SECTION 245C/INCOME-TAX ACT

[2008] 170 TAXMAN 618 (BOM.)

HIGH COURT OF BOMBAY

Gobind Builders & Developers*

v.

Income-tax Settlement Commission

F.I. REBELLO AND R.S. MOHITE, JJ.
WRIT PETITION NO. 180 OF 2008
MARCH 4, 2008

Section 245C of the Income-tax Act, 1961 - Settlement Commission - Application for settlement of cases - Assessment years 2003-04 to 2005-06 - Whether any payment of additional tax made after 31-7-2007 can be considered for purpose of compliance with requirement of section 245C - Held, no

Section 245C, read with sections 245D and 2(45), of the Income-tax Act, 1961 - Settlement Commission - Application for settlement of cases - Assessment years 2003-04 to 2005-06 - Whether Settlement Commission, while considering as to whether tax has been paid as contemplated by section 245D(2A), has to examine whether that tax is on total income as disclosed - Held, yes - Whether if otherwise assessee is entitled to benefits of allowance or disallowance, same cannot be denied for purpose of working out total income under section 245C; therefore, if assessee is entitled to carry-forward loss of previous year, then total income has to be calculated in that manner - Held, yes

FACTS

The petitioner-company filed application under section 245C before the Settlement Commission. While calculating the total income as required under section 245C, the petitioner took the returned income for the assessment year 2004-05, which was the only assessment year, being the loss of Rs. 93,112 and added the additionally disclosed income of Rs. 53,57,375 and arrived at the figure of Rs. 52,64,263 wherefrom brought forward loss of Rs. 93,193 relating to the assessment year 2003-04 was deducted under section 72. The petitioner, accordingly, worked out additional tax and paid same within time. The Settlement Commission rejected the application on the ground that for the purpose of appreciating the compliance of the provisions of section 245D(2A), carried forward loss of an earlier year was not to be taken into account and if the carried forward loss of the earlier year was ignored, then the tax paid by the petitioner was rendered inadequate, thereby resulting in non-compliance of the provisions of section 245D(2A) and, accordingly, the proceedings abated.

On writ petition :

HELD

Admittedly, the excess amount based on the contentions urged by the respondents was paid only on 13-11-2007, on payment of additional tax on Rs. 92,317, which was beyond the period prescribed in terms of section 245D(2A). Sub-section (2A) of section 245D along with some other sub-sections to section 245D was introduced by the Finance Act, 2007 with effect from 1-6-2007. Considering the mandate of section 245D(2A), the provision will have to be construed as mandatory, meaning thereby that the additional tax had to be paid on or before 31-7-2007. If that was not paid, in terms of Explanation*, 31-7-2007 would be deemed to be the date of the order of rejection. There was, therefore, no discretion in respondent No. 1 to condone the delay or accept the additional amount after 31-7-2007 as the application itself stood rejected by operation of law. Once there being no power in respondent No. 1, it was not possible to read a power in the Court in the exercise of the extraordinary jurisdiction under article 226 read with article 227 of the Constitution. The normal construction to be placed both on literal construction and/or any other mode of construction is that the payment of additional tax had to be made on or before 31-7-2007. In the instant case, that was not so done and, consequently, the fact that the assessee paid the purported shortfall on 13-11-2007 would be inconsequential and of no effect.* [Para 8]

The second question on facts, however, remained whether the tax paid on the income as declared by the petitioner was in terms of section 245C, read with section 245D. What, therefore, is the meaning of the expression 'income' on which the tax had to be paid or the additional amount of income-tax payable on the income disclosed. In the normal course, the petitioner under the provisions of the Act was entitled to carry forward the loss while computing the tax to be paid. [Para 9]

From considering the provisions of section 245C, it would be clear that what is payable is tax on the total income. That would mean that whatever allowance or disallowance that an assessee is entitled to; if the assessee is entitled to carry forward the loss of the previous year, then the total income has to be calculated in that manner. The Settlement Commission, while considering as to whether the tax has been paid as contemplated by section 245D(2A), has to examine whether that tax is on the total income as

disclosed. If the argument of the respondent was to be accepted, that would mean that the assessee, while working out the total income if entitled to any deduction,would not be so entitled and because he has applied under section 245C, he would have to pay the tax on income which otherwise would not have been payable. This is not what section 245C or for that matter section 245D contemplates. The provisions were enacted so as to enable tax compliance so that the additional tax is paid and the party can avail of the benefits including non-prosecution. A reading of the section cannot result in holding that if otherwise, the assessee is entitled to the benefits of allowance or disallowance, that cannot be considered for the purpose of working out the total income under section 245C.

