

(2015) 07 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition (L) No. 1800 of 2015

Vascon Engineers Ltd.

APPELLANT

Vs

Income Tax Settlement Commission and Others

RESPONDENT

Date of Decision : 09-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143(1), 154, 234B, 245(2C), 245(2D)

Citation : (2016) 282 CTR 530 : (2015) 376 ITR 360 : (2015) 235 TAXMAN 436

Hon'ble Judges : M.S. Sanklecha, J;N.M. Jamdar, J

Bench : Division Bench

Advocate : J.D. Mistry, Senior Advocate and Mandar Vaidya, for the Appellant;
Tejveer Singh, Advocates for the Respondent

Judgement

M.S. Sanklecha, J—Rule. Rule made returnable forthwith. The respondent waives service. By consent the petition taken up for, final disposal.

2. This petition under article 226 of the Constitution of India challenges the order dated May 12, 2015, passed under section 245D(2C) of the Income-tax Act, 1961 ("the Act") by the Settlement Commission ("the Commission") dismissing the petitioner's application for settlement of its pending proceedings for the assessment years 2007-08 to 2014-15. This on the ground that application for settlement as filed is not valid for failure to pay taxes on the additional declared income as contended by the Commissioner of Income-tax (Central) ("the Commissioner"). This resulted in the pending proceeding of the petitioner for the assessment years 2007-08 to 2014-15 being restored to the Assessing Officer.

3. On March 23, 2015, the petitioner filed an application before the Commission under section 245C(1) of the Act seeking to settle its pending assessments for the assessment years 2007-08 to 2014-15. In its application, the petitioner disclosed an additional income, aggregating to Rs. 13.64 crores for the assessment years 2007-08 to 2014-15 which was not disclosed before the Assessing Officer. The additional income-tax payable along with interest thereon

on the additional declared income was Rs. 2.77 crores. The petitioner in its application for settlement had explained that it had fulfilled the requirement of paying the tax on the declared additional income by having paid an amount of Rs. 77 lakhs into the treasury and adjusting an amount of Rs. 2.37 crores out of the refund due to the petitioner.

4. On March 31, 2015, the Commission passed an order under section 245D(1) of the Act. In its order dated March 31, 2015, the Commission held that the application for settlement is in respect of pending assessments satisfying all technical requirements, including the disclosure of additional income being above the threshold requirements for settlement, payment of additional taxes on the additional income and interest thereon. Thus, admitting the petitioner's application for settlement.

5. Thereafter, the Commissioner, namely, respondent No. 2, under section 245D(2B) of the Act filed its report dated May 5, 2015, before the Commission. In its report, the Commissioner objected to the settlement on the merits as also on the ground that the requirement of paying the taxes on the additional income disclosed had not been satisfied. This is because no refund was due for the assessment year 2012-13 and refunds for the assessment years 2010-11 and 2011-12 had been adjusted against pending demands. Hence, it was submitted that the application be dismissed as the petitioner had failed to comply with the condition precedent for maintainability of the application before the Commission.

6. It was only later, i.e., on May 7, 2015, the petitioner was served with an intimation dated January 2, 2014, under section 143(1) of the Act for the assessment year 2012-13 by the Assessing Officer. The intimation, inter alia, reflected that the petitioner was entitled to a refund of Rs. 8.85 crores for the assessment year 2012-13. However, the same was set off against the interest payable by the petitioner of the identical amount of Rs. 8.85 crores under section 234B of the Act resulting in nil refund to the petitioner for the assessment year 2012-13.

7. The petitioner by letter dated May 9, 2015, filed a rectification application under section 154 of the Act seeking to rectify the intimation dated January 2, 2015. In its application for rectification, the petitioner pointed out the mistake apparent from the record of charging Rs. 8.85 crores under section 234B of the Act as interest and seeking to adjust the refund due to the petitioner to meet the demand of interest. In the meantime on May 11, 2015, the petitioner filed its reply to the report of the Commissioner. In its reply, the petitioner pointed out that for the assessment year 2012-13, it was entitled to a refund and the intimation under section 143(1) of the Act contained error apparent from the record inasmuch as after holding that the petitioner is entitled to a refund of Rs. 8.85 crores, sets off the same against the interest demanded under section 234B of the Act.

