

(2009) 09 MP CK 0044

In the Madhya Pradesh High Court

Case No : W.A. No's. 614 to 621 of 2008

Tarun Goyal

APPELLANT

Vs

Income Tax Settlement Commission and others

RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 142(1), 143(2)

Citation : (2009) 4 MPLJ 690

Hon'ble Judges : S.M. Samvatsar, J;A.P. Shrivastava, J

Bench : Division Bench

Advocate : V.K. Bhardwaj, with K.R. Manghani and Rajas Sharma, for the Appellant; D.P.S. Bhadoria, for respondents-Income Tax Department, for the Respondent

Judgement

S. Samvatsar, J.

This judgment shall govern disposal of all these appeals i.e. W. A. Nos. 614/2008 to 621/2008 as all these appeals arise out of a common order dated 23-9-2008 passed by learned Single Judge of this Court in W.P. Nos. 3364/08, 3359/08, 3360/08, 3356/08, 3358/08, 3357/08, 3361/08 and 3357/08 respectively. The said petitions were filed claiming following reliefs:-

i. Writ of Certiorari or Writ, Order of direction in the nature of Certiorari or any other appropriate Writ order or direction under Articles 226/227 of the Constitution of India expunging/Quashing directions to respondent Nos. 2 and 3 contained in para 8.10 of the order dated 31-3-2008 passed by the respondent No. 1 u/s 245D(4) to conduct further enquiries and to submit a report to the respondent No. 1 and consequential directions/observations in the said order.

ii. Consequently Writ of Certiorari or Writ, Order of direction in the nature of Certiorari or any other appropriate Writ order or direction under Articles 226/227 of the Constitution of India quashing the notices u/s 143(2) of the Act for

assessment years 2001-02 to 2007-2008 in connection with the proceedings u/s 153A of the Act calling explanation/information u/s 142(1) in respect of assets/documents found at the time of search and any proceedings in terms of para 8.10 of impugned order if any also be directed to be dropped.

iii. Such further or other relief as this Hon"ble Court may deem fit and proper in the facts and circumstances of the case also be granted;

The brief facts of the case are that the appellants in Writ Appeals No. 614/08, 616/08, 617/08, 618/08, 619/08 and 620/08 are member of the same family and appellants of Writ Appeals No. 615/08 and 621/08 are other family members. They are engaged in Real Estate Business, Share Trading, Trade in Liquor and other businesses. A raid was conducted on 4/5-8-2006 at their residential place by the Income Tax Department and Income Tax Department seized several documents, papers including case of Rs. 16,36,500/- and other assets like account books and ornaments etc.

On the basis of this search and seizure, the Income Tax Department reached to the preliminary conclusion that appellants have not paid income tax correctly from the year 2001-02 to 2006-07 onwards and started proceedings against the appellants. The appellants therefore, filed their returns on 14-5-2007. The appellants thereafter approached the Settlement Commissioner under Chapter XIX-A of the Income Tax Act and filed an application u/s 245-C(1) before the Commissioner, Settlement. This applications was filed by the appellants on 28-5-2007 and informed the Assessing Officer accordingly and prayed for adjustment of return. According to the appellants, the application filed by them was deemed to be allowed, hence the excess tax paid by them be refunded.

Thereafter, appellants have filed a Writ Petition No. 969/2008 before this Court, which was disposed of by this High Court on 4-3-2008 with a direction to the Commissioner to decide the application for settlement before 31 -3-2008. The Commissioner in pursuance of the directions issued by this Court has passed an order dated 31-3-2008, holding that the appellants are not cooperating with him in deciding the matter. He was also of the opinion that some further investigation in the matter is necessary. Hence by the impugned order of the Commissioner, he directed to conduct an enquiry under Rule 9 and this order is assailed by the appellants before this Court by filing a writ petition which was dismissed by impugned judgment. Hence, all these appeals.

The first contention raised by Shri K. R. Manghani, Learned Counsel appearing on behalf of appellants is that as per section 245-4A, all applications which were filed before 1st July, 2007 were to be decided finally before 31st March, 2008. The order passed by the Commissioner is dated 31st May, 2007 (Annexure P/I); whereby, it was directed to hold further enquiry. According to him since 31 st March, 2008 is already expired, now their application should be deemed to be allowed and the excess tax paid by them be refunded.