*Respondent No. 1, in holding that the tax was also payable on the loss carried forward, totally ignored the imperative language of sections 245C and 245D. The tax payable would be on the income as set out in section 2(*45*). In the instant case, if the petitioner was entitled to carry forward the loss of Rs. 92,370, it had correctly paid the tax and, on that point, there was no dispute. The only dispute was whether the petitioner could carry forward the loss of the preceding assessment year. That could have been done by the petitioner. Considering the above, the finding recorded by respondent No. 1, that the tax was not paid, clearly disclosed an error of law apparent on the face of the record. The consequences were that finding recorded that the application had abated, had to be set aside. The application filed by the petitioner, in the absence of any other reasons given by respondent No. 1 for rejecting the application, was to be treated as an application to be proceeded with.* [Para 10]

CASE REVIEW

B. Komalakshi v. *Dy. CIT* [2007] 292 ITR 99/ 162 Taxman 16 (Kar.) *distinguished.* [Para 8]

CASES REFERRED TO

CIT v. *Shirke Construction Equipment Ltd.* [2007] 291 ITR 380/ 161 Taxman 212 (SC) [Para 3], *D. Komalakshi* v. *Dy. CIT* [2007] 292 ITR 99/ 162 Taxman 16 (Kar.) [Para 8] and *IPCA Laboratory Ltd.* v. *Dy. CIT* [2004] 266 ITR 521/ 135 Taxman 594 (SC) [Para 10].

S.N. Inamdar and **A.K. Jasani** *for the Petitioner.* **Vimal Gupta** *for the Respondent.*

JUDGMENT

F.I. Rebello, J. - Rule. Heard forthwith.

2. The petitioner had filed his return of income for the assessment years 2003-04, 2004-05 and 2005-06 respectively on 30-9-2003, 26-9-2004 and 30-10-2005. There was a search and seizure operation on the premises of the petitioner on 9-12-2004 and 10-12-2004, as a result of which certain books and papers were found and seized. The petitioners contend that their firm came in existence on 1-5-2002. During the search a diary relating to receipts and expenditure of the firm on its project was also seized. The entries in the diary are partly recorded in the books of account on the basis of which regular returns were filed. According to the petitioner as the entries in the diary, its reconciliation with books of account and their interpretation involved complex investigation, the petitioner approached the respondent No. 1 by filing an application dated 14-9-2006 under section 245C of the Income-tax Act, hereinafter referred to as 'the Act', under the cover of their letter of their Chartered accountant dated 20-9-2006.

3. According to the petitioner they fulfil all the eligibility conditions and that their case falls under section 245C of the Act. Section 245C of the Act requires that where the income disclosed in the application relates to only one previous year and if the applicant has furnished a return in respect of the total income of that year, additional tax is to be calculated on the aggregate of the total income returned and the income disclosed in the application as if such aggregate were the total income. The petitioners accordingly took the returned income for the assessment year 2004-05 which was the only assessment year (previous year 1-4-2003 to 31-3-2004) being the loss of Rs. 93,112 and added the additionally disclosed income of Rs. 53,57,375 and arrived at the figure of Rs. 52,64,263 wherefrom brought forward loss of Rs. 93,193 relating to the assessment year 2003-04 was deducted under section 72 to arrive at the aggregate total income as required by section 245C. According to the petitioner section 2(*45*) defines "Total income" to mean the total amount of income referred to in section 5 computed in the manner laid down in the Act, which obviously includes sections 70 and 72 also, as held by the Supreme Court in *CIT* v. *Shirke Construction Equipment Ltd.* [2007] 291 ITR 380[1] . The petitioner accordingly worked out additional tax payable on the aggregate total income of Rs. 51,70,820 at Rs. 18,55,032 and paid Rs. 25,59,932 together with interest on 26-5-2007 *i.e.,* well within time. A letter dated 11-8-2007 was sent to the Assessing Officer to that effect.

