IT : For computing additional tax for settlement application, total income has to be considered as if aggregate of total income returned and income disclosed would be total income

[2014] 44 taxmann.com 250 (Gujarat)

HIGH COURT OF GUJARAT

Unipon (India) Ltd.

v.

Income Tax Settlement Commission*

AKIL KURESHI AND MS. SONIA GOKANI, JJ.
SPECIAL CIVIL APPLICATION NO. 6382 OF 2008
CIVIL APPLICATION NO. 2273 OF 2009
APRIL 16, 2014

Section 245C of the Income-tax Act, 1961 - Settlement Commission - Application for settlement of cases (Total income) - Assessment year 2005-06 - Whether for computing additional tax for settlement application, definition of 'total income' under section 5 is not applicable in view of deeming fiction contained in clause (ii) of sub-section (1B) of section 245C whereby total income has to be considered as if aggregate of total income returned and income disclosed would be total income - Held, yes - Whether such deeming fiction must be allowed in its full effect - Held, yes [Para 26][In favour of revenue]

FACTS

- For relevant assessment year, the petitioner filed the return of income declaring nil income.
- Thereafter, the petitioner applied to the Settlement Commission for settlement of his assessment for the said assessment year under section 245C. In such application, the petitioner disclosed additional income of Rs.72 lakhs which did not form part of the original return.
- In terms of amended sub-section(2A) of section 245D with effect from 1-6-2007, the petitioner was required to pay the additional tax on the income disclosed in the application for settlement along with the interest thereon, on or before 31-7-2007 in order to proceed further with the application for settlement. The petitioner deposited a sum of Rs. 20 lakhs by 31-7-2007.
- The Settlement Commission, in order to verify the compliance of section 245D(2A), called for a report from the Commissioner who made a report suggesting that the petitioner was required to pay a total amount of Rs.35,55,000 by way of tax and interest on the additional income disclosed for the assessment year 2005-06 whereas the petitioner had paid only Rs.20 lakhs till 31-7-2007. The Settlement Commission, therefore, issued a show-cause notice to the petitioner why the proceedings before the Commission be declared as abated for the failure of the petitioner to comply with the provisions of section 245D(2A).

- In response, the petitioner submitted that in the year under consideration, the assessee had unabsorbed depreciation of Rs.34,29,183. The disclosure of Rs.72,00,000 was adjusted against such unabsorbed depreciation leaving the revised net total income for the year under consideration at Rs.37,70,817. The assessee had, therefore, computed the tax on such total income and paid the same along with interest. On the basis of such computation, the petitioner contended that the requirement of depositing additional tax with interest under section 245D(2A) was fully satisfied.
- The Settlement Commission rejected the petitioner's contention that the tax required to be paid under section 245D(2A) was fully paid on two grounds, firstly, that sub-sections (1A) to (1D) of section 245C do not permit the set off of brought forward business losses or unabsorbed depreciation/investment allowance; and secondly that the very question of such set off of unabsorbed depreciation or brought forward business losses against income from short-term capital gains or from other sources in the normal computation of income, was itself questionable.

HELD

- Combined effect of section 32(2) and section 72(1) would be that the carried forward unabsorbed depreciation would be available for set off against the business income or income from other sources of an assessee in a particular year. [Para 10]
- It is also true that while passing order for settlement of a case, the Commission is required to apply the provisions contained under the Act. It is held by the Supreme Court in number of decisions that the Settlement Commission does not undertake the full-fledged assessment proceedings, and, therefore, cannot be challenged as if it is an appealable order, nevertheless, its order can be challenged on the limited ground that the same is not in accordance with law. [Para 11]
- In that view of the matter, if the application for settlement was properly instituted and if allowed to be proceeded further, after crossing different stages envisaged under the Act, the Settlement Commission would have to decide the tax liability of the petitioner, unless further additions are made for appropriate reasons, on the basis of additional disclosed income by giving benefit of set off of unabsorbed depreciation. It was in this context, that petitioner vehemently contended that the petitioner cannot be expected to deposit by way of additional tax which ultimately may not result into its tax liability in an order that the Settlement Commission may pass. [Para 12]
- The proceedings before the Settlement Commission under Chapter XIXA are special proceedings aimed at simplifying the procedure for bringing within the tax-net otherwise undisclosed income by an assessee with the temptation to avoid prosecution and penalty. These special provisions, therefore, have been made in the said Chapter in order to bring about an early end to such settlement proceedings. Different stages envisaged after an assessee makes an application for settlement of his case come with time limits. The proceedings before the Settlement Commission have to be completed within the time frame and various stages envisaged under section 245D also come with various time frames. [Para 20]
- Bearing in mind this general scheme of settlement of cases contained in Chapter XIXA, one may peruse more closely sub-sections (1A) to (1D) of section 245C. Sub-section (1A) of section 245C prescribes the manner in which the additional amount of income tax payable in terms of sub-section (1) of section 245C in respect of income disclosed in an application made under the said sub-section shall be computed

