

CASE NO.:
Appeal (civil) 7966-67 of 1996

PETITIONER:
Commissioner of Income Tax

RESPONDENT:
M/s Hindustan bulk Carriers

DATE OF JUDGMENT: 17/12/2000

BENCH:
D.M. Dharmadhikari.

JUDGMENT:

J U D G M E N T

Dharmadhikari J.

I am in respectful agreement with the reasoning and conclusion recorded by Brother Pasayat J. in his opinion prepared by him in these appeals. I, however, consider it necessary to supplement his reasons for the conclusion reached by us. Since in these appeals common questions on interpretation and extent of application of the provisions of Chapter XIX A of the Income Tax Act (for short the IT Act) 1961, are involved, I propose to discuss the questions involved by this common judgment.

Brother Pasayat J. has reproduced all the relevant provisions of IT Act and the questions formulated and answered by the Special Bench of the Settlement Commission constituted in accordance with the provisions contained in Chapter XIX-A of the said Act.

Chapter XIX-A providing forum and procedure for "settlement of cases" was introduced in the IT Act by Taxation Laws (Amendment) Act 1975 published in the Gazette of India Extraordinary Part II dated 9th May, 1973 (Pages 443 to 530). The Statement of Objects and Reasons for the Amendment reads thus:

"To unearth black-money and prevent its proliferation; to fight and curb tax evasion; to check avoidance of tax through various legal devices, including the formation of trusts and diversion of income or wealth to members of family' to reduce tax arrears and to ensure that in future, tax arrears do not accumulate; to rationalise the exemptions and deductions available under the relevant enactments, and to streamline the administrative set-up and make it functionally efficient".

Clause 58 of the Bill introduced in Parliament to introduce separate Chapter in the IT Act for "settlement of cases" reads thus :-

"Clause 58 : This clause seeks to insert a new Chapter XIXA in the act, making provision for settlement of cases. The provisions proposed in this Chapter are mainly intended to give a statutory basis for settlements of cases which are necessitated at times in the interests of the revenue. However, settlement will not be allowed in cases where concealment of income or fraud is established before the making of an application for settlement.

Settlements are to be made by a Committee of not less than three members of the Central Board of direct Taxes. An application for settlement once made will not be allowed to be withdrawn.

The order of settlement shall provide for the terms of settlement, including any demand by way of tax, penalty or interest, the manner of payment of the sum due under the settlement, etc. It shall also provide that the settlement shall be void if it is subsequently found to have been obtained by fraud or mis-representation of facts. The Committee may, if it is satisfied that the applicant has co-operated with it in the proceedings before it and has made full and true disclosure of his income and the manner in which it has been derived, grant to the applicant immunity from prosecution and penalty. Such immunity can, however, be withdrawn later under certain circumstances. The order of settlement will be final. There will be a bar on subsequent applications for settlement by a person if an order of settlement provides for imposition of penalty for concealment of income or if the person has, after the order of settlement, been convicted of any offence under Chapter XXII of the Act in relation to that case."

On the questions formulated by the Special Bench of the Settlement Commission two main issues require consideration and answer by this Court. The first main question is what is the efficacy of the regular assessment proceedings which took place before and after the admission of the case for consideration by the Settlement Commission. The second question is what would be the extent of liability towards payment of interest on the tax due as determined in a 'case' by the Settlement Commission in the light of various situations of no payment of tax or delayed payment of tax in the course of regular assessment. The various situations contemplated in the IT Act have been delineated in the order of the Special Bench of the Settlement Commission and reproduced in the two separate opinions of Brother Pasayat J.

For answering these two main questions, it is necessary to examine the scheme of Chapter XIXA as reflected in its various provisions and the other relevant provision in sections 234 A to 234 C on the subject of interest chargeable in various specified circumstances on tax due.

