

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 05.11.2012
PRONOUNCED ON: 20.11.2012

+ W.P.(C) 213/2012, C.M. APPL. 452/2012

COMMISSIONER OF INCOME TAX Petitioner

Through : Sh. Deepak Chopra, Sr. Standing Counsel with
Sh. Harpreet Singh Ajmani, Advocates.

versus

INCOME TAX SETTLEMENT COMMISSION Respondent

Through : Sh. Kaanan Kapoor, Advocate, for Respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V.EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. In this writ petition, the revenue challenges the impugned order passed by the Income Tax Settlement Commission (Commission, in short) dated 21.10.2011 whereby the Settlement Commission, by a majority of 2:1 admitted applications under section 245C, Income Tax Act, 1961 (the Act, in short) for settlement of cases even after the expiry of the time limit prescribed for making an order of assessment under section 143/144 of the Act.

2. In this view, the short question that arises for consideration in this writ petition is whether proceedings are to be deemed to remain

“pending” for the purposes of section 245A(b) when the time limit for completion of assessment under section 143 or section 144 has expired.

3. The brief facts of the case are that the second respondent (hereafter called the “assessee”) had filed returns in respect of four assessment years. The last date for completing scrutiny assessments as provided by the law expired on different dates. A tabular statement disclosing the relative assessment years, the dates on which returns were filed and the dates on which the time provided by law expired, is extracted below:

<i>Assesment Year</i>	<i>Date of filing return</i>	<i>Last date for completion of assessment</i>
2004-05	20.10.2004	31.10.2005
2005-06	19.10.2005	31.10.2006
2007-08	31.10.2007	31.10.2008
2008-09	26.09.2008	30.09.2009

4. In the above circumstances, on 05.08.2011, the assessee filed an application before the Settlement Commission seeking a settlement of its cases. By the impugned order dated 28.08.2011, overruling the objections of the petitioner, the Commission by a majority order (2:1) decided to entertain the settlement application. The Revenue had objected to the maintainability of the application, contending that the foundational condition, i.e. the need for a “case” to be pending before any Income Tax forum had not been fulfilled.

5. Learned counsel for the revenue contended that the Commission erred in law in admitting the application for settlement since there were no proceedings *pending* on the date on which the said application was filed. He drew the Court's attention to the definition of "case" as provided under section 245A(b) of the Act. It was contended that since there was no direction to the assessee to file a return, and more importantly, since the time period of 21 months prescribed as the period within which order of assessment under section 143/144 has to be made, had expired, there was no question of any proceeding remaining pending for the purposes of settlement by the Commission under Chapter XIXA. He also emphasized that since proceedings under Section 147 are specifically excluded from the ambit of "case", the time limit prescribed under making an order there under is irrelevant.

6. In support of his contentions, the revenue's counsel placed strong reliance on a decision passed by a Single Judge of the Calcutta High Court in *Outotech Group case* reported as *Director of Income Tax (International Taxation) Kolkata v. Income Tax Settlement Commissioner, Additional Bench, Kolkata & Anr.*, (2012) 1 CAL LT 309 (HC). Reliance was also placed on *Rambhai Jethabhai Patel v. Commissioner of Income Tax, Gujarat-I*, [1997] 108 ITR 771 (Guj) and *Fordham v. Clagett*, (1882) 20 Ch. D. 637 and *Asgarali Nazarali vs The State Of Bombay* AIR 1957 SC 503.

7. Learned counsel on behalf of the assessee, on the other hand, defended the majority view taken in the impugned order. He

underlined Explanation (iv) to section 245A(b) to suggest that a statutory fiction had been created in terms of which a case is deemed to have commenced on the first day of the assessment year and concluded on the date on which the assessment is made. It was moreover contended that the definition of assessment included reassessment, and that once a notice under Section 148 is issued for reopening an assessment, the assessee has to file a return again, as if such return were filed under Section 139. Based on this, it was contended that once such return under Section 139 is filed afresh, the period for making an order for assessment under Section 143 would renew. This would imply that even after expiry of the 'initial' period prescribed for making an assessment under Section 143/144, the period can be renewed after an assessee files his return afresh in terms of Section 149 read with Section 139. Therefore, submitted counsel, the intendment of the provisions was that proceedings must be deemed to remain "*pending*" even where no order under Section 143/144 is made within the prescribed time limit. In support of this argument, counsel placed reliance on *K.L. Varadarajan v. Commissioner of Income Tax, Madras*, AIR 1974 SC 2357.

