

CASE NO.:
Appeal (civil) 7248 of 1999

PETITIONER:
Commissioner of Income Tax, Mumbai

RESPONDENT:
M/s Damani Brothers

DATE OF JUDGMENT: 17/12/2002

BENCH:
M.B. SHAH, ARIJIT PASAYAT & D.M. DHARMADHIKARI.

JUDGMENT:

JUDGMENT

ARIJIT PASAYAT, J.

The basic issue involved in this appeal is whether the Settlement Commission (hereinafter referred to as 'the Commission') gets a complete role in total substitution of other authorities under the Income Tax Act, 1961 (in short 'the Act') and if so, for what purpose and to what extent. When this appeal was placed before a Bench of two learned Judges, it was considered appropriate to list the appeal before a larger bench than merely bench of two Judges.

That is how the matter was placed before us.

Factual backdrop in nutshell is as follows:

Respondent-Damani Brothers (hereinafter referred to as the 'assessee') filed an application for settlement before the Mumbai Bench of the Commission. Chairman of the Commission exercising power under Section 245 (BA)(5A) of the Act constituted a Special Bench vide order dated 18.9.1998 for adjudicating following three issues.

"1. Was the Special Bench of the Settlement Commission right in holding in the case of Om Metals and Mineral Pvt. Ltd. (193 ITR 57 ITSC) that the assessment order passed by the assessing officer before the admission of the settlement application subsisted and recovery proceedings continued, even after the admission of the said application, especially after the judgment of the Supreme Court in the case of CIT vs. Express Newspaper Ltd. (206 ITR 443)?

2. If the answer to question No.1 is in the affirmative would it be correct to say that once the Settlement Commission determines a liability of the applicant for tax, penalty and interest under section 245D(4), the orders of the lower authorities would automatically stand set aside and consequently there will be no liability under section 220(2) of the Act?

3. If the answer to question No.1 is in the affirmative, or not the question No.2 in the negative, has the Settlement Commission powers to waive interest u/s 220(2) of the Act?"

The Special Bench by majority view in its judgment dated 15.4.1999 came to hold that the orders of the lower authorities are not automatically set aside by the Commission's order under Section 245D(4); but are modified to give effect to such order. By the theory of merger, the liability of interest under Section 220(2) if any, will be up to the date of the order under Section 245D(1). Thereafter, there will be no liability for interest under Section 220(2); the Commission has power to waive or reduce interest under Section 220(2) of the Act. The Vice Chairman did not agree with a reply to question No.3 and held that recovery proceedings based on the order of the assessments passed before the date of filing an application under Section 245C can be continued even after the admission of the application and where the assessment order is passed after the date of filing an application under Section 245C, the question of liability of interest under Section 220(2) does not arise.

Civil Appeal has been filed raising the following questions:

"I. Whether the Settlement Commission is empowered to waive or reduce the interest u/s. 234-A read with Section 220 [2] of the Income Tax Act while exercising its jurisdiction under Section 245-D[4] of the said Act?

II. Whether the Assessment Order passed by the Assessing Officer prior to the admission of Settlement Application under Section 245-C of the Act, will subsist and the recovery proceedings will continue or not? On this issue, the petitioner is relying on the decision, reported in 206 ITR 443 [S.C.]; CIT vs. Express Newspaper Ltd.

III. Whether after determination of liability by the Settlement Commission, the orders of the lower authorities under the Act would automatically stand set aside?"

Stand of the revenue as highlighted is that the Commission's approach is not correct and is not sustainable. Reference is made to the Constitution Bench decision of this Court in Commissioner of Income Tax v. Anjum M. H. Ghaswala and Ors. (2001(252) ITR 1). Reference was made to various provisions of Chapter XIX-A in this regard. It is further submitted that there is no power of waiver conferred on the Commission to waive the interest charged under Section 220(2) of the Act.

In response, learned counsel for the assessee submitted that an artificial distinction is sought to be made between the date of filing of petition under Section 245C and the date of decision to proceed with the petition under Section 245D. With reference to definition of the expression "case" as appearing under Section 245A, it is submitted that the proceedings may be pending before the concerned authority i.e. the Assessing Authority, the Appellate Authority or the Revisional Authority; and Explanation (1)(v) to Section 153(3) makes it clear that extension is granted for completing the pending proceedings in case the petition under Section 245C is rejected. Therefore, Commission gets jurisdiction to deal with the matter, as soon as an application is made under Section 245C. Commission till admission of the petition exercises powers of the income-tax authorities and after admission it functions as a Settlement Commission in addition to powers exercisable by the income-tax authorities. With reference to Anjum's case (supra) it was submitted that specific power of waiver is given to the concerned authority and, therefore, interest charged can be waived. There cannot be double levy of interest and when interest is charged under Section 245D(2C)/6A interest under Section 234B cannot be charged.