For taking a case for settlement before the Settlement Commission, the word 'case' in clause (b) of Section 245 A has been comprehensively defined to include proceeding under the Act for assessment or reassessment for any years and at any stage in original, appellate or revisional proceeding. The definition of 'case' excludes appeals or revisions which have not been formally admitted by the concerned authorities. This definition clause (b) of Section 245 A indicates that the Settlement Commission can take up for settlement a 'case' as defined which is pending at any stage of regular assessment proceeding before any of the authorities under the IT Act.

Section 245 C enables an assessee to approach the Commission by disclosing his income which he had not earlier disclosed. On such undisclosed income which is subsequently disclosed only before the Settlement Commission, the assessee is required to submit the return and pay additional tax along with the application in accordance with its own assessment. Clauses (i), (ii) & (iii) of sub-section (b) of Section 245 C clearly indicate the ambit of the power of Settlement Commission and provide that on such approach with disclosure of earlier concealed income, the Commission shall redetermine the taxable income after

clubbing the earlier disclosed income, if any, and subsequently disclosed income before it. Such clubbing for consideration of the aggregate income of the relevant year, based on earlier and subsequently disclosed income has to be done in relation to the 'case' pending before the regular assessment authorities at the original, appellate or revisional stage as the case may be.

Clauses (a), (b) & (c) of sub-section (1C) of Section 245 C are also indicative of the scope, power and jurisdiction of the Settlement Commission. It has been provided therein that it is on the determination of the 'aggregate income' by the Settlement Commission, the tax payable for the relevant assessment year shall be calculated by giving adjustment to the tax, if any, already paid by the assessee when its case was pending at whatever stage in the regular assessment proceeding. Sub-section (1D) of Section 245 C also requires the Settlement Commission to undertake the exercise of clubbing the disclosed income, if any, of the assessee in the regular proceeding and subsequently disclosed income before the Commission and treat it as an 'aggregate income' for the purpose of determining taxable income of a particular year. The Settlement Commission, thus, is empowered to this limited extent to reopen the assessment proceedings already undertaken, for settlement of 'case' before it on the basis of subsequently disclosed income and pass a composite order determining the liability of assessee towards tax, penalty and interest. This is clear from sub-section (6) of Section 245 D which requires the Settlement Commission to make an order providing for terms of settlement, indicating the demand towards tax, penalty and interest and the manner in which it shall be paid. The above discussed provisions make it clear that once a case is admitted by the Settlement Commission for consideration, it shall have exclusive jurisdiction to exercise all powers of regular authorities under the IT Act for the purpose of effecting a settlement and for recovery of tax penalty and interest. Sub-section (1) & (2) of Section 245 F are important for the questions raised before us and they read thus :-

"245F.(1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in an income-tax authority under this Act.

(2) Where an application made under Section 245 C has been allowed to be proceeded with under Section 245 D, the Settlement Commissioner shall, until an order is passed under sub-section (4) of section 245 D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an income-tax authority under this Act in relation to the case".

The exclusive jurisdiction which the Settlement Commission derives for exercise of powers and functions of regular income-tax authority in accordance with Sub-section (1) & (2) of Section 245 F can be exercised only when the Commission makes a formal order to admit or allow the application to be proceeded with for the purpose of effecting a settlement. This is clear from the language of Sub-section (1) of Section 245 D which reads :-

"245 D.(1) On receipt of an application under Section 245 C, 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."

[Underlining for emphasis]

One of the questions that is posed before us in these appeals, therefore, can be easily answered on the basis of the above quoted portion as underlined of sub-section (1) of Section 245 D read with sub-sections (1) & (2) of Section 245 F. It is only when the Settlement Commission formally allows the application for being considered for "settlement" the regular assessment proceedings and recoveries initiated for tax penalty or interest pursuant thereto, shall become subject to the powers of Commission and not prior to the same. In other words, it means that mere filing of an application by the assessee for settlement and before the same is formally allowed for consideration, would have no adverse effect on the proceeding of assessment or recovery pending or initiated against the assessee under the regular procedure for assessment and recovery of dues under the IT Act.