Prior to that the petitioner's chartered accountants, M/s. Khandelwal Jain & Associates, wrote a letter to the respondent No. 1, dated 11-7-2007 bringing to its notice that in view of the amendment made by Finance Act, 2007 to section 245D(2D) there was an obligation to pay the additional tax and the interest on or before 31-7-2007 and that they have already paid additional tax and interest on the income declared in the settlement petition and further requested the respondent No. 1 to confirm whether the said obligation has been complied with. The petitioner also stated that in case it is found that there is shortfall in payment of additional

tax/interest, the applicant may kindly be intimated so that the same can be paid and made good on or before 31-7-2007.

4. The petitioner received a letter dated 21-9-2007 from respondent No. 1 setting out that on examination of the application it is seen that there is no proof of payment of additional tax and asking the applicant to show cause why the application should not be treated as abated. The petitioner promptly replied by letter dated 3-10-2007 stating that the additional tax and interest was paid on 26-5-2007 and that proof of payment was produced on 13-8-2007 and also inviting attention to the letter dated 11-7-2007. The petitioner were given notice of hearing. On the matter being heard the respondent No. 1 passed an order on 28-11-2007 holding that the petitioner's application stood abated. It is this order which is the subject-matter of the present petition.

5. It may be pointed out that the respondent No. 1 while rejecting the petitioner's application as abated proceeded on the footing that on a plain reading of the relevant provisions of the Act as reproduced in the order, it was clear that for the purpose of appreciating the compliance of the provisions of section 245D(2A) carried forward loss of an earlier year is not to be taken into account. The petitioner had disclosed the income of Rs. 53,57,375 while taxes etc., have been paid on income of Rs. 51,71,070 after adjusting not only the loss (Rs. 93,112) of the relevant year but also the carry forward loss (Rs. 93,193) of the preceding assessment year. The respondent No. 1 held that if the carried forward loss of the earlier year is ignored then the tax paid is rendered inadequate thereby resulting in non-compliance of the provisions of section 245D(2A) and accordingly held that the proceedings abated.

6. Reply has been filed by respondent No. 3. The same objections based on which the respondent No. 1 rejected the petitioner's application as abated have been reiterated.

7. The questions for our consideration in this petition are :

(*i*)Whether the carry forward loss is not to be taken into account for computing the total income.

(*ii*)Whether any payment made after 31-7-2007 can be considered for the purpose of compliance with the requirement of section 245C(1).

8. We proceed to answer the second issue first. Admittedly the excess amount based on the contentions urged by the respondents was paid only on 13-11-2007 on payment of additional tax on Rs. 92,317 which is beyond the period prescribed in terms of section 245D(2A). The only contention raised on behalf of the petitioner is by placing reliance on the judgment of a learned Bench of the Karnataka High Court in the case of *D. Komalakshi* v. *Dy. CIT* [2007] 292 ITR 99[1], where also the amount due and payable was not paid on time. The learned Bench of the Karnataka High Court, however, granted four weeks time to make payment of the admitted amount before the authority. Section 245D(2A) reads as under :

> "(2A) Where an application was made under section 245C before the 1st day of June, 2007, but an order under the provisions of sub-section (1) of this section, as they stood immediately before their amendment by the Finance Act, 2007, has not been made before the 1st day of June, 2007, such application shall be deemed to have been allowed to be proceeded with if the additional tax on the income disclosed in such application and the interest thereon is paid on or before the 31st day of July, 2007.
>
> *Explanation*.—In respect of the applications referred to in this sub-section, the 31st day of July, 2007 shall be deemed to be the date of the order of rejection or allowing the application to be proceeded with under sub-section (1)."