In reply to this argument, Shri DPS Bhadoria, Learned Counsel appearing on

behalf of Income Tax Department supported the impugned judgment.

Before dealing with the arguments advanced by the parties, it is necessary for this Court to deal with Chapter XIX-A of the Income Tax Act to understand the scheme of the legislation.

Chapter XIX-A of the Income Tax Act, 1961, contains the machinery for settlement of cases through the Settlement Commission. The said provisions were inserted by the Taxation Laws (Amendment) Act, 1975, w.e.f. 1-4-1976 and was comprised of section 245A to 245L. The Chapter contained a complete machinery whereby the assessee could approach the Settlement Commission by disclosing their correct income and get a settlement in accordance with the provisions of the Chapter. The provisions of this chapter has been extensively amended by Finance Act, 2007 w.e.f. 1-6-2007. The intention of the extensive amendments (as explained in the Memorandum explaining the provisions of Finance Bill 2007 - 289 ITR 344) is expeditious disposal of the proceedings, with a view to avoid delay in determining the tax liability of assessee which is caused because of factors like duplication of proceedings, absence of statutory time frame for settling the cases and also with a view to streamline the proceedings before the Settlement Commission.

Sub-section (1) of section 245 D which has been substituted by Finance Act, 2007 w.e.f. 1-6-2007 now obliges the settlement Commission to issue a notice to the applicant within 7 days from the date of receipt of application, requiring the applicant to explain as to why the application made by him be allowed to be proceeded with. The Settlement Commission is obliged to pass an order in writing within 14 days from the date of receipt of application either to reject the application or to allow the application to be proceeded with. Proviso to section 245(1) provides that if no order is passed within the aforesaid period, the application shall be deemed to be allowed to be proceeded with.

Sub-section (2A) of said section 245D contains a provision regarding disposal of the pending cases and provides that where an application has been made u/s 245C prior to 1 st June, 2007 but no order under sub-section (1) of section 245D as it stood prior to amendment by Finance Act, 2007 has been made before 1 -6-2007, such application shall be deemed to be allowed to be proceeded with if the additional tax on the income disclosed in such application and interest thereon is paid on or before 31-7-2007. Explanation to sub-section (2A) further provides that in respect of such application 31-7-2007 shall be deemed to be date of order of rejection or allowing the application to be proceeded with sub-section (1). At this stage it would be relevant to refer to the provisions of sub-section (1) of section 245D as they stood prior to their amendment by Finance Act, 2007 w.e.f. 1-6-2007, which contained the procedure on receipt of application u/s 245D. Under the unamended provisions the settlement Commission called for report of the Commission first and then pass an order either allowing the application to be proceeded with or rejecting the application. Such order was required to be passed within a period of one year from the end of

the month in which the application u/s 245D was made. The amendment, thus, contemplates an expeditious disposal of the application brought before the Settlement Commission and such procedure for expeditious disposal have even been made applicable for the cases pending before the Commission on 1-6-2007 in which order under sub-section (1) has not been passed. The distinction between sub-section (1) and (2A) is that sub-section (1) would govern the applications made before 1-6-2007 where an order accepting or rejecting the application is required to be passed mandatorily within 14 days from the date of application. As against this, provisions of sub-section (2A) are applicable to the pending applications and in such cases if the applicant pays the tax on additional income along with interest thereon before the specified date such application shall be deemed to have been allowed to be proceeded with.

Sub-section (2B) has substituted from 1-6-2007 really sets the machinery in motion and obliges the Commission to call for a report from Commissioner in respect of the application allowed to be proceeded with either under sub-section (1) or sub-section (2A) and the Commissioner is required to furnish the report within 30 days from the date of completion of settlement commission. Sub-section (2C) then provides that where a report of the Commission has been furnished within specified time, then the settlement Commission may on the basis of such report, by an order in writing declare the application in question to be invalid, of course after giving opportunity to the applicant. Second proviso to sub-section (2C) provides that where Commissioner has not completed the report within the aforesaid period Commission shall proceed further in the matter without the report of the Commissioner.

Sub-section (2D) deals with a situation where the application was made under sub-section (1) prior to 1-6-2007 and an order under the provisions of subsection (1) as they stood immediately prior to amendment by Finance Act, 2007 allowing the application to be proceeded with has been passed before 1-6-2007 i.e. before the amendment but an order under sub-section (4) of section 245D as it stood before amendment was not passed before 1-6-2007, such application shall not be allowed to be proceeded further unless the additional tax on income disclosed in application is paid along with interest thereon on or before 31-7-2007. This is notwithstanding any extension granted by Settlement Commission.

