(2009) 09 BOM CK 0169

In the Bombay High Court

Case No : Writ Petition No. 6140 of 2008

Shri Vijay Kumar Bagadia (Indl.) APPELLANT

Vs

Income Tax Settlement Commission, Additional Bench, Commissioner of Income Tax and Union of India (UOI) RESPONDENT

Date of Decision : 25-09-2009

Acts Referred:
Income Tax Act, 1961 — Section 132, 158BB, 158BC, 245C, 245C(1)

Citation : (2009) 09 BOM CK 0169

Hon'ble Judges : N.D. Deshpande, J;B.R. Gavai, J

Bench : Division Bench

Advocate : M.K. Kulkarni, for the Appellant; Alok Sharma, Assistant Solicitor General, for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—Rule. Rule made returnable forthwith. Heard by consent. The petitioner has filed the present petition, inter alia, challenging the order passed by the respondent No. 1 i.e. Income Tax Settlement Commission, 31/3/2008, in settlement case No. 5/N/023/00-01/IT.

2. Facts in brief, giving rise to the present petition are as under: The authorities of the Income Tax Department, carried out search action between 24th September, 1997 and 26th September, 1997 against the Bagadia Group, Jalna, of which the petitioner is one of the members. The said action was carried out u/s 132 of the Income Tax Act, 1961 (Hereinafter referred to as "the said Act" for the sake of brevity). It is the contention of the petitioner that the Bagadia Group consists of 3 assesses, out of which, 2 are individuals and 1 is HUF. The said group is predominantly in construction business activity and the group is also running business of a hotel, i.e. "Hotel Amit". During the search and seizure action, certain assets belonging to the petitioner and other assesses of the said group were seized on 2nd January, 1998. The petitioner was issued a notice u/s 158BC of the said Act directing the petitioner to file a Block Return of undisclosed

income. The petitioner filed his Block Return on 28th July, 1998, declaring his income at Rs. 13,41,530/-. It appears that the Assessing Officer did not accept the Block Return filed by the petitioner and assessed the income of the petitioner at Rs. 6,35,70,222/- for the said block year.

3. The petitioner, being aggrieved by the said assessment order, has preferred an appeal before the Commissioner of Appeals, Income Tax, Aurangabad. During the pendency of the appeal, the petitioner alongwith 2 other assesses of the group, namely, Shri Vijay Kumar Bagadia (HUF) and Smt. Ashadevi Bagadia, filed settlement applications before the respondent No. 1. In the said settlement applications, in addition to the Block Assessment period, the petitioner had also sought settlement in respect of the assessment years, 1998-99, 1999-2000 and 2000-2001. The application was admitted by the Commission and on admission of the application, the appeal before the respondent No. 2 stood withdrawn from the respondent No. 2 and transferred to the Commission.

4. The respondent No. 1 vide the impugned order, has held that the applications in so far as the regular assessment was concerned, was beyond the jurisdiction and as such, it is excluded from the ambit of the said order. By the said order, the respondent No. 1 has subjected only block assessment proceedings for settlement. The application of the petitioner alongwith two other assesses from the group were decided by a common order. However, the petitioner, has restricted the present petition, only in so far as the order passed in case of the present petitioner, is concerned.

5. The petitioner had offered an additional income of Rs. 15,74,572/- in his S.O.F and Revised S.O.F. alongwith his Returned Income of Rs. 13,21,530/-. The respondent No. 1 vide the impugned order found that during the block assessment period, the total application were, 82,62,015/- whereas sources were 34,69,878/-. The respondent No. 1, therefore, directed income to be computed on that basis. Being aggrieved by the order passed by the Settlement Commission, the petitioner has approached this Court. We have heard Shri Kulkarni, the learned Counsel for the petitioner and Shri Sharma, the Assistant Solicitor General for the respondent.

6. Shri Kulkarni, the learned Counsel for the petitioner submits that in view of Section 158BB of the said Act, while determining the undisclosed income of the block period, the said determination can be done only on the basis of the evidence found as a result of search or requisition of the books of accounts or other documents and such other material or information as are available with the Assessing Officer and relatable to such evidence. He submits that since the application made before the Settlement Commission was for a block period, the powers of the Settlement Commission were circumscribed by the parameters laid down u/s 158BB and the Settlement Commission could not have taken into consideration any other material which is not permissible u/s 158BB.