by providing that the same shall be calculated in accordance with the provisions of sub-sections (1B) to (1D). Sub-section (1B) envisages two situations; first is where the applicant had not furnished a return in which case the tax shall be calculated on the income disclosed in the settlement application considering such income as total income of the assessee. The second situation is where the applicant had furnished return in respect of the total income of the assessment year under consideration; in such a case, the tax would 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. In terms of clause (ii) of said sub-section (1B), therefore, the tax would be calculated on the aggregate of the returned total income and the disclosed income, treating the aggregate thereof as the total income of the applicant. Sub-section (1C) of section 245C provides for the additional amount of income tax payable in respect of income disclosed. Clause (b) thereof provides that the amount of tax calculated under section 245C(1B)(ii) shall be reduced by the amount of tax calculated in the total income returned for that year. [Para 21]

- In simple terms, therefore, where an assessee has furnished return of income and applies for settlement of his case, one has to calculate his total income for the purpose of the said provision by aggregating the total income returned and the income disclosed in the application. Applicant's liability to pay additional tax would be the amount of tax calculated on such total income minus the amount of tax calculated on the total income returned for that year. [Para 22]
- Sub-section (1B) and (1C) of section 245C, thus, provide for a special formula for arriving at an applicant's liability to pay additional tax for maintaining an application for settlement. Such special formula contains a deeming fiction. Such deeming fiction for the purpose of calculating additional tax payable defines term 'total income' in artificial manner. Use of the deeming fiction is the well-known legislative device to give rise to an artificial situation or fiction. Such device can be created not necessarily by using the term 'deemed to be'. The expression 'as if' is also seen as giving rise to a deeming fiction. [Para 23]
- In the instant case, the Legislature has created a deeming fiction by providing that the tax of the applicant would 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. This device is created for a special purpose and has a localized effect. It comes into existence only for the purpose of calculating the tax to be deposited by an applicant for settlement of a case. In such a situation, the aggregate of the total income returned and the income disclosed would be considered as total income. [Para 25]
- Under the circumstances, the contention of the petitioner that the term 'total income' should be construed as defined under section 5 for the purpose of calculating additional tax of an applicant for settlement of a case cannot be accepted. This is for multiple reasons. Firstly, clause (ii) of sub-section (1B) of section 245C gives rise to deeming fiction where total income has to be considered as if the aggregate of the total income returned and the income disclosed would be the total income. Such deeming fiction must be allowed its full effect. Secondly, the very same clause uses the term 'total income' returned in a different context and the aggregate of the total income returned and the income disclosed which would partake the character of a total income for this limited purpose. Thirdly, such deeming fiction cannot be discarded by bringing into consideration such term used elsewhere by the Legislature. It is well-known that Legislature provides for definition of various terms frequently used in the statutes. The

definition section usually comes with the expression 'unless the context otherwise provides' or 'unless there is anything repugnant to'. Such definition section defines various terms repeatedly used in a statute which would carry the meaning as contained in the definition. It is also well-known that the statute defines often times terms for the special purpose of a section or even for a sub-section. Examples are replete in the Act itself where the definitions are provided only for the purposes of a particular section or even a sub-section. In the instant case, this formula, which contains a special definition for a special purpose, would, therefore, have its effect only for section 245C. Being a special provision it would prevail over any other general term of a concept contained in the Act. Section 245C(1) also requires the applicant to provide besides other details, true and full disclosure of his income which has not been disclosed before the Assessing Officer and amount of income-tax payable on 'such income'. Reference to 'such income', thus, is the income disclosed in the settlement application which was not disclosed before the Assessing Officer. [Para 26]