All the above amendments clearly shows the intention of Legislature to have expeditious disposal of all matters by the Settlement Commission. This is sought to be achieved by introducing the statutory time intervals for all procedural matters because the Parliament intends that all proceedings brought before settlement Commission either before 1-6-2007 or thereafter must be concluded by passing final orders before the date specified in sub-section (4A).

Sub-section (3) of section 245D again seems to be relevant as it enables the Settlement Commission to call for the report from Commissioner and even get further enquiry or investigation conducted through the Commissioner. In such a

case where the Settlement Commission feels that the enquiry/investigation is necessary and directs the Commission to make such enquiry/investigation, the Commissioner in such a case required to furnish his report from 90 days from the date of receipt of communication from Settlement Commission. Proviso to section 245(3) enables the Settlement Commission to proceed further and pass an order under sub-section (4) even in absence of the report from the Commissioner if the commissioner fails to furnish the report

Sub-section (4) is the crucial provision regarding final order to be passed by Settlement Commission. According to this provision, the Settlement Commission can pass "such order as it thinks fit" on the matters covered by the application and any other matter relating to the case not covered by the application but referred to in the report of the Commissioner. Reading this provision along with sub-section (6), it appears that an order under sub-section (4) has to be an order providing the terms of settlement. Sub-section (4A) again prescribed the limitation and contemplates that an order under sub-section (4) shall be necessarily passed by the Settlement Commission in respect of application referred to in sub-section (2A) or (2D) on or before 31-3-2008 and in respect of an application made on or after 1-6-2007, within twelve months from the end of the month in which application was made.

Considering the above provisions the question to be considered is about the nature of the order that can't be passed by Settlement Commission under subsection (4) of section 245D. That is at the stage of passing an order under subsection (4) whether the Settlement Commission can cause an enquiry to be conducted through Commissioner and remand the matter for further enquiry. A bare reading of the entire procedure as substituted by Finance Act, 2007 by amending the provisions of section 245D, it becomes certainly clear that at the stage of passing an order under sub-section (4) the Commission can only pass an order containing the terms of settlement and no other order, much less an order directing further enquiry can be passed under sub-section (4). As a matter of fact the stage of conducting an enquiry has already crossed under sub-section (3). If before passing an order under sub-section (4), the Commission feels that further enquiry or investigation is necessary in the matter, it can certainly get the enquiry or investigation conducted through the Commissioner within the time frame prescribed under that section. Proviso to sub-section (3) of section 245D takes care of situation where Commissioner does not furnish report during the prescribed period for whatever reason, which may even include non-co-operation from the assessee. In such a situation proviso enables the Settlement Commission to proceed without even report and pass order under sub-section (4). The words "pass such order as it think fit", therefore, cannot be interpreted to be even an order of an enquiry or investigation by remanding the matter. At the stage of passing order under sub-section (4), Settlement Commission can only pass an order of Settlement and no other order. Sub-sections (4), (4A) and (6) of section 245D, if read together, also do not contemplate even dismissal of the application at that stage. Hence the order passed by Settlement Commission

remanding the matter for further enquiry while passing order under sub-section (4) appears to be contrary to section 245D(4) and (6).

That next question that would arise for consideration is that what would be the effect of the order passed by Settlement Commission remanding the matter for further enquiry. This would result in keeping the proceedings pending before the Settlement Commission on the cut off date prescribed u/s 245D (4A) and would ultimately result in abatement of proceedings u/s 245HA(4)(iv). The question that is required to be considered is whether the proceedings could be allowed to be abated by virtue of an order passed by the Commission contrary to the statutory provisions. This may have been resulted even by reason of non-co-operation of the assessee but looking to the scheme of the Act if the assessee is non-co-operative, the Commission could still proceed further in the matter and passed a final order, but the said order must be passed before the specified period i.e. prior to 31-3-2008. In the present case the order is passed by the Settlement Commission on 31-3-2008; whereby, he has directed to hold further investigation within six months.

Contention of Learned Counsel for the appellants is that as this part of the order directing further investigation is beyond jurisdiction of the Settlement Commission. The order therefore deserved to be quashed. He also contended that the notices issued u/s 142(1) and 143(2) of the Act also deserves to be quashed.