7. The learned Counsel submits that the Settlement Commission has passed the

impugned order by taking into consideration various aspects, which are not permissible u/s 158BB.

8. Shri Sharma, the learned Assistant Solicitor General on the contrary submits that the order passed by the Settlement Commission has been passed after taking into consideration the relevant material and as such, in a writ petition, the scope of judicial review would be permissible only to examine as to whether, the Settlement Commission has passed an order after taking into consideration the relevant material or not and it would not be permissible for this Court to act as an Appellate Tribunal, over the decision of the Settlement Commission. He, therefore, submits that the petition deserves to be dismissed.

9. After hearing the learned Counsel for the parties, we had closed the matter for orders on 28th August, 2009. However, subsequently, we noticed the judgment and order passed by the Apex Court in the matter of Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd., , which was not brought to our notice by either of the parties. We had, therefore, kept the matter for rehearing on 11th September, 2009. On the said date, again, we heard the learned Counsel for the parties.

10. Shri Kulkarni, learned Counsel for the petitioner submits that the judgment of the Apex Court (cited Supra) considered the provisions of Section 245D and Specifically Sub-section (1-A) thereof, wherein, it was provided that the application u/s 245-C would not be proceeded if the Commission objects the said application on certain grounds. He submits that, however, Sub-section (1-A) of Section 245D, has been omitted by Finance Act (No. 2 of 1991). He, therefore, submits that the said judgment would not be applicable to the facts of the present case.

11. From the perusal of the judgment of the Apex Court in the case of Express Newspapers Ltd. (supra), it could be seen that, the Apex Court has taken into consideration the provision that was in existence prior to the enactment of Finance Act, 1979 which required that if the Commissioner objects to the application being processed, then his objection was final and conclusive. The Apex Court found that the Section 245D, which was brought into effect by Finance Act of 1979, was to the effect that the Commission''s objection ceased to be final and conclusive. The Apex court found that the proviso to Sub-section (1-A) empowered the Commission to examine whether the objection of the Commission was correct or not and that after hearing, if the Commission was satisfied that the objection of the commission was not correct, it could proceed with the application. However, it is pertinent to note that though the other provisions of Chapter XIX A suffered various amendments, the provisions of Section 245-C which were considered by the Apex Court, are the same even as on today. The Apex Court, while considering the provisions of Section 245-C which provides for filing an application for settlement of the case, observed thus:

Para. 11. For a proper delineation of the jurisdiction of the Commission, it is necessary to bear in mind the language of Sub-section (1) of Section 245C. It provides that at any stage of a case relating to him, an assessee may make an application to the Commission disclosing fully and truly income which has not been disclosed before the Assessing Officer. He must also disclose how the said income has been derived by him besides certain other particulars. This means that an assessee cannot approach the Commission for settlement of his case with respect to income already disclosed before the Assessing Officer. An application u/s 245C is maintainable only if it discloses income which has not been disclosed before the Assessing Officer. The disclosure contemplated by Section 245C is thus in the nature of voluntary disclosure of concealed income.

The Apex court has further observed thus:

Para. 19. The idea underlying the said words [in the limb of Sub-section (1-A)] is self evident. The disclosure u/s 245C must be of an income not disclosed before the Assessing Officer. If the Assessing Officer (or the Income Tax authority) has already discovered it and has either gathered the material to establish the particulars of such income or fraud fully or is at a stage of investigation/enquiries where the material gathered by him is likely to establish the particulars of such income or fraud, the assessee cannot be allowed to defeat or forestall, as the case may be, the entire exercise of the Income Tax authorities just by approaching the Commission. In such a case, it cannot be said that he is acting voluntarily or in good faith. He should not be allowed to take advantage of the comparatively easy course of settlement. He must be allowed to face the normal channels of assessment/appeal etc. Section 245C is meant for those assesses who seek to disclose income not disclosed before the officer including "the manner in which such income has been derived". If the Department already knows and has gathered particulars of such income and the manner in which it has been derived, there is no "disclosure" by the assessee. Let it be remembered that the words in question (in Section 245D(1A) are not words of limitation nor are they meant to help unscrupulous assessees. Chapter XIXA is a part of the Income Tax Act and must be construed consistent with the overall scheme and object. The chapter is meant for those assesses who want to disclose income not disclosed till then together with the manner in which the said income is derived. It is not meant for those who come after the event, i.e. after the discovery of the particulars of income and its source, or discovery of particulars of fraud perpetrated by the assessee, as the case may be, nor even to those who come to the Commission to forestall the investigation/enquiries which have reached a stage where the Department is in possession of material which though not sufficient to establish such concealment or fraud, is such that it is likely to establish it may be some more material is required to establish it fully. The Commission has to keep all this in mind while deciding whether to allow the application to be proceeded with before it or to reject it.

