IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1208 OF 2016

Yashovardhan Birla .. Petitioner

v/s.

Deputy Commissioner of Income Tax,
Central Circle -4(1) & 3 Ors. .. Respondents

Mr. J.D. Mistri, Senior Counsel a/w Mr. Madhur Agarwal i/b Mint and Confreres for the petitioner
Mr. Anil C. Singh, Additional Solicitor General of India a/w Suresh Kumar, Ms. Indrayani Deshmukh and Ms. Samiksha Kanani for respondents

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.
DATED : 3rd AUGUST, 2016.

P.C.

1. At the specific request of the Counsel, the petition is taken up for final disposal at the stage of admission itself.

2. This petition under Article 226 of the Constitution of India challenges order dated 12th April, 2016 passed by the Income Tax Settlement Commission (the Commission) under Section 245D(1) of the Income Tax Act, 1961 (the Act). The impugned order dated 12th April, 2016 dismissed the petitioner's application for settlement under Chapter XIX A of the Act relating to Assessment Years 1989-99 to 2014-15.

3. This petition raises an interesting question :

When can an assessment be said to have been made, for the purpose of it ceasing to be pending assessment, so as to oust the jurisdiction of the Commission to entertain a settlement application ?

According to the petitioner, the issue is covered by the decision of this Court in ***Commissioner of Income Tax Vs. Income Tax Settlement Commission & Anr. 375 ITR 483*** (hereinafter referred to as ITSC) which holds that till such time the assessment order is served upon the assessee, the assessment proceedings are pending. Therefore, the Commission cannot refuse to entertain the application of settlement till such time the assessment order is served upon the applicant. This is contested by the Revenue on the ground that the above decision had no occasion to consider the plain words of the statute which provides that an assessment shall stand concluded on the date on which assessment is made. Thus, it is submitted that the service of order is irrelevant to decide whether the assessment (case) is pending with the Assessing Officer.

4. Before dealing with the rival contentions, the brief facts leading to this petition are adverted to as under :-

(a) On 7th January, 2014 a search was conducted on the petitioner and his premises. Consequent to above search, Notices were issued under Section 153A of the Act to the petitioner for Assessment Years 2008-09 to 2013-14. In response to the notices under Section 153A of the Act, the petitioner filed his Return of Income for Assessment Years 2008-09 to 2013-14. Further, the Assessing Officer also issued notices under Section 148 of the Act for Assessment Years 1998-99 to 2007-08 and 2014-15.

(b) As according to the petitioner, the assessments consequent to Section 153A and 148 of the Act were pending on 30th March, 2016 the petitioner filed an application for settlement under Section 245C of the Act for the Assessment Years 1998-99 to 2007-08 with the Commission. An acknowledgement for the receipt of the application for settlement was also given to the petitioner by the Commission.

(c) Thereafter in the evening of 30th March, 2016 itself the petitioner sought to serve a copy of the application for settlement filed by the petitioner with the Commission for the Assessment Years 1998-99 to 2014-15 with the Assessing Officer along with the intimation in the prescribed Form 34BA of the Income Tax Rules. However, the Assessing Officer did not accept a copy of the application for settlement and returned it with following handwritten endorsement thereon :

"Sri. O.P. Jain, Consultant appeared on behalf of Shri. Yash Birla to file the copy of application filed in Settlement Commission at 5.45 p.m.. Sri. O.P. Jain is informed that the assessment order in this case is already passed after receiving approval from Additional C.I.T., Central, Range-4 ….before afternoon... (illegible) ... Sd/-"

(d) In the above view, on 30th March, 2016 itself, the petitioner sent a copy of the settlement application on which the Assessing Officer had made endorsement along with prescribed intimation in Form 34BA at 7.30 p.m. by speed post. It was on 31st March, 2016, the assessment orders for A.Ys. 2008-09 to 2014-15 were issued and sent by Speed Post to the petitioner.

(e) Thereafter, the petitioner's application for settlement came up for admission before the Commission on 7th and 11th April, 2016 for orders under Section 245D(1) of the Act. At that stage, the Revenue appeared before the Commission and submitted that the application for settlement filed by the petitioner ought not to be entertained as the jurisdictional requirement of pending assessments was not satisfied on the date when the application for settlement was filed i.e. 30th March, 2016. This for the reason that the order of assessment was passed on 30th March, 2016 itself and the assessment were no longer pending.

(f) On 12th April, 2016, the Commission passed the impugned order at the stage of Section 245D(1) of the Act rejecting the application for settlement. This on the ground that there was no pending assessment before the Assessing Officer on 30th March, 2016, when the application for settlement was filed with the Commission.

5. Mr. Mistri, learned Senior Counsel for the petitioner in support of the petition submits:-

(a) The issue arising in this petition is no longer *res integra* as this Court in ITSC (supra) on an identical fact situation held that an assessment would cease to be pending before the Assessing Officer only when a copy of the assessment order has been served upon the assessee for the purposes of Chapter XIXA of the Act.