8. The Commission without awaiting the fate of the rectification application dated

May 9, 2015, or itself deciding on the correctness of the Commissioner's report or the rectification application, by an order dated May 12, 2015, dismissed the petitioner's application for settlement. This on the basis of the report of the Commissioner that no refund was due to the petitioner for the assessment years 2010-11, 2011-12 and 2012-13. Consequently, the petitioner would not be entitled to claim adjustment of the refund due against additional tax payable on the further disclosure of income-tax. In the result, the petitioner's application for settlement was dismissed as invalid.

9. Consequent to the above, on June 22, 2015, the petitioner received a communication from the Assessing Officer, disposing of the petitioner's application for rectification dated June 18, 2015, inter alia, holding as under:

"As far as your rectification application is concerned, it may be noted that your contention regarding wrong charge of interest under section 234B has been looked into and prima facie your claim that the refunds will arise in the assessment year 2012-13 appears to be correct. However, this refund is likely to be set off against the demand likely to arise on completion of assessment in your case."

10. The aforesaid communication was received by the petitioner after filing of this petition. Consequently, leave was granted to amend the petition and to annex the communication dated June 22, 2015, of the Assessing Officer to the petition. No reply to the petition was filed by the Commissioner or the Assessing Officer.

11. Mr. Mistry, learned senior counsel appearing for the petitioner, submits as under:

(a) Once the application for settlement has been admitted under section 245D(1) of the Act, it is not open to the Commission to declare the application invalid/defective on account of non-payment of tax on the additional income. This is particularly so when while passing the order dated March 30, 2015, under section 245D(1) of the Act, the Commission recorded its satisfaction.

(b) The impugned order of the Commission proceeds on the basis that the application of the petitioner for settlement is invalid on account of deficient payment of tax and interest on the additional amount of income disclosed therein. This merely on the basis of the report of the Commissioner which seeks to rely on intimation issued under section 143(1) of the Act in the body of the report to suggest that no refund is due but does not annex to the report a copy of the intimation but only a computer print out from its office. Moreover, the intimation reflects that the petitioner was entitled to a refund of Rs. 8.85 crores and the same stood adjusted by equal amount of interest charged under section 234B of the Act. This intimation itself contains an error and calls for rectification; and

(c) On May 5, 2015, the date when the Commissioner filed its report under

section 245D(2B) of the Act the petitioner had no notice of the intimation dated January 2, 2014, as it was served upon the petitioner only on May 7, 2015. Thus, when the application was filed the petitioner did satisfy the requirements of section 245C of the Act. Moreover, the intimation itself to the extent it adjusts the refund of Rs. 8.85 crores due to the petitioner against the demand of interest is admittedly a mistake as is evident from the communication June 22, 2015, of the Assessing Officer, holding that, *prima facie*, the petitioner's claim for refund for the assessment year 2012-13 is correct. Thus, the entire exercise of the Commission in not applying its mind to the report of the Commissioner makes the decision-making process vulnerable.

In the above circumstances, it is submitted that the order of the Commission dated May 12, 2015, be set aside and the application be restored to the Commission for fresh disposal.

12. As against the above, Mr. Tejveer Singh, learned counsel appearing for the respondent, supported the impugned order on the following grounds:

(a) The condition precedent for an application for settlement application being entertained by the Commission in terms of section 245C of the Act is that the petitioner must pay the tax and interest on the additional amount of income-tax disclosed in the application. According to him, there is no provision for adjustment of refund payable to the petitioner against demand of tax and interest to be paid by the petitioner while approaching the Commission for settlement; and

(b) Restoring the application to the Commission for fresh disposal would run contrary to the statutory provision, viz., section 245K(2) of the Act. In terms of the above section, where an application for settlement has been allowed to be proceeded with under section 245D(1) of the Act, then such a person is not entitled to make any further application under section 245C of the Act. Thus, as the application for settlement has been dismissed after the section 245D(1) stage, restoration would run counter to the clear statutory provision.