- The reason for the Legislature to provide a simple formula is not far to seek. As noted, the different stages before the Settlement Commission, once an application is made by the assessee for settlement of his case, come with time frame. Even the final order which the Settlement Commission may pass has a deadline beyond which if no order is passed, the proceedings would abate. At a stage where the Settlement Commission is required to ascertain whether an assessee applicant has paid the additional tax with interest thereon only upon which application can be allowed to proceed further, no complex exercise or verification is envisaged. If the concept of total income contained in the Act is imported at such a stage, it can give rise to multiple disputes and lengthy debates with respect to the total income of an assessee and whether full tax on such income has been paid or not. At such a stage, the legislature does not envisage the Commission to go into a complex exercise of ascertaining the total income of the assessee and further ascertaining his tax liability on such income. The Legislature has, therefore, provided for a simple formula possible of a simple arithmatical application. It may be that in a given case the assessee may be entitled to a refund once the Settlement Commission passes its final order. Such isolated case, however, would not govern the interpretation of sub-sections (1B) and (1C) of section 245C. Any such interpretation would give rise to complex consideration by the Settlement Commission of the assessee's total income not as defined in sub-section (1B) but as otherwise understood and referred to in section 5. Likewise, the computation of the tax on such total income and the resultant liability of the assessee for paying additional tax also would become a complex exercise. In income tax proceedings multiple claims of deductions and exemptions give rise to, often times, complex considerations. Often the liability itself is fluctuating due to Court pronouncements. Sometimes, a legal question or interpretation of a provision may be in the virgin field not covered by any Court judgment. The legislature never intended that at the stage of ascertaining whether the assessee has deposited the additional tax on an application made for settlement of the case, such complex exercise should be undertaken by the Settlement Commission. Further, accepting any such interpretation would defeat the very purpose of introducing the simplicity of computation of 'total income' of an assessee for the purpose of the said provision and his liability to pay additional tax with interest thereon. [Para 27]
- The assessee had filed nil return. In terms of clause (ii) of sub-section (1B) of section 245C, therefore, Rs. 72 lakhs, which the assessee declared in the application for

settlement would be his total income for the purpose of computing the additional tax liability. Admittedly, the assessee had not deposited the tax with interest thereon calculated on amount of Rs. 72 lakhs. The Commission, therefore, correctly did not allow such application to be proceeded further. [Para 29]

CASES REFERRED TO

CIT v. *Jaiupria China Clay Mines (P.) Ltd* [1966] 59 ITR 555 (SC) (para 4), *E.K. Lingamurthy* v. *Settlement Commissioner (CIT and WT)* [2009] 314 ITR 305/[2008] 178 Taxman 116 (SC) (para 4), *Gobind Builders & Developers* v. *Income-tax Settlement Commission* [2009] 309 ITR 167/[2008] 170 Taxman 618 (Bom.) (para 4), *Jyotendrasinhji* v. *S.I. Tripathi* 1993 Supp. (3) SCC 389 (para 11), *Dargah Committee* v. *State of Rajasthan* AIR 1962 SC 574 (para 24) and *Khemka & Co.(Agencies) (P.) Ltd* v. *State of Maharashtra* [1975] 2 SCC 22 (para 24).

S.N. Soparkar and **Mrs. Swati Soparkar** *for the Petitioner.* **Manish Bhatt** and **Mrs. Mauna M. Bhatt** *for the Respondent.*

JUDGMENT

Akil Kureshi, J. - The petitioner has challenged an order dated 17.12.2007 passed by the Settlement Commission. Under such order, the Settlement Commission held that the petitioner failed to pay additional tax and interest on the income disclosed in the application for settlement as required under section 245D(2A) of the Income Tax Act, 1961 ("the Act" for short).

2. The petition arises in the following factual background :

2.1 The petitioner is a private limited company. For the assessment year 2005-2006, the petitioner filed the return of income on 31.3.2006 declaring nil income. On 22.6.2006, the petitioner applied to the Settlement Commission for settlement of his assessment for the said assessment year under section 245C of the Act. In such application, the petitioner disclosed additional income of Rs.72,00,000/- which did not form part of the original return. In terms of amended sub-section(2A) of section 245D of the Act with effect from 1.6.2007, the petitioner was required to pay the additional tax on the income disclosed in the application for settlement along with the interest thereon, on or before 31.7.2007 in order to proceed further with the application for settlement. The petitioner deposited a sum of Rs.20 lakhs by 31.7.2007. The Settlement Commission in order to verify the compliance of section 245D(2A) of the Act, called for a report from the Commissioner of Income tax, Ahmedabad. The Commissioner made a report suggesting that the petitioner was required to pay a total amount of Rs.35,55,000/- by way of tax and interest on the additional income disclosed for the assessment year 2005-2006 whereas the petitioner had paid only Rs.20 lakhs till 31.7.2007. The Settlement Commission therefore, issued a show cause notice to the petitioner why the proceedings before the Commission be declared as abated for the failure of the petitioner to comply with the provisions of section 245D(2A) of the Act.

