Paper and Board Limited and Others Vs. Deputy Commissioner of Income Tax, It is held in this case that Chapter XIV-B of the Income Tax Act, 1961, lays down a special procedure for assessment of search cases and provides for assessment of undisclosed income as a result of search. u/s 158BB(1), read with Section 158BC of the Income Tax Act, 1961, what is assessed is the undisclosed income of the block period and not the total income or loss of the previous year required to be assessed in the normal regular assessment u/s 143(3). This exercise u/s 143(2) and (3) for regular assessment stands in contrast to the exercise of the Assessing Officer u/s 158BB read with Section 158BC(b), where he has to assess only the undisclosed income of the block period on the basis of the evidence found and material available as a result of the search conducted u/s 132 of the Act. The regular assessment is to assess the total income or loss of the previous year where a return is filed u/s 139 and the Assessing Officer considers it necessary or expedient u/s 143(2) to ensure that the assessee had not understated the income or has not computed excessive loss or has not underpaid tax in any manner.

8. Mr. Patel further relied on the decision of Delhi High Court in Commissioner of Income Tax Vs. Mahavir Alluminium Limited, wherein it is held that whenever there is a change in the valuation at one end, then there must necessarily be a corresponding change at the other end, otherwise, the true profit would not be reflected. While dismissing the Appeal filed by the Department, the Delhi High Court has further held that in para 23.13 of the guidance note on tax audit u/s 44AB issued by the Institute of Chartered Accountants of India it is made clear

that whenever any adjustment is made in the valuation of inventory, this will affect both the opening as well as the closing stock. If any adjustment was required to be made by a statute, effect should be given to it irrespective of any consequences on the computation of income for tax purposes. Section 145A begins with a non obstante clause and therefore to give effect to Section 145A, if there is a change in the opening stock as on March 31, 1999, there must necessarily be a corresponding adjustment made in the opening stock as on April 1, 1998. Thus, the question of double deduction did not arise since no adjustment was made by the assessee in profit and loss account for the year ending March 31, 1998.

9. Mr. Patel has further submitted that the decision of the Settlement Commission on the issue of unaccounted cash advances to employees is contrary to the facts and circumstances and evidence on record since the advances are out of cash available in the books of accounts pertaining to advances given to various staff members to meet business expenditure and employee wise total advance is given.

10. Mr. Patel has further submitted that the Settlement Commission has committed serious error of law while rejecting the Misc. Applications by stating that the power of revision/review is not conferred on the Settlement Commission as if the Commission is an Appellate Authority, whereas in fact the Settlement Commission steps into the shoes of the Assessing Officer has not only powers of Assessing Authority, but has got wider powers since in law the order of Settlement Commission is final and not appealable as opposed to the order of the Assessing Authority which is an appealable order u/s 246 of the Income Tax Act, 1961. Even in the Misc. Application specific ground is raised by the petitioner with regard to charging of interest u/s 220(2) of the Act contending therein that vague/general direction was given on the issue of levy of interest, by incorporating various provisions of levy of interest in the direction inspite of the fact that several provisions are not applicable to the facts of the case. Levy of interest was also challenged on the ground of disparity shown by the Commission in granting specific direction in the case of Directors of the Company on similar facts and circumstances of the case. Mr. Patel further submitted that the Assessing Officer could not have charged interest u/s 220(2) of the Act from the date of expiry of the statutory time limit of issuance of demand notice alongwith block assessment order but he should have charged interest considering the demand notice issued as a result of order of the Settlement Commission passed u/s 245D(4) of the Act. In support of this submission, he relied on the decision of the Apex Court in the case of Vikrant Tyres Ltd. Vs. First Income Tax Officer, where it is held that the condition precedent u/s 220 was that there should be a demand notice and there should be a default in paying the amount so demanded within the time stipulated in the notice. The assessee satisfied the demands under the notices issued u/s 156 and nothing was due pursuant to the notices of demand. After the judgment of the High Court on a reference fresh demand notices were issued and in satisfaction of those demands the assessee had paid

the amounts as demanded within the time stipulated therein. In such a situation, on a literal meaning of Section 220(2), the Department had no right to demand interest for the period commencing from the date of refund of the tax upon the appellate order till the taxes were finally paid after disposal of the reference.

11. Mr. Patel has, therefore, submitted that the order passed by the Settlement Commission requires to be quashed and set aside and appropriate directions sought for by the petitioner are required to be issued to the Settlement Commission for deciding the petitioner's application afresh.