13. Chapter XIX-A of the Act provides for settlement of cases. The entire object of the scheme of settlement provided in Chapter XIX-A of the Act is to accelerate the recovery of taxes which may otherwise be stuck in protracted litigation and also to give an opportunity to an assessee to mend its ways. The incentive to an assessee to approach the Commission by making a clean breast of its activities by disclosing the income not disclosed and paying the tax thereon, is the likely immunity from prosecution and penalty. The statute, however, expects an assessee who approaches the Commission for settlement to make a true and full disclosure of its undisclosed income and the manner in which such income has been earned and pay the taxes. However, such an application for settlement can only be entertained, subject to various preconditions being satisfied, such as pending proceedings before the Assessing Officer, true and full disclosure of income which has not been disclosed earlier before, the Assessing Officer and the

manner in which the said income has been earned along with the additional amount of income-tax payable on the said income which has to be paid on or before the date of making an application. On the application for settlement being entertained/allowed to proceed further by the Commission, bestows upon the Commission an exclusive jurisdiction to deal with the assessment of the person in respect of the assessment years it has been approached. However, in case the application for settlement is rejected at any time for any reason, the proceedings (dispute) goes back to the Assessing Officer for completion of assessment in regular proceedings entitling the Assessing Officer to utilize all the information disclosed by the assessee in the settlement proceedings. Till such time the Commission is seized of the proceedings, the Assessing Officer shall cease to have jurisdiction over the assessee for the assessment years under consideration of the Commission.

14. Keeping in view the above scheme of settlement as provided in the Act and also being conscious of the fact that in the writ jurisdiction we are more concerned with examining the decision-making process, we shall examine the challenge in the present petition. The issue for examination is whether the dismissal of the petitioner's application for settlement at the stage of section 245(2D) of the Act merely on the ground of the Commissioner's report dated May 5, 2015, was justified particularly when on the face of it the assertion of the Commissioner required some investigation.

15. The petitioner made an application for settlement on March 23, 2015, for the assessment year 2007-08 to 2014-15. The petitioner appears to have prima facie satisfied the condition precedent for a valid application for settlement. This is evident from the order of the Commission dated March 31, 2015, under section 245D(1) of the Act--wherein it is recorded that the petitioner had disclosed its additional income which is above the threshold limit and has also paid the additional tax and interest thereon. This acceptance of the application was on the basis that the petitioner sought to fulfill the requirement of payment of tax by adjusting the refund due to it from the Revenue.

16. The contention of the petitioner that in view of the order dated March 31, 2015, passed under section 245D(1) of the Act the Revenue and/or the Commission are barred from contending that the conditions precedent to invoke the provisions for settlement are not satisfied. The requirement of paying the taxes on the additional income disclosed is a jurisdictional requirement. Absent satisfaction of the same the Commission would have no jurisdiction to entertain the application for settlement and this issue could be noticed at any point of time by the Commission either on its own or at the instance of one of the parties before it. This would by itself warrant dismissal and there is no bar in raising the jurisdiction issue at any time. Thus, the above contention of the petitioner is not acceptable.

17. Thereafter, at the stage of section 245D(2C) of the Act, the Commissioner filed his report dated May 5, 2015, objecting to the application for settlement

being entertained. In its report dated May 5, 2015, the Commissioner reported that the additional tax payable on the undisclosed income, now being declared, had not been paid and, therefore, could not have been entertained. This the report stated was in view of the fact that no refund as claimed or any part thereof was due to the petitioner from the Revenue. In the body of its report, the Commissioner placed reliance upon intimation issued under section 143(1) of the Act to the petitioner for the assessment year 2012-13. However, what is annexed to the report is not intimation under section 143(1) of the Act but a computer print out which shows a ledger balance available in the office of the Income-tax Department. It is only after the Commissioner filed his report dated May 5, 2015, was the petitioner served on May 7, 2015, with the intimation dated January 2, 2014, under section 143(1) of the Act for the assessment year 2012-13. These facts have not been disputed by the Revenue.