The Settlement Commission has no power to waive tax or interest because as laid down in sub-section (4) of Section 245 D, it has to pass orders on the matter of determining the quantum of income and tax in accordance with the other relevant provisions of the Act applicable to the relevant assessment year or years. There is no power with the Settlement Commission to settle the 'case' de hors the provisions of IT Act applicable to regular assessment because the provisions contained in scheme of settlement under Chapter XIX A as examined above, do not envisage and allow the Commission to settle a 'case' based on disclosure of income before it in any other manner. As has been found from the Statement of Objects and Reasons for introducing Chapter XIX A, which can be taken aid of for construing various provisions of the Act, the forum of Settlement Commission is constituted for 'early recovery of tax and to unearth black money'. The only impetus given to the assessee to avail the forum is to allow him to make a request to the Settlement Commission to grant immunity from prosecution and penalty in exercise of its powers under Section 245 H. In all other respects, on the question of tax and interest, the Settlement Commission has to settle a 'case' in accordance with the other provisions of the Act as are applicable to regular assessment proceedings. The Act does not make distinction or differentiation in treatment between the assessee who honestly disclose income and are willing to pay the tax and the other assessee who do not fully or partly disclose the income to avoid payment of tax in due time and approach the Commission for disclosure of their earlier concealed income. Such distinction or differentiation between the above mentioned two classes of assessee is not permitted by the provisions contained in Chapter XIX A, it being neither legally valid nor just. The Chapter XIX A providing settlement of cases is not intended to benefit the assessee who had not earlier honestly disclosed their income and paid the tax in due time. The settlement procedure aims to bring such assessee at par with the assessee who had honestly disclosed their income and paid the tax. The provisions of Chapter XIX A, therefore, have to be read harmoniously with other provisions of the Act and thus applied to give full effect to other relevant provisions of the IT Act which confer all powers of income-tax authority under the Act on the Settlement Commission for assessing the income and determining the tax.

On the second question with regard to liability towards interest in various statutorily contemplated contingencies of a 'case' brought for settlement under Chapter XIX A of the Act, it is to be noticed that after insertion of the said Chapter for Settlement of Cases, corresponding legislative changes have been effected by insertion of sections 234 A and 234 C in IT Act to redetermine quantum of interest payable in various contemplated contingencies under the Act. Section 234 A creates liability of interest for defaults in furnishing return of income. Such interest can be charged from the assessee whose 'case' has been 'settled' by the Commission even though no return of income was filed by him for regular assessment. Sub-section (4) of Section 234 A requires necessary adjustments to be given for the interest earlier

charged in regular assessment and the interest chargeable after re-determination of the taxable income and the quantum of tax. Sub-section (4) of Section 234 A reads thus :-

"234A.(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 245 D, the amount of tax on which interest was payable under sub-section (1) or sub-section (3) of this section 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".

Similarly, necessary adjustment to be made towards interest payable on the tax due after settlement of case in case of default in payment of advance tax can be found in sub-section (4) of Section 234B which reads thus :-

"234B.(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 245 D, 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".

All the aforesaid changes incorporated in Section 234 A to Section 234 B clearly indicate that interest payable on the tax due, has to be determined by the Commission after settlement of case and the starting point for charging interest would be the due date under the regular assessment proceedings and end point the date of order of the Settlement Commission. The aforesaid provisions clearly indicate that interest, if any, already paid on the tax earlier due and demanded, would be adjusted from the interest found due on the tax, as determined and quantified by the Settlement Commission. Starting point for calculating the interest has to be the due date in accordance with the procedure indicated in regular assessment and the terminal date would be the date of the order of the Settlement Commission. The assessee would have right of claiming adjustment of tax and interest paid in the intervening period. This appears to be the scheme of the Chapter XIX A as harmoniously construed with the other provisions of the Act in the light of aims and objectives for introduction of Chapter XIX A. The forum of Commission for 'Settlement of Cases' is not created to put a premium on fraud or misrepresentation of tax evaders. The provisions contained in Chapter XIX A merely aim at encouraging tax payers to