This sub-section along with some other sub-sections to section 245D, were introduced by Finance Act, 2007 with effect from 1-6-2007. The judgment of the Division Bench of the Karnataka High Court is dated 8-11-2006 *i.e.,* before the amendment. That judgment, therefore, cannot be considered while construing the provisions as amended. In our opinion considering the mandate of section 245D(2A) the provision will have to be construed as mandatory, meaning thereby that the additional tax had to be paid on or before 31-7-2007. If that was not paid, in terms of *Explanation*, 31-7-2007 shall be deemed to be the date of the order of rejection. There is, therefore, no discretion in the respondent No. 1 to condone the delay or accept the additional amount after 31-7-2007 as the application itself stands rejected by operation of law. Once there being no power in the respondent No. 1 it is not possible to read a power in this Court in the exercise of the extraordinary jurisdiction under article 226 read with article 227 of the Constitution of India. The normal construction to be placed both on literal construction and/or any other mode of construction is that the payment of additional tax had to be made on or before 31-7-2007. In the instant case that was not so done and consequently the fact that the petitioner paid the purported shortfall on 13-11-2007 would be inconsequential and of no effect.

9. The second question on facts here, however, remains whether the tax paid on the income as declared by the petitioners is in terms of section 245C read with section 245D. What, therefore, is the meaning of the expression "Income" on which the tax had to be paid or the additional amount of income-tax payable on the income disclosed. In the normal course the petitioner under the provisions of the Act was entitled to carry forward the loss while computing the tax to be paid.

10. Are such losses not to be carried forward while computing the income on which tax is payable under section 245C read with section 245D of the Income-tax Act. We may firstly refer to the judgment relied upon by the petitioner in the case of *Shirke*

Construction Equipment Ltd. (*supra*). The Court noted that in *IPCA Laboratory Ltd.* v. *Dy. CIT* [2004] 266 ITR 521[1] (SC) the Court had taken a view that (*i*) section 80HHC of the Act is not independent of section 80AB and would be governed by section 80AB; and (*ii*) losses were to be set off against the profits earned from export of self-manufactured goods. Based on that it is submitted that while considering the income it was open to the petitioner to have set off the carry forward losses while computing the total income and in that context the tax that had to be computed and paid had been correctly paid in terms of the income disclosed by the petitioner and consequently the petitioner's application could not have been treated as abated. Section 245C(1B) provides that in the event the applicant has not furnished a return in respect of the total income of that year, then, tax shall be calculated on the income disclosed in the application as if such income were the total income. "Income" has been defined under section 2(*45*) of the Income-tax Act. Insofar as section 245C is concerned the additional amount of income-tax payable in respect of the income disclosed in the application related to the previous year in case where return has not been filed the amount calculated under that clause and in case where the return has been filed the amount of tax calculated on the total income returned for that year. It would be clear, therefore, from considering the aforesaid provisions what is payable is tax on the total income. That would mean that whatever allowance or disallowance that the assessee is entitled to, if the assessee is entitled to carry forward the loss of the previous year then the total income has to be calculated in that manner. The Settlement Commission while considering as to whether the tax has been paid as contemplated by section 245D(2A) has to examine whether that tax is on the total income as disclosed. If the argument of the respondent revenue is to be accepted that would mean that the assessee while working out the total income if entitled to any deduction, would not be so entitled and because he has applied under section 245C would have to pay the tax on income which otherwise would not have been payable. In our opinion this is not what section 245C or for that matter section 245D contemplates. The provisions were enacted so as to enable tax compliance so that the additional tax is paid and the party can avail of the benefits including non-prosecution. A reading of the section cannot result in holding that if otherwise the assessee was entitled to the benefits of allowance or disallowance that cannot be considered for the purpose of working out the total income under section 245C.

In our opinion the respondent No. 1 in holding that the tax was also payable on the loss carried forward totally ignored the imperative language of sections 245C and 245D. The tax payable would be on the income as set out in section 2(*45*) of the Income-tax Act. In the instant case if the petitioner was entitled to carry forward the loss of Rs. 92,370 the petitioner has correctly paid the tax and on this point there is no dispute. The only dispute was whether petitioner could carry forward the loss of the preceding assessment year. In our opinion, that could have been done by the assessee. Considering the above in our opinion, the finding recorded by respondent No. 1 that the tax was not paid clearly discloses an error of law apparent on the face of the record. The consequences are that finding recorded that the application has abated, has to be set aside. The application filed by the petitioner in the absence of any other reasons given by respondent No. 1 for rejecting the application is to be treated as an application to be proceeded with.

11. Rule made absolute accordingly. There shall be no order as to costs.