12. Mr. M. R. Bhatt, learned Senior Counsel appearing for the respondent, on the other hand, has submitted that the decision of the Settlement Commission cannot be challenged in the petition filed under Article-226 of the Constitution of India. In support of his submission, he relied on the decision of the Apex Court in the case of C.A. Abraham and Others Vs. Assistant Commissioner of Income Tax and Others, It is held that the Settlement Commission has decided the issue on the basis of assessee's applications disclosing full and true income. Therefore, it could not be said that the Settlement Commission had followed an irregular procedure to enable the Court to interfere with the order of the Commission. Moreover, the Court's power of judicial review on the decision of the Settlement Commission was very restricted. The Court while exercising jurisdiction under Article 226 of the Constitution cannot go into the facts whether that income is undisclosed income or income other than undisclosed income.

13. Mr. Bhatt further relied on the decision of Apex Court in the case of Jyotendrasinhji Vs. S.I. Tripathi and others, it is held that the scope of the enquiry whether by the High Court under Article 226 or before the Supreme Court in the appeal under Article 136 remains the same. Viz. to consider whether the order of the Settlement Commission is contrary to the provisions of the Income Tax Act, and if so whether it has prejudiced the petitioner. This is, of course, apart from grounds of bias, fraud and malice which constitute a separate and independent category.

14. Apart from limited scope of indulgence by this Court in the decision of Settlement Commission, Mr. Bhatt has invited the Court's attention to the stand of the department taken before the Settlement Commission in respect of points of dispute raised by the petitioner in the present petition. With regard to burning loss claimed by the petitioner Mr. Bhatt submitted that this claim is without any basis. The Director of petitioner Company Mr. K. K. Bansal in his statement recorded on 17.11.1995 had mentioned that since 1989 the burning loss is being shown excessive by 1% to 1.25%. The suppression of production and sale through excess burning loss claim is calculated on the basis of consumption of raw material. Since this process was going on for a number of years, it was but natural to make presumption that part of production has been sold outside the books of account. In relation to the issue on unaccounted stock of finished goods, Mr. Bhatt has submitted that Mr. Bansal in his statement has accepted unaccounted stock of 651 MT. Even an affidavit to this effect was filed before the

Settlement Commission alongwith reconciliation of stock on 11.4.1996. He has, therefore, submitted that the books of accounts have been fabricated by the petitioner. With regard to the issue of unexplained money and advances, Mr. Bhatt has submitted that loose sheets of the intervening period were found during the search and these transactions are outside the books of accounts. The petitioner has raised this money through rotation of unaccounted stock and unaccounted sale has already been proved by the Department. With regard to valuation of closing stock of finished goods and raw-materials, Mr. Bhatt has submitted that the Assessing Officer has valued investment at cost which included freight and octroi. The petitioner has omitted these two items from the cost. With regard to charging of interest u/s 220(2) of the Act, Mr. Bhatt has submitted that this issue was raised by the petitioner in rectification application as while disposing of the main application, the Settlement Commission has given a categorical direction to charge interest u/s 220(2) after the date of the order u/s 245D(4) following the decision of the Supreme Court on the issue and hence there is no scope of any rectification as prayed for by the petitioner. In support of his submission Mr. Bhatt relied on the decision of Apex Court in Commissioner of Income Tax Vs. Hindustan Bulk Carriers, it is held that interest payable on the tax due has to be determined by the Settlement Commission after settlement of the case and the starting point of charging interest would be the due date of payment of advance tax or tax assessed or demanded as applicable to regular assessment proceedings and the end point the date of the order of the Settlement Commission.

15. Mr. Bhatt further relied on the decision of Apex Court in Commissioner of Income Tax Vs. Damani Brothers, it is held that wherever the Act provides for waiver of interest the Settlement Commission can in appropriate cases direct waiver or reduction of interest, provided the conditions in the respective provision for waiver or reduction are satisfied, since waiver or reduction of interest u/s 220(2A) and other provisions is hedged in with certain conditions, the Commission has to examine whether the assessee had made out a case for waiver or reduction.

16. Section 234B, Section 245D(2C) and Section 245D(6A) operate in different fields. Interest is payable u/s 234B when there is default in payment of advance tax. Liability to pay interest u/s 245D(2C) arises when the additional amount of tax is not paid within the time specified u/s 245D(2A). Section 245D(6A) fastens liability to pay interest when tax payable pursuant to an order u/s 245D(4) is not paid within the specified time. Therefore, when interest is charged in respect of those provisions, it does not amount to double levy of interest, as the infractions are different.