approach the Settlement Commission with full disclosure of their income which they had not earlier disclosed in the course of regular assessment. Such assessee who co-operate with the assessing authorities in making proper assessment of tax can be granted immunity from prosecution and penalty. There is no provision that they can be granted immunity from payment of interest on the tax assessed. Brother Pasayat J. in his two opinions separately rendered in the appeals has taken note of the decision in the case of Commissioner of Income Tax vs. Express Newspapers Limited [1994 (2) SCC 374] and Commissioner of Income Tax, Mumbai vs. Anjum Ghaswala [2002 (1) SCC 633] which authoritatively construe some of the provisions in Chapter XIXA and records its conclusions on some aspects of the question raised before us for answer.

In the case of Express Newspapers (supra) it was found that in regular assessment for the years 1985-86, 1986-87 and 1987-1988 the assessee had fraudulently claimed certain losses and when they were being enquired into and investigated by the assessing authorities for reaching to a finality, the assessee approached the Settlement Commission for settlement of the cases. The Supreme Court was of the view that it was a case of fraud in claiming certain losses where there were none for the assessment years in question and it was not a case of any subsequent disclosure of income by the assessee. It was, therefore, held that it was not open to the assessee to avail the procedure of settlement of cases before the Forum of the Settlement Commission. While construing sub-section (4) of Section 245D, it was observed that the Commission is empowered to direct the waiver of penalty as well as interest and to direct that the tax payable in question shall be paid in prescribed instalments.

The decision of three Judge Bench of this Court in the case of Express Newspapers Limited (supra) came up for consideration before the five Judges Bench of this Court in the case of Anjum Ghaswala (supra) and the former case was distinguished by observing thus:

"In our opinion, this observation in Express Newspapers case does not help the Commission in support of its conclusion in regard to its power under Sections 245-D(4) and (6). It is to be noted that in that case the settlement sought was with regard to Assessment Years 1985-86, 1986-87 and 1987-88. It is an admitted fact that during those assessment years, Sections 234-A, 234-B and 234-C were not in the statute book. On the contrary, the corresponding provisions existing in the statute, namely, Sections 139(8), 215(4) and 216 in terms empowered the income tax authorities to waive or reduce interest. It is in that context that this Court observed, in the paragraph extracted hereinabove, that under Section 245-D(4), the Commission has the power to direct the waiver of penalty as well as interest because that was within the scope of the provisions of the Act, as then existing, whereas at present and for the assessment years involved in this case, Sections 234-A, 234-B and 234-C being applicable, that observation does not apply to the cases in hand. The sentence "except to mention that the Commission is empowered to direct the waiver of penalty as well as interest" is used in that judgment on the basis of the then existing law and to apply the same to the facts of the present case with the mandatory change in law would amount to applying those principles in Express newspapers case out of context."

[Underlining by court to supply emphasis]

In the case of Anjum Ghaswala (supra) the main question that fell for consideration before the Supreme Court was whether the Settlement

Commission has power to waive interest for non-payment or delayed payment of tax found due. The Supreme Court answered the question holding that the scheme contained in Chapter XIXA does not empower the Commission to waive interest payable for non-payment or delayed payment of tax found due. Brother Pasayat J. has also reached the same conclusion and I am in respectful agreement with the same that such waiver of interest by the Settlement Commission is neither intended in the scheme of Chapter XIX-A nor such a power can be inferred because conceding such power to Settlement Commission to waive interest would help the tax evaders who did not disclose full income at the relevant time and made a disclosure subsequently. Such interpretation would also be discouragement to an honest tax payer who fully discloses his income and on the basis of regular assessment makes payment of tax and interest. In the case of Anjum Ghaswala (supra), the five judges bench of this Court came to the conclusion that Settlement Commission has to complete the assessment proceedings and determine quantum of tax as also interest payable in accordance with the provisions applicable to regular assessment. The observations in that case pertinent for this case read as under :-