8. This Court has considered the arguments advanced. Section 245A(b) reads as:

"245A.(b) "case" means any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of section 245C is made:

Provided that -

(i) a proceeding for assessment or reassessment or re-computation under section 147;

(iv) a proceeding for making fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or canceling an assessment' shall not be a proceeding for assessment for the purposes of the clause.

Explanation. - For the purposes of this clause -

(i) a proceeding for assessment or reassessment or re-computation referred to in clause (I) of the proviso shall be deemed to have commenced from the date on which a notice under section 148 is issued;

(ii) A proceeding for making fresh assessment referred to in clause (iv) of the proviso shall be deemed to have commenced from the date on which the order under section 254 or section 263 or section 264, setting aside or canceling an assessment was passed;

(iii) a proceeding for assessment or reassessment for any of the assessment years, referred to in clause (b) of sub-section (I) of section 153A in case of a person referred to in section 153A or section 153C, shall be deemed to have commenced on the date of issue of notice initiating such proceedings and concluded on the date on which the assessment is made.

(iv) A proceeding for assessment for any assessment year, other than the proceedings or assessment or reassessment referred to in clause (i) or [clause (iv) of the proviso or clause (iii) of the Explanation], shall be deemed to have commenced from the 1st day of the assessment year and concluded on the date on which the assessment is made;

9. At the very outset, this Court notices that exactly the same question has been answered by the Single Judge of the Calcutta High Court in *Outotech Group case* (supra). The reasoning and conclusion of the learned Single Judge is as under:

“31. If the aforesaid test is applied proceedings could only be said to be pending for as long as any proceedings could be taken, excluding proceedings under section 147 which consciously been excluded by Parliament in its wisdom.

32. An application [sic] appended to a section, to explain the meaning of words contained in that section, should normally be read to harmonize with and clear up any ambiguity in the main section and should not be construed to widen the ambit of the section.

33. It is difficult to accept the submission that Explanation iv to section 245A(b) is to be construed to provide that proceedings for assessment could only conclude with the passing of an assessment order of assessment and if no order of assessment was made, such proceedings would be deemed to continue for a period of six years and nine months from the end of the relevant assessment year, within which period an assessment could be made under section 147 after issuing a notice under section 148.

34. Construed literally, Explanation iv to section 245A(b) would give rise to absurdity, for proceedings would be deemed to continue eternally, if no order of assessment were made and no notice under section 148 were issued. The interpretation suggested by Dr. Pal that proceedings would be deemed to continue for a period of six years and nine months from the end of the relevant Assessment Year, within which period as assessment might be done under section 147, upon notice under section 148 would also involve some modification of the literal meaning of the Explanation iv to section 245A(b).

35. There can be no dispute with the proposition that where a strict and literal interpretation produces an absurd and unjust result, which could never have been the intention of the legislature, the Court might modify the language used by the legislature or do some violence to it so as to achieve the

obvious intention of the legislature and produce a rational construction.

36. As held in K. P. Varghese v. Income Tax Officer reported in 131 ITR 597 (SC) and as held by Lord Denning in (1969) 2 All. E. R. 912 and approved by the Supreme Court in AIR 1997 SC 1519 "whenever a statute comes up for consideration it must be remembered that it is not within the human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity. The question a Judge should ask himself is to how the makers of the Act would themselves have resolved the ruck? A Judge is not to alter material of which the Act is woven and should have to iron out the creases".

37. Since the legislature has, in its wisdom, very consciously excluded proceedings under section 147, from the purview of a settlement application, this Court ought not to interpret the expression 'case' in a manner that would in effect bring within the purview of a settlement application, something which has consciously been excluded by the legislature.

38. If two reasonable constructions of a taxing provision are possible, the construction which favours the assessee must be adopted. There can be no dispute with the proposition of law laid down by the Supreme Court in CIT v. Vegetable Products Ltd. reported in 88 ITR 192 (SC) 195. However, as observed above, literal construction of Explanation iv would give rise to absurdity. This Court meaningfully construes the said explanation to mean that pending assessment proceedings would conclude with an order of assessment, and where no order of assessment is made, the proceedings would lapse, when an order can no longer be made, by reason of expiry of the statutory time limit under section 153(1).

39. This Court is constrained to hold that irrespective of whether returns were filed or not, a case would be deemed to be pending but only for twenty one months from the end of the

assessing year in question, i.e. the period within which an assessment could have been made. Once the aforesaid time period expires, it cannot be said that the proceedings are pending.

40. If the time period to make an assessment had not expired on the date on which the settlement application was made, the commission might entertain and proceed with the same, irrespective of whether income tax returns had been filed or not. However, where the period of twenty one months from the end of the assessment year expired on the date of making of the application, the settlement application cannot be proceeded with.”