17. Mr. Bhatt has, therefore, submitted that none of the issues raised by the petitioner in the present petition deserves any consideration by this Court while exercising its extraordinary writ jurisdiction under Article 226 of the Constitution of India and hence the petition deserves to be dismissed.

18. We have heard learned Counsels appearing for the parties and considered their rival submissions. We have also perused the order passed by the Settlement Commission and considered the relevant statutory provisions as well as the case law cited before the Court. In light of the ratio laid down by the Apex Court in C.A. Abraham and Ors. (Supra) the Court's power of judicial review on the decision of the Settlement Commission was very restricted. Even in the case of Jyotendrasinhji (Supra), the Apex Court has carved out an exception holding that the scope of the enquiry whether by the High Court under Article 226 or before the Supreme Court in the appeal under Article 136 is only to consider whether the order of the Settlement Commission is contrary to the provisions of the Income Tax Act, and if so whether it has prejudiced the petitioner, apart from grounds of bias fraud and malice which constitute a separate and independent category. Keeping this ratio in mind, we are of the view that except a issue regarding undervaluation of closing stock of finished goods and raw-materials no other issues deserve any consideration by this Court as they are all in the realm of facts and it is difficult to hold that the finding of the Settlement Commission is contrary to the provisions of Income Tax Act, 1961. Even the directions issued by the Settlement Commission with regard to charging of interest u/s 220(2) of the Act are also in consonance with the provisions of Income Tax Act and they are duly supported by the binding decision of the Apex Court. In the case of CIT v. Hindustan Bulk Carriers as well as CIT v. Damani Brothers (Supra), it is difficult to accept the submissions of Mr. Patel that the order of Settlement Commission is very vague on the issue of charging of interest as it is not clarified as to from which period the interest is charged. In fact, two terminus are known to the petitioner. The Assessing Officer has passed the original order and raised the demand by issuance of notice u/s 156 of the Act. After the expiry of period of 30 days from the date of the order and/or demand notice, the interest u/s 220(2) is payable. Thus, the starting point of charging of interest is known. The order of Assessing Officer is merged to the order of the Settlement Commission and whatever amount is determined by the Settlement Commission interest is payable on that amount. Under Section-245D(6A) liability to pay interest is fastened when tax payable pursuant to an order under Section-245D(4) is not paid within the specified time. Keeping this provisions in mind, the Settlement Commission has directed to charge interest u/s 220(2) upto the date of order u/s 245D(4) of the Act. While disposing of the rectification application Settlement Commission has made it clear that if the petitioner is of the opinion that there is computational error in determination of the quantum of interest u/s 220(2) leviable in its case, appropriate remedy may have to be sought by way of rectification/revisonal proceedings before the Income Tax authority. Thus, there is no substance in the submission of Mr. Patel with regard to petitioner's challenge against levy of interest u/s 220(2) of the Act. The petitioner's challenge to non-waiver of interest on the ground of alleged discrimination does not persuade us to take any different view than the view taken by the Settlement Commission.

19. As far as issue regarding undervaluation of closing stock of raw-material and finished goods is concerned, there is much substance in the submission of Mr. Patel that the same is not covered within the definition of undisclosed income. It is an admitted position that there was no change in the method of valuation of raw-material/closing stock and the same was uniformly and consistently followed as in the earlier years and the issue of valuation of closing stock should be taken up in regular assessment proceedings and not in block assessment proceedings as per the binding decision of this Court. The method of valuation of closing stock was duly accepted in the regular assessment proceedings for the assessment years 1995-96 and 1996-97. The Assessing Officer adopted average cost of raw-material instead of adopting the value on the basis of cost of raw-material which is contrary to the principle of valuation of closing stock. The Settlement Commission has not accepted the method of valuation only on the ground that freight and octroi have not been included while valuing the same. However, even while valuing the opening stock of finished goods and raw-materials the freight and octroi charges have not been included. Hence such non-inclusion of freight and octroi would not affect closing stock and bring it within the ambit undisclosed income. The Settlement Commission has also not considered the submission of the petitioner that if the value of the stock have been enhanced then appropriate set off by way of increased value in the opening stocks should be granted. Hence in either case appropriate direction for the effect of stock valuation is required to be given in the case of the petitioner.

20. In view of above submissions made on behalf of the petitioner, we set aside the order of the Settlement Commission only on this issue and remand the matter to Settlement Commission with a direction to re-examine this issue in light of decision of this Court in case of N. R. Paper as well as observations made by us in the preceding paras and pass the fresh order after giving opportunity of being heard to the petitioner in accordance with law.

21. Thus, this petition is allowed to the above extent only. Rule is made absolute to the above extent without any order as to costs.