2.2 In response to such notice, the petitioner canvassed before the Settlement Commission that in the year under consideration, the assessee had unabsorbed depreciation of Rs.34,29,183/-. The disclosure of Rs.72,00,000/- was adjusted against such unabsorbed depreciation leaving the revised net total income for the year under consideration at Rs.37,70,817/-. The assessee had therefore, computed the tax on such total income and paid the same along with interest. The computation putforth by the petitioner before the Settlement Commission was as under :

"Income as per Return:	
Profit and gain from business and profession	47143810
Profit and gain from speculation	810572
Total Income	47954382

Additional Disclosure			
Profit and gain from business and profession			
Capital Gains			
STCG	6730189		
		6730189	
Income from other sources			
Dividend	4960		
Others	464851		
Total		469811	
			7200000
Total Disclosure			55154382
Revised Gross Total Income			
Less :			
Set off of B/f losses			
Business losses		47954382	
Unabsorbed depreciation		3429183	
Total set off of losses			51383565
Revised Net Total Income			3770817"

2.3 On the basis of such computation, the petitioner contended that the requirement of depositing additional tax with interest under section 245D(2A) was fully satisfied. The Revenue, on the other hand, contended that the provisions of the Act were clear. The application of the petitioner could be allowed to proceed only if the additional tax on the income disclosed in the application for settlement along with interest is paid before 31.7.2007. In the present case, same was not done. For the purpose of computing the additional tax payable under section 245D(2A) of the Act, resort must be had to sub-sections (1A) to (1D) of section 245C of the Act. These provisions would not permit any set off for the purpose of computing liability of paying the additional tax.

2.4 The Settlement Commission held as under :

> "10. We have considered the facts of this case as also the arguments advanced by both the parties. We are in agreement with the CIT(DR). The applicant had disclosed 'NIL' total income in the return of income filed on 31.03.06. Having disclosed an additional income of Rs.72 lacs in the settlement application, the applicant was required to pay tax on a total income of Rs.72 lacs. The provisions of sub-sections 1A to 1D of section 245C clearly show that there is no room for allowing set off of brought forward business losses or unabsorbed depreciation/investment allowance. Further, the set off of unabsorbed depreciation/brought forward business loss against income from short term capital gain or from other sources in the normal computation of total income in itself is questionable. We, therefore, find that the applicant has failed to pay the additional tax and interest on the income disclosed in the application as was required u/s.245D(2A)."

2.5 It is this decision of the Settlement Commission which is challenged before us.

3. From such decision it can be seen that the Settlement Commission rejected the petitioner's contention, that the tax required to be paid under section 245D(2A) was fully paid, on two grounds. Firstly, that sub-sections(1A) to (1D) of section 245C do not permit the set off of brought forward business losses or unabsorbed depreciation/investment allowance and secondly, that the very question of such set off of unabsorbed depreciation or brought forward business losses against income from short term capital gains or from other sources in the normal computation of income, is itself questionable.

4. On the basis of such facts, Shri S.N. Soparkar submitted that the Settlement Commission has committed a serious error in declaring that the application of the petitioner be abated for non payment of tax plus interest before the due date. Counsel raised the following contentions in support of his challenge:

(1) In terms of section 32(2) read with section 72(1) of the Act, the petitioner was

allowed to set off unabsorbed depreciation against his income from other sources. This was clearly so held by the Supreme Court in case of *CIT* v. *Jaiupria China Clay Mines (P.) Ltd.* [1966] 59 ITR 555. The Settlement Commission therefore, committed an error in observing that the very question of such set off even in normal computation is questionable.

(2) The Settlement Commission has to compute the tax liability of an applicant in terms of provisions contained in the Act. In the final order that the Commission would pass, effect of section 32(2) read with section 72(1) of the Act would have to be given. Combined effect of these provisions would be that the petitioner's income from other sources would be squared off against unabsorbed depreciation. The tax liability of the petitioner would be decided accordingly. Under such circumstances, the petitioner would be taxed not on Rs. 72,00,000/- which formed the additional disclosure in the application for settlement but on Rs.37,70,817/- after adjusting sum of Rs.34,29,183/-pertaining to unabsorbed depreciation. In this context reference was made to the decision of the Supreme Court in case of *E.K. Lingamurthy* v. *Settlement Commissioner (IT & WT)* [2009] 314 ITR 305/178 Taxman 116. In the said case, the Court held that while computing total income for the block period, undisclosed income must be set off against the brought forward losses. It was held that the Settlement Commission had erred in disallowing such set off.

(3) Heavy reliance was placed on decision of Bombay High Court in case of *Gobind Builders & Developers* v. *Income-tax Settlement Commission* [2009] 309 ITR 16/[2008] 170 Taxman 618 wherein in similar situation in the context of liability of an assessee to pay additional tax while applying for settlement, the Court held that computation of such additional tax would have to be done after allowing set off of the unabsorbed depreciation against the income disclosed under the application for settlement.

5. On the other hand, Shri Manish Bhatt for the department opposed the petition contending that for the purpose of making deposit of additional tax in terms of section 245D(2A) of the Act, special computation is provided under sub-sections (1A) to (1D) of section 245C. These provisions do not permit set off of unabsorbed depreciation against the additional income disclosed in the application for settlement. When such special formula is provided by the legislature, general rules for computation of total income and tax liability of an assessee cannot be applied disregarding the formula so provided under the Act. Counsel further submitted that at the stage of verifying whether the additional tax as required under section 245D(2A) was deposited or not, complex exercise of ascertaining the ultimate possible tax liability of an assessee cannot be undertaken. These being summary proceedings, the legislature desired that different stages envisaged before the Settlement Commission would be completed without waste of time. In this context, therefore, while verifying whether the applicant before the Settlement Commission had deposited the tax as required under section 245D(2A), the formula under sub-sections (1A) to (1D) of section 245C had to be applied.