10. The expression “pending” in this case, has to be viewed contextually. In plain terms, it would mean when some case, cause or controversy is actually pending consideration before the assessment officer. In the facts of this case, the assessee filed its returns for four successive years; no notice under Section 143 (3) was issued. The AO lost jurisdiction to deal with those matters on the expiry of 21 months’ period reckoned from the date(s) when the returns were filed. In *Calcutta Discount Company Limited vs. Income-tax Officer & others*, AIR 1961 SC 372, the Supreme Court had ruled that an assessment proceeding commences from the date when the assessee files its return. The *terminus quo* therefore would be the last date by which the Assessing Officer can legally pass an order. Once that period lapses, the officer loses jurisdiction and authority to issue any order. The possibility of his issuing a notice under Sections 147/148 is in the realm of potential exercise of jurisdiction; till notice is actually issued, nothing is “pending” before the AO. Parliament consciously directed the tax

administrators not to entertain a settlement application, in cases when a reassessment notice is issued. Parliamentary intent having been expressed in clear terms, the Courts cannot, by adopting a strained interpretation, thwart it, by holding that in case a notice is issued, the assessee had to file a return, which will be considered a fresh return, in which case, a fresh period has to be reckoned, which in turn means that a case is pending. Fortunately, such a convoluted interpretation cannot be taken, because it would do violence to the plain words of the statute.

11. *Black's Law Dictionary*, VII Edition explains the term “pending” as follows:

"Pending, adj. 1. Remaining undecided ; awaiting decision (a pending case) 2. Parliamentary law. (Of a motion) under consideration : moved by a member and stated by the chair as a question for the meeting's consideration. See Consideration (2); On the Floor. A motion may be immediately pending, meaning that it is directly under consideration, being the last motion stated by the chair and next in line for a vote ; or it may be pending subject to other motions of higher rank that have taken precedence over it. See immediately pending motion under motion (2).

Pending, prep. 1. Throughout the continuance of; during (in escrow pending arbitrations) 2. While awaiting; until (the injunction was in force pending trial)."

12. *Stroud's Judicial Dictionary*, Edition 3, Volume 3, page 2141, defines “pending” in this manner:

"Pending : (1) A legal proceeding is 'pending' as soon as commenced and until it is concluded, i.e., so long as the court

having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein."

13. It can be clearly seen that there must exist a live cause or matter, which the concerned court or tribunal is capable of resolving through its determination. Conversely, something cannot be said to be "pending" if the judicial tribunal ceases to legally have jurisdiction over it.

14. In view of this position, this Court is agreement with the view taken by the Calcutta High Court. It is inconceivable how proceedings could have been deemed to continue indefinitely, in cases where no assessment order is made under Section 143/144 as in this case. Explanation (iv) to section 245A(b) cannot be construed so literally so as to leave the "proceedings" in limbo for an eternity. The rule prescribed in Section 153(1) must be given effect to despite Explanation (iv). It is clarified that Explanation (iv) merely casts the deeming provision in respect of assessments which can still be validly made. Where by application of Section 153, an assessment order can no longer be made, the proceeding, for purposes of section 245A, would have to be construed as terminated. This Court concurs with the reasoning employed, and authorities cited in the *Outotech Group case*. The case cited by the Commission's counsel i.e. *Varadarajan* (supra) is merely on the point that assessment would include re-assessment. This is anyway statutorily provided section 2(8) of the Act. This decision is of no assistance to the respondent's case. This Court also notices that the meaning of

“pending” as clarified in *Fordham v. Clagett* (supra) broadly applies in the facts of this case. The test indicated in *Fordham* is:

“A cause is said to be pending in a Court of justice when any proceeding can be taken in it”

This test was adopted by the Supreme Court in *Kumar Pashupatinath Malia and Anr. v. Deba Prosanna Mukherjee* AIR 1951 SC 447, and was followed in *Asgarali Nazarali* (supra). Applying this test, since no assessment order can be passed after the expiry of the prescribed time-limit, *no proceeding can be taken in it*. Moreover, proceeding for assessment/reassessment under section 147 are specifically excluded from the purview of “case” as defined under Section 245A(b). Thus, there is no question of proceedings of the type which are subject matter of this petition can be said to be “pending”.

15. In view of the aforesaid discussion, this Court holds that the impugned order of the Settlement Commission admitting the assessee’s application, was contrary to law. The impugned order is accordingly set aside. The writ petition is consequently allowed.

S. RAVINDRA BHAT
(JUDGE)

November 20, 2012

R.V.EASWAR
(JUDGE)