18. This intimation dated January 2, 2014, served upon the petitioner on May 7, 2015, on the face of it appears to be incorrect for the reason that after intimating the petitioner that it is entitled to refund of Rs. 8.85 crores has adjusted the entire refund to satisfy a demand on account of interest of an equivalent amount of Rs. 8.85 crores. These facts when brought to the notice of the Commission at the hearing should have led the Commission to make some enquiry into it and not accept the Commissioner's report as unimpeachable. This is particularly so as a rejection at a stage when the petitioner has made full and true disclosure in the spirit of settlement, without proper examination does cause prejudice to the petitioner. A rejection of the application on dubious/suspicious ground made out in the report should not be allowed by the Commission without some enquiry to satisfy itself about the stand of the Commissioner. The circumstances surrounding the Commissioner report, viz., of equal amount of interest demand to refund granted by the intimation, not annexing the intimation to the report and the intimation itself being served upon the petitioner after over one year of its purported issue and after the Commissioner's report also raise questions about its authenticity. Thus, an unjustified rejection without proper enquiry into the stand of the Revenue would cause prejudice to the assessee as all the information made, available during the settlement proceedings would be capable of use by the Assessing Officer to the prejudice of the applicant in regular assessment proceedings. Therefore, non-enquiry into issues which were suspicious, by the Commission, before rejecting the application for settlement evidences a flaw in the decision-making process.

19. The fact that there was a mistake in the intimation under section 143(1) of the Act as served upon the petitioner on May 7, 2015, is also evident from the letter dated June 22, 2015, of the Assessing Officer who records:

"As far as your rectification application is concerned, it may be noted that your contention regarding wrong charge of interest under section 234B has been looked into and prima facie your claim that the refunds will arise in the assessment year 2012-13 appears to be correct."

Possibly if this enquiry was done by the Commission which at the relevant time was seized of the proceeding for the assessment year 2012-13, the proceedings before the Commission may have taken a different turn.

20. The petition in substance questions the conduct of the Commissioner in filing a report indicating that the petitioner is not entitled to refund, even though, according to petitioner, it is entitled to the same. It is pertinent to note that the Commissioner has chosen not to file any reply. Non-filing of reply, when such serious allegations are made, only lends credence to the stand of the petitioner. At the very least this would warrant an enquiry by the Commission before deciding the application at the stage of section 245(2C) of the Act.

21. We shall now deal with the contention of the Revenue that under section 245C(1) of the Act, it is not open to the applicant-petitioner before the Commission to seek a set off of the refund due to it against the additional tax payable for the purpose of settling pending assessments before the Commissioner. The payment has to be made into the treasury and not by set off/adjustments. This is contested by the petitioner and it is submitted that there are numerous orders of the Commission itself allowing such adjustments of the tax payable out of refund due. We venture no opinion on the issue. This is for the reason that it is not the basis of the impugned order of the Commission nor the basis of the objections filed by the Commissioner before the Commission. Both of them have proceeded on the basis that as the petitioner is not entitled to any refund, consequently occasion for setting off the tax payable for settlement does not arise. This being a new ground and not the basis of the impugned order, we see no reason to examine it at this stage.

22. The next objection raised by Mr. Tejveer Singh is that restoring the application to the file of the Commission would contravene section 245K of the Act. This section prohibits a subsequent application by a person whose application for settlement has been allowed to be proceeded with earlier under section 245D(1) of the Act. It has no bearing on the present dispute in any manner. The setting aside of the impugned order dated May 12, 2015, and restoring the petitioner's application to the file of the Commission would not amount to filing of a fresh application for settlement but only the earlier application for settlement would stand revived. Accordingly, the second objection taken by the Revenue is also not sustainable.

23. We take note of the fact that the Commissioner in his report dated May 5, 2015, before the Commission, had categorically stated that there is no refund due to the petitioner for the assessment year 2012-13. However, the Assessing Officer on receipt of the petitioner's application for rectification of intimation, has by a letter dated June 22, 2015, informed the petitioner that charging of interest under section 234B, prima facie appears to be incorrect and the petitioner would be entitled to the refund as claimed for the assessment year 2012-13. The aforesaid communication sets at naught the report of the Commissioner dated May 5, 2015, that no refund is due to the petitioner for the assessment year

2012-13.

24. It is in these circumstances that we set aside the impugned order dated May 12, 2015, and restore the application to the Commission at the section 245D(2) stage for fresh disposal after hearing the parties.

25. All contentions are left open. We also make it clear that the Commission would decide the issue before it in accordance with law, without in any manner being influenced by any observations made herein. Rule made absolute in the above terms. No order as to costs.