6. Having thus heard learned counsel for the parties and having perused the documents on record, facts emerge more or less as undisputed. Such undisputed facts are that for the assessment year 2005-2006, the petitioner made an application to the Settlement Commission for settlement of the case. In such application, the petitioner declared an undisclosed income of Rs.72 lakhs. In the return filed for the said assessment year, the petitioner had disclosed nil income. For the said year, the petitioner had unabsorbed depreciation of Rs.34,29,183/-. The short question is whether the petitioner was required to deposit additional tax on Rs. 72,00,000/- or on Rs.37,70,817/- (i.e. Rs.72,00,000 - Rs.34,29,183) after setting off

the unabsorbed depreciation against such additional income?

7. The fact that in normal computation of petitioner's tax liability, the petitioner would be entitled to set off the unabsorbed depreciation against his income from other sources of Rs.72,00,000/- is legally not disputable.

8. Section 32(2) of the Act reads as under :

> "32(2) Where in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years."

9. In turn Section 72(1) of the Act reads as under :

> "(1) Where for any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and —
>
> (*i*) It shall be set be off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year :
>
> (*ii*) If the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on"

10. Combined effect of section 32(2) and section 72(1) would be that the carried forward unabsorbed depreciation would be available for sett off against the business income or income from other sources of an assessee in a particular year. This is precisely what the Supreme Court held in case of *Jaiupria China Clay Mines(P.) Ltd* (*supra*). Even before us the Revenue has not seriously contested this legal position. We would therefore, proceed on such basis.

11. It is also true that while passing order for settlement of a case, the Commission is required to apply the provisions contained under the Act. It is held by the Supreme Court in number of decisions that the Settlement Commission does not undertake the full-fledged assessment proceedings, and therefore, cannot be challenged as if it is an appealable order, nevertheless, its order can be challenged on the limited ground that the same is not in accordance with law. "In accordance with law" would include in accordance with the provisions of the Act. Reference in this regard may be made to the decision of Supreme Court in case of *Jyotendrasinhji* v. *S.I. Tripathi* 1993 Supp (3) SSC 389, in which it was held and observed as under :

> "16. It is true that the finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this court under Article 136. A party does not and cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in

Article 136; it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. May be, there is also some force in what Dr. Gauri Shankar says viz., that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. According to learned counsel, the Commission is not even required or obligated to pass a reasoned order. Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to, give reasons for its order. Even if it gives reasons in a given case, the scope of enquiry in the appeal remains the same as indicated above viz., whether it is,contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (and alteram partem) has been incorporated in Section 245-D itself. The sole overall limitation upon tire Commission thus appears, to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant apart from ground of bias, fraud & malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in Sri Ram Durga Prasad v. Settlement Commission [176 I.T.R. 169], which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is " concerned with the legality of procedure followed and not with the validity of the order.' The learned Judge added 'judicial review is concerned not with the decision but with the decision-making process." Reliance was placed upon the decision of the House of Lords in Chief Constable of the N.W. Police v. Evans, [1982] 1 W.L.R.1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders' of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant The main controversy in these appeals relates to the interpretation of the settlement deeds though it is true, some contentions of law are also raised. The commission has interpreted the trust deeds in a particular manner, Even if the interpretation placed by the commission the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income Tax Act. It is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years."

12. In that view of the matter, it does appear to us that if the application for settlement was properly instituted and if allowed to be proceeded further, after crossing different stages envisaged under the Act, the Settlement Commission would have to decide the tax liability of the petitioner, unless further additions are made for appropriate reasons, on the basis of additional disclosed income by giving benefit of set off of unabsorbed depreciation. It was in this context, learned senior counsel Shri Soparkar had vehemently contended that the petitioner cannot be expected to deposit by way of additional tax which ultimately may not result into its tax liability in an order that the Settlement Commission may pass. It was in this context that the Bombay High Court had also understood and appreciated the provisions contained in section 245C and 245D of the Act.

13. The question before us therefore, is of the interpretation of sub-sections (1A) to (1D) of section 245C

of the Act, of-course, bearing in mind other provisions contained in Chapter XIXA of the Act.

16.04.2014

14. Chapter XIX-A of the Act pertains to settlement of cases. Section 245A contained in the said Chapter defines certain terms for the purpose of the said Chapter. Section 245B provides for the constitution of the Income Tax Settlement Commission. Section 245BA pertains to jurisdiction and powers of Settlement Commission.