12. It can thus, clearly be seen that the Apex Court in unequivocal terms has held that the disclosure u/s 245C must be of an income not disclosed before the

Assessing Officer. The Apex Court has further held that if the Assessing Officer has already discovered it and has either gathered the material to establish the particulars of such income or fraud, the assessee cannot be allowed to defeat or forestall, as the case may be, the entire exercise of the Income Tax authorities just by approaching the Commission. It has been clearly held that in such a case, it cannot be said that he is acting voluntarily and in good faith.

The Apex court has further held that the assessee should not be allowed to take advantage of the comparatively easy course of settlement He must be allowed to face the normal channels of assessment/appeal etc. In unequivocal terms, it has been held that Section 245C is only meant for disclosing the income not disclosed before the assessing officer. It has been clearly held that if the Department already knows and has gathered particulars of such income and the manner in which it has been derived, there is no disclosure by the assessee. It has been further held that the provision of Section 245C are not meant for those who come after the event i.e. after the discovery of the particulars of income and its source, or discovery of fraud perpetrated by the assessee, as the case may be.

13. It is thus clear that the application u/s 245C would be tenable only when the assessee makes full and true disclosure of the income which is not known to the assessing officer. If the income tax authorities are already aware about the income and the manner in which such income has been derived, then the application u/s 245C would not be tenable.

14. The Division Bench of the Madras High Court in the matter of Canara Jewellers and Yogesh Palke alias Yogesh Achar (decd. by LRs) Vs. Settlement Commission and Another, , relying on the judgment of the Apex Court cited supra, observed thus:

The provision of Section 245C of the Income Tax Act, 1961, fell for consideration before the Supreme Court and High Courts from time to time. In Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd., , the Supreme Court held that in an application u/s 245C of the Act, for settlement of applicant''s Income Tax case, there should be disclosure of income not earlier disclosed before the Assessing Officer. If the Assessing Officer or the Income Tax authority has already discovered it and either has gathered the material to establish the particulars of such income or fraud fully or is at a stage of investigation/ enquiries, then the disclosure cannot be said to be voluntary or in good faith and the assessee cannot be allowed to take advantage of the comparatively easy course of settlement.

We respectfully agree with the view taken by the Division Bench of the Madras High Court, which is on the basis of the judgment of the Apex Court, in the matter of Express Newspapers Ltd., cited supra.

15. It is thus clear that the application filed by the petitioner u/s 245C was with respect to the income, which was already discovered by the authorities of the Income tax Department during the search and since there was no voluntary

disclosure of income and the manner in which it is derived, which was not disclosed earlier, the application filed by the present petitioner u/s 245C itself was not tenable in view of the judgment of the Apex Court, in the case of Express Newspapers Ltd. cited supra.

16. We, therefore, hold that the order passed by the respondent No. 1 allowing the application u/s 245C is without jurisdiction. Needless to state that the order without jurisdiction is non-est in law. Since in view of the admission of the case by the Commission, the appeal filed before the respondent No. 2 stood withdrawn and transferred to the Commission, we direct that the appeal shall be restored to the file of the respondent No. 2 and shall be dealt with, in accordance with law. Rule is disposed of in the aforesaid terms.

At this stage, learned Counsel for the petitioner seeks stay of the judgment and order passed by this Court for eight weeks. Since there was already an interim order operating in the petition for considerable length of time, we allow the said prayer and stay the effect and implementation of the order passed by us for a period of six weeks from today.