The question raised in the present case is that the appellants have filed an application u/s 245C before the 1st day of June, 2007. As per section 245(2D) that last date of passing the order on application was 31st day of July, 2007 and in absence of any order, according to counsel for the appellants, their application deemed to have been accepted.

This argument cannot be accepted because of failure to decide an application. Sub-section (ii) of section 245HA lays down that if an application is made u/s 245 C has not been allowed to be proceeded with under subsection (2A) or further proceeded with under sub-section (2D) of section 245D, the proceedings before the Settlement Commission shall abate and the matter will relegated to the Assessing Officer for regular assessment.

In the case of Mahima Real Estate (P) Ltd. and Another Vs. Income Tax Settlement Commission and Another, , the Rajasthan High Court was also of the view that if an application is not decided before 31st March, 2008, the proceedings before the Settlement Commission shall stand abated.

Similarly, in the case of Vikas Dangayach Vs. Union of India (UOI) and Others, the Rajasthan High Court has laid down that if an application u/s 245C is not decided before 31st March, 2008 as per section 245D(4A)(i), the same shall be abated. The Rajasthan High Court in the aforesaid case further held that the paucity of time cannot be a ground for denial of consideration of the case as prayed for by the petitioners and therefore, in the aforesaid case the respondents

were directed to decide the cases of the petitioners on or before 31st March, 2008.

There is no provision in the said Chapter which lays down that if an application is not decided before the specified date, the application shall be deemed to be allowed. The provision is that if an application is not decided, the proceedings before the Settlement Commission shall stand abated and the matter be placed again before the Assessing Authority.

In case of Vatika Farms Private Limited and Sh. Anil Bhalla, Director of Vatika Farms Private Limited Vs. Union of India (UOI) and Income Tax Settlement Commission, Principal Bench, the Delhi High Court has held that if an application u/s 245D(4) is not decided by 31st March, 2008 then the consequences of abatement are calamitous, once the settlement application abates, the fate of the petitioners would be in the hands of an AO or a CIT(A) who does not have wide knowledge and experience that a Member of the Settlement Commission would have. Besides, the AO to whose jurisdiction the petitioners are to be relegated on the abatement of settlement application is himself a litigant before the Settlement Commission having a right to oppose admission of the settlement application. It is not possible or realistic for petitioners to get fair or even handed treatment from such an AO. Further, in the case of regular assessment a petitioner might have to go through a plethora of appeals before a final decision is taken in his case.

Similar view is taken by the Bombay High Court in a recent judgment dated 7-8-2009 passed in W.P. No. 952/2008, Star Television News Limited vs. Union of India and ors. In that case also an application filed by the assessee u/s 245 C was not decided before 31st March, 2008 and the Bombay High Court has held that fixing of cut-off-date as 31st March, 2008 was arbitrary. The provisions of section 245HA(1)(iv) to that extent will be also arbitrary and this recourse has been taken in order to avoid holding the provisions as unconstitutional. Section 245HA(1)(iv) mean that in the event the application could not be disposed of for any reasons attributable on the part of the applicant who has made an application u/s 245C, such proceedings would abate u/s 245HA(1)(iv) and directed the Settlement Commission to consider the application of settlement to dispose of the proceedings by holding that if proceedings are allowed to be abated then delay will deprive the assessee from just rights to file an application u/s 245C.

In the present case the Settlement Commission himself has found that the settlement order could not be decided due to non-co-operation of the assessee and further investigation in the matter is necessary. Thus, the Settlement Commissioner has failed to decide the application for settlement before the prescribed date i.e. 31-3-2008. Therefore, the consequences provided u/s 245HA will follow. That means the application for the settlement will stand abated and not that the application is deemed to be allowed. The consequence of abatement will be that the appellants shall be relegated to the regular assessment under

sections 142 and 143 of the Act and will be assessed under the regular assessment proceedings. The information collected during the settlement proceedings be used against the appellants for that purpose.

In the result, the appeals stand partly allowed. The order of settlement Commissioner for further investigation or enquiry cannot be sustained in law. The settlement proceedings stands abated. The notices issued u/s 142(1) and 143(2) cannot be quashed. The Assessing Authorities shall now proceed with assessment proceedings. They shall be free to use the information collected against the appellants, during the settlement proceedings against the appellants and pass appropriate orders in accordance with law.