15. Section 245C pertains to the application for settlement of cases. Sub section (1) of Section 245C provides inter alia that an assessee may, at any stage of a case relating to him, make an application in prescribed form and manner containing a full and true disclosure of his income which has not been disclosed, the manner in which such income has been derived, the additional amount of income tax payable on such income to the Settlement Commission to have the case settled. Proviso to sub section (1) of Section 245C inter alia requires the applicant to pay such tax and interest thereon which would have been paid under the provisions of the Act had the income disclosed in the application been declared in the return of income before the Assessing Officer on the date of application and the proof of such payment to be attached with the application. Since this requirement of payment of tax with interest on declared income was introduced w.e.f. 01.06.2007 opportunity was given to those applicants, who had already made such applications by the said date and whose applications were still pending, to pay such amounts on or before 31.07.2007 as provided in sub section (2A) of Section 245D of the Act.

15.1 Sub-section (1A) of Section 245C provides that for the purposes of sub section (1) the additional amount of income tax payable in respect of the income disclosed in an application made under sub section (1) shall be the amount calculated in accordance with the provisions of sub sections (1B) to (1D). Since entire controversy revolves around these provisions we may reproduce the same here:

> "(1A) For the purpose of sub section (1) of this section the additional amount of income tax payable in respect of the income disclosed in an application made under sub section (1) of this section shall be the amount calculated in accordance with the provisions of sub sections (1B) to (1D).
>
> (1B) Where the income disclosed in the application relates to only one previous year,
>
> (*i*) if 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;
>
> (*ii*) if the applicant has furnished a return in respect of the total income of that year, tax shall 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.
>
> (1C) The additional amount of income tax payable in respect of the income disclosed in the application relating to the previous year referred to in sub section (1B) shall be-
>
> (*a*) in a case referred to in clause(i) of that sub section, the amount of tax calculated under that clause;
>
> (*b*) in a case referred to in clause (ii) of that sub section, the amount of tax calculated under the clause as reduced by the amount of tax calculated on the total income returned for that year;
>
> (1D) Where the income disclosed in the application relates to more than one previous year, the additional amount of income tax payable in respect of the income disclosed for each of the years shall first be calculated in accordance with the provisions of sub sections (1B) and (1C) and the aggregate of the amount so arrived at in respect of each of the years for which the application has been made

under sub section (1) shall be the additional amount of income tax payable in respect of the income disclosed in the application."

16. Section 245D of the Act pertains to procedure on receipt of an application under Section 245C. Under sub section (1) of Section 245D on receipt of an application under Section 245C, the settlement commission, within seven days from the receipt of the application, would issue a notice to the applicant requiring him to explain why the application made by him be allowed to be proceeded with. On hearing the applicant, the Settlement Commission, within 14 days from the date of the application, pass an order in writing either rejecting the application or allowing the application to be proceeded with. Proviso to sub section (1) of Section 245D provides that where no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with. Sub section (2A) of Section 245D, as noticed earlier, provides for payment of tax and interest by the applicants who had applied before the Settlement Commission before 01.06.2007 and whose applications were pending as on 01.06.2007. Sub section (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 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."

17. Under said section (2B) of Section 245D of the Act, the Settlement Commission with respect to the applications which have been allowed to be or deemed to have been allowed to be proceeded with shall call for a report from the Commissioner which would be furnished by the Commissioner within 30 days from the receipt of communication from the Settlement Commission.

18. Under Sub section (2C) of Section 245D of the Act, the Settlement Commission would proceed to pass an order on the basis of the report by the Commissioner within 15 days of the receipt of the report if so found appropriate declaring the application as invalid after giving an opportunity of being heard to the applicant. Further proviso to sub- section (2C) makes it clear that where the Commissioner has not furnished the report within the period prescribed, the Settlement Commission would proceed further in the matter without the report of the Commissioner. Sub sections (3) and (4) of Section 245D of the Act pertain to the power of the Settlement Commission to call for the records from the Commissioner and to direct further enquiry or investigation, if necessary, and to pass such order as it thinks fit.

19. Sub-section (4A) of Section 245D of the Act lays down time limit for passing order under sub section (4). Under Section 245H the Settlement Commission has the power to grant immunity from prosecution and penalty. Section 245HA pertains to abatement of proceedings before the Settlement Commission, in particular, it provides that where in respect of any application under Section 245C and order under sub section (4) of Section 245D has not been passed within the time or period specified under sub section (4A) of Section 245D of the Act, the proceedings before the Settlement Commission shall abate on the specified date.