In order to appreciate the rival submissions, it is necessary to take note of few provisions so far as relevant:

"Section 153(3): The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments, and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time

(i) xxx xxx xxx
[Explanation 1. In computing the period of limitation for the purposes of this section ^

xxx in a case where an application made before the
(v) Income-tax Settlement Commission under section
245C is rejected by it or is not allowed to be
proceeded with by it, the period commencing from
the date on which such application is made and
ending with the date on which the order under sub-
section (1) of section 245D is received by the
Commissioner under sub-section (2) of that
section,

shall be excluded :

Section 220(2) If the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one and one-half per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid:

Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded.

xxx xxx xxx

(2A) Notwithstanding anything contained in sub-section (2), 'the Chief Commissioner or Commissioner may reduce or waive the amount of interest paid or payable by an assessee under the said sub-section if he is satisfied that

(i) payment of such amount has caused or would cause genuine hardship to the assessee;

(ii) default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and

(iii) the assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

Interest for defaults in payment of advance tax.
234B. (1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of

section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one and one-half per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

Explanation 1- In this section, "assessed tax" means, -

- (a) for the purposes of computing the interest payable under section 140A, the tax on the total income as declared in the return referred to in that section;
- (b) in any other case, the tax on the total income determined under sub-section (1) of section 143 or on regular assessment,

as reduced by the amount of tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income.

Explanation 2. Where, in relation to an assessment year, an assessment is made for the first time under section 147, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 3. In Explanation 1 and in sub-section (3) "tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

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xxx

xxx

(4) Where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under sub-section (1) or sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and

- (i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;
- (ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.

"245D. Procedure on receipt of an application under section 245C.

(1) On receipt of an application under section 245C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved

therein, the Settlement Commission may, by order, allow the application to be proceeded with or reject the application :

Provided that an application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided further that the Commissioner shall furnish the report within a period of forty-five days of the receipt of communication from the Settlement Commission in case of all applications made under section 245C on or after the 1st day of July, 1995 and if the Commissioner fails to furnish the report within the said period, the Settlement Commission may make the order without such report.

(1A) Omitted

(2C) Where the additional amount of income-tax is not paid within the time specified under sub-section (2A), then, whether or not the Settlement Commission has extended the time for payment of the amount which remains unpaid or has allowed payment thereof by instalments under sub-section (2B), the assessee shall be liable to pay simple interest at fifteen per cent per annum on the amount remaining unpaid from the date of expiry of the period of thirty-five days referred to in sub-section (2A).

(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorized in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, 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 under sub-section (1) or sub-section (3).

(6) Every order passed under sub-section (4) shall provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

(6A) Where any tax payable in pursuance of an order under sub-section (4) is not paid by the assessee within thirty-five days of the receipt of a copy of the order by him, then, whether or not the Settlement Commission has extended the time for payment of such tax or has allowed payment thereof by instalments, the assessee shall be liable to pay simple interest at fifteen per cent per annum on the amount remaining unpaid from the date of expiry of the period of thirty-five days aforesaid."

The conclusions in Anjum's case (supra) can be summed up as follows.

(1) Commission in exercise of its power under Section 245D(4) and (6), does not have the power to reduce or waive interest statutorily payable under Sections 234A, 234B and 234C, except to the extent of granting relief under the Circulars by Notification dated 23rd May, 1996 issued by the Board

under Section 119 of the Act. While exercising the power derived under the Circulars of the Board, the Commission does not act as a subordinate to the Board but will be enforcing the relaxed provisions of the circulars for the benefit of the assessee in the process of settlement.

(2) Interest due under the mandatory provisions like Sections 234A, 234B and 234C has to be included in the settlement.

(3) Wherever the Act contemplated power to waive or reduction of interest to be exercised by any particular authority in any particular situation it has done so like in Sections 139(8), 215(4), 216 and Section 220(2A).

(4) Prior to Finance Act, 1987, the corresponding sections pertaining to imposition of interest used the expression 'may' but the change brought about in the Finance Act, 1987 is a clear indication that the intention of the legislature was to make the collection of statutory interest mandatory. The expression 'shall' is used deliberately.