"It is no doubt true that the terminology "settlement" has a very wide dictionary meaning and in the absence of a statutory definition generally the word "settlement" in sub-section (4) of Section 245-D would give the Commission sufficient power to arrive at a settlement which it deems fit, but when the statute qualifies such expression like "settlement" with mandatory words like "in accordance with the provisions of this Act" the width of the term 'settlement' becomes subject to the mandate found in that section, which would mean that while a Commission has sufficient elbow room in assessing the income of the applicant under Section 245-D(4) it cannot make any order with a term of the settlement which would be in conflict with the mandatory provisions of the section, like in the quantum and payment of tax and/or interest. In this view of the matter, we are of the opinion that assuming that there is any room for interpretation of the provisions of Part F of Chapter XVII and Chapter XIX-A, we would hold that it would not in any manner empower the Commission to either waive or reduce interest which is statutorily payable under the provisions of Part F of Chapter XVII."

Brother Pasayat J. has also rightly observed that if interest on tax not paid or paid after delay is governed by different provisions on the basis of the starting point of levy of interest and the date of payment of tax, the interest will have to be demanded and recovered in accordance with the provisions applicable to regular assessment may be that the tax is redetermined by the Settlement Commission under special Chapter XIX A of the IT Act.

A note of caution is required to be recorded. If on quantum of income and tax earlier disclosed in regular assessment proceedings, interest had been charged on tax due, till payment no further interest will be payable for the said period on the total quantum of tax determined by the Settlement Commission and necessary adjustments would be granted. Thus, in no case there would be charge of interest on interest. The interest chargeable in different circumstances in regular assessment proceedings will be calculated on the basis of the quantum of income and tax determined by Settlement Commission and necessary recovery and adjustments will be granted so as to avoid demand of any interest on interest.

In conclusion, two main questions formulated by me are answered thus :-

The first question formulated is what is the efficacy of the regular
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assessment proceedings which took place before and after the admission of the case by the Settlement Commission for settlement under Chapter XIX A of IT Act.

The answer is that it is only after a formal order of allowing or admitting the application for consideration of settlement is recorded by the Settlement Commission that all earlier assessment proceedings and recovery proceedings, if any, issued pursuant thereto, would become subject to the order of the Settlement Commission which will exercise all powers conferred on the income-tax authority under the IT Act.

The second question is what would be the extent of liability towards payment of interest on the tax as determined and found due in a case settled by the Settlement Commission in various situations contemplated in the IT Act like non-payment of tax or delayed payment of tax in the course of regular assessment.

As has been settled by five Judges Bench in the case of Anjum Ghaswala (supra), the Settlement Commission has no power to waive interest on the tax determined and found due while considering the case under Chapter XIX A in various statutory eventualities as delineated in the impugned orders of the Special Bench of the Settlement Commission. The interest on the "aggregate income" based on earlier disclosed and subsequently disclosed income, is to be determined by the Settlement Commission and on the tax found due on such income, interest will be charged in accordance with the provisions applicable in the regular assessment proceedings. The starting point of charging interest would be the due date of payment of advance tax or tax assessed and demanded as applicable to regular assessment proceedings and the end point the date of the order of the Settlement Commission. The tax and interest already paid, if any, on the basis of regular assessment would be adjusted from the quantum of interest and tax found due and as determined by the Settlement Commission. It is clear that the provisions do not allow charging of any interest on interest found due.

With the aforesaid additional reasons, I respectfully concur with the opinion expressed by Pasayat J. The questions are answered accordingly.

The appeals are disposed of accordingly.