20. Some of these provisions were referred to in order to appreciate that the proceedings before the Settlement Commission under Chapter XIXA of the Act are special proceedings aimed at simplifying the procedure for bringing within the tax-net otherwise undisclosed income by an assessee with the temptation to avoid prosecution and penalty. These special provisions, therefore, have been made in the said Chapter in order to bring about an early end to such settlement proceedings. Different stages envisaged after an assessee makes an application for settlement of his case come with time limits. For example, as we saw, on receipt of an application under Section 245C of the Act, the Settlement Commission would, within 7 days from the date of the receipt of the application, issue a notice to the applicant. Within 14 days from the date of the application, the Settlement Commission would pass an

order in writing either rejecting or allowing the application to be proceeded with. If no such order is passed within such time, the application would be deemed to have been allowed to be proceeded with. Likewise, a report called for from the Commissioner under sub section (2B) of Section 245D of the Act has to be furnished within 30 days of the communication by the Settlement Commission. Sub section (4A) of Section 245D lays down time limits for passing orders under sub section (4) in terms of Section 245HA(1)(iv). If no such order is passed within the time prescribed, the proceedings before the Settlement Commission would abate from such date. Thus, it can be seen that the proceedings before the Settlement Commission have to be completed within the time frame and various stages envisaged under Section 245D of the Act also come with various time frames.

21. Bearing in mind this general scheme of settlement of cases contained in Chapter XIXA we may peruse more closely sub sections (1A) to (1D) of Section 245C of the Act. Before that we may recall, under sub section (1) of Section 245C of the Act, the applicant for settlement of a case has to deposit additional amount of income tax payable on "such income", reference to this being the disclosure of his income which has not been disclosed before the Assessing Officer. Sub section (1A) of Section 245C prescribes the manner in which the additional amount of income tax payable in terms of sub section (1) of Section 245C in respect of income disclosed in an application made under the said sub section shall be computed by providing that the same shall be calculated in accordance with the provisions of sub sections (1B) to (1D). Sub section (1B) envisages two situations; first is where the applicant had not furnished a return in which case the tax shall be calculated on the income disclosed in the settlement application considering such income as total income of the assessee. The second situation is and with respect to which we are concerned, where the applicant had furnished return in respect of the total income of the assessment year under consideration, in such a case, the tax would 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. In terms of Clause (ii) of said section (1B) therefore the tax would be calculated on the aggregate of the returned total income and the disclosed income, treating the aggregate thereof as the total income of the applicant. Sub section (1C) of Section 245C provides for the additional amount of income tax payable in respect of income disclosed. Clause (b) thereof which covers our situation provides that the amount of tax calculated under Section 245C(1B)(ii) shall be reduced by the amount of tax calculated in the total income returned for that year.

22. In simple terms, therefore, where an assessee has furnished return of income and applies for settlement of his case, one has to calculate his total income for the purpose of the said provision by aggregating the total income returned and the income disclosed in the application. Applicant's liability to pay additional tax would be the amount of tax calculated on such total income minus the amount of tax calculated on the total income returned for that year.

23. Sub-section (1B) and (1C) of Section 245C thus provide for a special formula for arriving at an applicant's liability to pay additional tax for maintaining an application for settlement. Such special formula containes a deeming fiction. Such deeming fiction for the purpose of calculating additional tax payable defines term "total income" in artificial manner. Use of the deeming fiction is the well-known legislative device to give rise to an artificial situation or fiction. Such device can be created not necessarily by using the term "deemed to be". The expression "as if" is also seen as giving rise to a deeming fiction.

24. In case of *Dargah Committee* v. *State of Rajasthan* AIR 1962 SC 574, the Supreme Court considered a regulation section which provided that any money recoverable by the committee shall be recovered as if it were a tax levied by the committee on the property and shall be charged thereon. In this context, it was observed that if the fiction introduced by the said section is to be deemed as if it were a tax it is obvious that full effect must be given to this legal fiction. In case of *Khemka & Co.(Agencies) (P.) Ltd* v. *State of Maharashtra* [1975] 2 SCC 22 the Supreme Court had the occasion to consider the deeming provision enacted by using expression "as if". Section 9(2) of the Central Sales Tax adopted the machinery for

assessment, reassessment, collection and enforcement of tax including penalty if any of the State under the Sales tax law of the State as if the tax or penalty were payable under the sales tax law of the State.

25. In the present case, legislature has created a deeming fiction by providing that the tax of the applicant would 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. This device is created for a special purpose and has a localized effect. It comes into existence only for the purpose of calculating the tax to be deposited by an applicant for settlement of a case. In such a situation, the aggregate of the total income returned and the income disclosed would be considered as total income.