It has to be noted that the Commission exercises power in respect of income which was not disclosed before the authorities in any proceeding, but are disclosed in the petition under Section 245C. It is not that any amount of undisclosed income can be brought to the notice of the Commission in the said petition. Commission exercises jurisdiction if the additional amount of tax on such undisclosed income is more than a particular figure (which at different points of time exceeded rupees fifty thousand or rupees one hundred thousand, as the case may be). The assessee must have in addition furnished the return of income which he is or was required to furnish under any of the provisions of the Act. In essence the requirement is that there must be an income disclosed in a return furnished and undisclosed income disclosed to the Commission by a petition under Section 245C. A new Chapter XIX-A was introduced by the Taxation Laws (amendment) Act, 1975 (in short the 'Amendment Act') w.e.f. 1.4.1976. The Commission is constituted by the Central Government for the settlement of cases under Chapter XIX-A. The expression "case" as appearing in Section 245A(b) refers to any proceeding under the Act for the assessment or re-assessment of income of any person in respect of any year or years or by way of appeal or revision in connection with such assessment or re-assessment which may be pending before any income-tax authority on the date on which an application under sub-section (1) of Section 245C is made. It further provides that where any appeal or application for revision has been preferred after the expiry of the specified period and which has not been admitted then the same shall not be deemed to be a proceeding pending within the meaning of clause (b) of Section 245A. Scheme of Chapter XIX-A shows that the filing of application by the assessee is a unilateral act, and the department may not be aware of the same. It has to be noted that if an application for settlement is filed under Section 245C, it is not automatically admitted. Section 245D deals with procedure on receipt of an application under Section 245C. Under sub-section (1) thereof, the Commission after following the prescribed procedure can allow the application to be proceeded with or rejected. Only after the Commission allows the petition to be proceeded with, it exercises the power of settlement. Stand of the assessee is that before the Commission decides to proceed with the matter, it exercises the functions of the income-tax authority and after deciding to proceed with the petition exercises dual function as the Commission and the income-tax authority. The plea is untenable for more reasons than one. Before the Commission decides to proceed with the petition, it cannot complete assessment in respect of a return which is pending before the assessing officer or even cannot act as an appellate or revisional authority. The return filed is in respect of disclosed income. Similar is the position vis--vis the appellate and the revisional authority. The petition before the Commission is in respect of undisclosed income, therefore, the situation is different till the Commission decides to proceed with the matter. That being the position, the income-tax authorities are free to proceed in the prescribed manner till the Commission decides to proceed with the petition. Emphasis was laid by the assessee on certain observations made by this Court in Commissioner of Income Tax v. Express Newspapers Ltd. (1994 (206) ITR 443). Observations to the effect that the proceedings before the Commission are not confined to the income disclosed

before it, does not mean that even before the Commission decides to proceed with the case, it can deal with disclosed income. While determining the total income, the Commission has to take note of both the disclosed income and the undisclosed income. This is logical because there cannot be two different total incomes for the same assessment year i.e. disclosed total income and undisclosed total income. Aggregation of both the disclosed and undisclosed income is also necessary because in several years different rates of tax for various slabs of income are provided. By way of an illustration, it may be said that supposing the disclosed income is rupees two lakhs and the undisclosed income is five lakhs, the rate of tax levied on rupees two lakhs may be one but may be different for an income of rupees seven lakhs. For the purpose of computation of taxes, there is a requirement to club both the disclosed and undisclosed income. But that does not empower the Commission to deal with the disclosed income before deciding to proceed with the petition.

In view of the position indicated above, relating to the first question considered by the Commission, the second question does not really survive. The position is indisputable that the liability exists and does not get automatically set aside.

Coming to the third question, the answer is provided in Anjum's case (supra). Wherever the Act provides for waiver of interest, the Commission can in appropriate cases direct waiver or reduction of the interest. It has to be noted that waiver or reduction of interest under Section 220(2A) and other provisions is hedged with certain conditions. If these conditions are satisfied, the Commission has the power to direct waiver or reduction. In view of this answer, the Commission has to examine whether the assessee has made out a case for waiver or reduction.

At this juncture, assessee's plea that there is no scope for double levy of interest; (i) for non payment of advance tax for which interest is chargeable under Section 234B of the Act and (ii) for delay in payment of the amount of interest, if any, payable in terms of Section 245D(2C) or Section 246D(6A) needs to be considered. There can be no dispute that double levy of interest is not permissible. But this principle is applicable only when the interest is chargeable more than once for same set of infractions. If the provisions under which interests are charged operate in different fields, there is no statutory bar on levying the interest, because in essence it does not amount to double levy of interest but levy of interest separately for different infractions. Section 234B, Section 245D(2C) and Section 246D(6A) operate in different fields. Section 234B comes into operation when there is default in payment of advance tax. Liability to pay interest under Section 245D(2C) arises when additional amount of income-tax is not paid within time specified under sub-section (2A). Section 246D(6A) fastens liability to pay interest when tax payable in pursuance of an order under sub-section (4) is not paid within the specified time. Therefore, when interest is charged in respect of the said provisions it does not amount to double levy of interest, as the infractions are different.

To put it differently, the interests charged in terms of Sections 234A, B and C become payable on the income already disclosed in the returns filed, together with the income disclosed before the Commission. The concerned interest as aforesaid shall be on the consolidated amount of income, i.e. both disclosed and undisclosed. As indicated above, such interests shall be charged till the Commission acts in terms of Section 245D. Thereafter, the prescription relating to charging of interests etc. becomes operative, after the Commission allows the application for settlement to be proceeded with. In such event, there is no further charge of interest in terms of Sections 234A, B and C. The interest charged in terms of Section 245D is a separate levy and not in terms of interest chargeable under Sections 234A, B and C. Therefore, the apprehension that there is scope for charging of interest on interest is without any basis. The appeal is allowed to the extent indicated above.