26. Under the circumstances, the contention of the counsel for the petitioner that the term "total income" should be construed as defined under Section 5 of the Act for the purpose of calculating additional tax of an applicant for settlement of a case cannot be accepted. This is for multiple reasons. Firstly, as discussed earlier Clause (ii) of sub section (1B) of Section 245C of the Act gives rise to deeming fiction where total income has to be considered as if the aggregate of the total income returned and the income disclosed would be the total income. Such deeming fiction must be allowed its full effect. Secondly, the very same clause uses the term "total income" returned in a different context and the aggregate of the total income returned and the income disclosed which would partake the character of a total income for this limited purpose. Thirdly, such deeming fiction cannot be discarded by bringing into consideration such term used elsewhere by the legislature. It is well known that legislature provides for definition of various terms frequently used in the statutes. The definition section usually comes with the expression "unless the context otherwise provides" or "unless there is anything repugnant to". Such definition section defines various terms repeatedly used in a statute which would carry the meaning as contained in the definition. It is also well known that the statute defines often times terms for the special purpose of a section or even for a sub-section. Examples are replete in the Act itself where the definitions are provided only for the purposes of a particular section or even a sub-section. In the present case, this formula which contains a special definition for a special purpose would, therefore, have its effect only for Section 245C. Being a special provision it would prevail over any other general term of a concept contained in the Act. Section 245C(1) of the Act also requires the applicant to provide besides other details, true and full disclosure of his income which has not been disclosed before the Assessing Officer and amount of income-tax payable on "such income". Reference to "such income" thus is the income disclosed in the settlement application which was not disclosed before the Assessing Officer.

27. The reason for the legislature to provide a simple formula is not far to seek. As noted, the different stages before the Settlement Commission once an application is made by the assessee for settlement of his case, comes with time frame. Even the final order which the Settlement Commission may pass has a deadline beyond which if no order is passed, the proceedings would abate. At a stage where the Settlement Commission is required to ascertain where an assessee applicant has paid the additional tax with interest thereon only upon which application can be allowed to proceed further, no complex exercise or verification is envisaged. If the concept of total income contained in the Act is imported at such a stage, it can give rise to multiple disputes and lengthy debates with respect to the total income of an assessee and whether full tax on such income has been paid or not. At such a stage, the legislature does not envisage the Commission to go into a complex exercise of ascertaining the total income of the assessee and further ascertaining his tax liability on such income. The legislature has, therefore, provided for a simple formula possible of a simple arithmatical application. It may be that in a given case the assessee may be entitled to a refund once the Settlement Commission passes its final order. Such isolated case, however, would not govern the interpretation of sub sections (1B) and (1C) of Section 245C. Any such interpretation would give rise to complex consideration by the Settlement Commission of the assessee's total income not as defined in sub section (1B) to but as otherwise understood and referred to in Section 5 of the Act. Likewise, the computation of the tax on such total income and the resultant liability of the assessee for

paying additional tax also would become a complex exercise. In income tax proceedings multiple claims, of deductions and exemptions give rise to often times complex considerations. Often the liability itself is fluctuating due to court pronouncements. Sometimes a legal question or interpretation of a provision may be in the virgin field not covered by any Court judgement. The legislature never intended that at the stage of ascertaining whether the assessee has deposited the additional tax on an application made for settlement of the case, such complex exercise should be undertaken by the Settlement Commission. Further, in our opinion, accepting any such interpretation would defeat the very purpose of introducing the simplicity of computation of "total income" of an assessee for the purpose of the said provision and his liability to pay additional tax with interest thereon.

28. The Bombay High Court in case of *Gobind Builders Developers* (*supra*) has adopted somewhat different approach. The court has held that what is payable under sub section (1) of Section 245C is the tax on total income which would mean whatever allowance or dis-allowance that the assessee was entitled to the same would also be available. We are unable to persuade ourselves to adopt this interpretation. In our opinion bringing the concept of total income for computing the assessee's liability to deposit additional tax while making application for settlement would amount to ignoring the deeming fiction created by the legislature in Clause (ii) of sub section (1B) of Section 245C. For the computation of such additional tax payable the total income would be the total returned income added by the disclosed income by the assessee.

29. Counsel Mr. Soparkar however contended that even viewed from this angle the assessee had discharged his additional tax liability. Such contention also cannot be accepted. The assessee's returned total income was nil. We may recall that the assessee had filed nil return. In terms of Clause (ii) of sub section (1B) of Section 245C therefore, Rs. 72 lacs which the assessee declared in the application for settlement would be his total income for the purpose of computing the additional tax liability. Admittedly the assessee had not deposited the tax with interest thereon calculated on amount of Rs. 72 lacs. The Commission, therefore, correctly did not allow such application to be proceeded further. The reasons adopted by the Commissioner are, however, somewhat different from what we have expressed in the judgement. Be that as it may, the petition must be and is dismissed. Interim relief, if any is vacated. Rule is discharged.

30. In view of the order passed in the main matter civil applications are disposed of.

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*In favour of revenue.