(b) The impugned order dated 12th April, 2016 of the Commission could not have rejected the application for settlement filed by the petitioner on 30th March, 2016. This is so as till that date, admittedly the assessment order was not served upon the petitioner; and

(c) The Commission itself on its website under the caption "Frequently Asked Questions" (FAQ) had specifically declared to all concerned that the *sine qua non* for approaching the Commission is that the assessment should be pending before the Assessing Officer. It further clarified that an assessment order would be considered to be pending till the date the same is served on the tax payer. This was undisputably so till 12th April, 2016, when the impugned order was passed. In the above view, it is submitted that the Commission is bound by the representation made by it as the petitioner has acted upon the same.

6. As against the above, Mr. Anil Singh, the learned Additional Solicitor General appearing for the Revenue contended as under :-

(a) The decision of this Court in ITSC (supra) would have no application to the present facts. This for the reason as the only issue canvassed before the Court was with regard to the question whether the service of the assessment order on the assessee therein was complete or not before filing of the application of settlement with the Commission for considering the words 'pending assessment'. The Court had no occasion in above case to consider the appropriate construction of the words "on the date on which the assessment is made" as found in Section 245A(b) Explanation (iiia) of the Act and its impact on the assessment being pending before the Assessing Officer. Therefore, the above decision does not bind this Court;

(b) The representations made by the Commission on its website under the caption "F.A.Q." as existing prior to 12th April, 2016 cannot have any bearing on deciding the question of law namely correct interpretation of Explanation (iiia) to Section 245A(b) of the Act. The understanding of the Revenue according to him cannot decide the correct position in law and no fault can be found with the impugned order dated 12th April, 2016.

(c) The Parliament in the Explanation (iiia) to Section 245(A)(b) of the Act has specifically used the words "the date on which assessment is made" in contrast to other provisions in the Act which provides for the assessment order to be "Served" as found in Section 249(2)(c) of the Act or date of communication as found in Section 253(3) of the Act for the purposes of computing limitation to file an appeal. Similarly, Section 148 of the Act providing for reopening of assessment uses the word "shall serve" and Section 149 of the Act which prescribes the time limit for issuing of notice invoking Section 148 of the Act, by use of the words "shall be issued". Thus, the Parliament has specifically in Explanation (iiia) to Section 245A(b) of the Act departed from the words "issued", served" or "communicated" which are normally found in the Act and used the words "the date on which assessment order is made". This change in the expression has to be given effect to; and

(d) Reliance was placed upon the Circular bearing No.16 of 2014 dated 17th November, 2014 issued by the Central Board of Direct Tax wherein the earlier Circular No.3 of 2008 has been modified. By this Circular it is made clear that the assessment shall be deemed to have been completed on the date when the assessment order is passed. This was in substitution to the earlier position in Circular No.3 of 2008 of date of service being taken as the date when the assessment order is made. These Circulars have been issued in the context of Chapter XIX A of the Act i.e. Settlement of Cases.

7. Before adjudicating upon the rival submissions, it would be useful to reproduce statutory provisions which falls for consideration as under :-

> *"245A In this Chapter, unless the context otherwise requires –*
> *(a) "Bench" means a Bench of the Settlement Commission*
> *(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.*
>
> *Explanation – For the purposes of this clause –*
> *(i) …..*
> *(ii) …..*
> (iii) …..
> *(iiia) a proceeding for assessment or reassessment for any of the assessment years, referred to in clause (b) of sub-section (1) 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 proceeding and concluded on the date on which the assessment is made;*
> (iv) *a proceeding for assessment for any assessment year,*

> *other than the proceedings of assessment or reassessment referred to in [clause(i) or clause (ii) or clause(iiia)], shall be deemed to have commenced [from the date on which the return of income for that assessment year is furnished under section 139 or in response to a notice served under section 142 and concluded on the date on which the assessment is made; or on the expiry of two years from the end of the relevant assessment year, in case where in assessment is made]"***.**

8. We find that the core dispute raised before us viz. what is the date on which the assessment is said to be made for the purpose of ousting the jurisdiction of the Commission under Chapter XIX A of the Act to entertain an application for settlement, was a subject of consideration by this Court in ITSC (supra).

9. In the facts before the Court in the above case of ITSC (supra), the assessment order was passed on 18th March, 2013 and sent by Speed Post on 18th March, 2013 and necessary entry was also made on the computerized system of the Department on 18th March, 2013. The assessee in the above case filed its application for settlement before the Commission on 18th March, 2013 i.e. before the assessment order was served upon the assessee, on 19th March, 2013. In the above facts, this Court held that the date of service and not the date of issuance of the order, would be considered to be the date on which the order of assessment was made. This was so held in the context of pending case

before the Assessing Officer for the Commission to entertain the application. The aforesaid decision of this Court also cited before the Commission. However, the impugned order distinguishes it on the ground that in the aforesaid decision, the Court has specifically stated that it was not required to consider any larger controversy on the effect of any amendment, which was made to the definition of word “case”. We were not able to understand the distinction sought to be made in the context of the dispute before the Commission in the present application for settlement. The learned Additional Solicitor General very fairly stated that the amendment to the word “case” which has been relied upon in the impugned order to distinguish the decision of this Court has no relevance to the present controversy. Thus, the principle laid down by this Court in ITSC (supra) viz. that assessment order is made when it is served for purposes of considering the jurisdiction of the Commission to entertain such an application is binding upon the Commission and upon the Revenue. In fact, we specifically asked the learned Additional Solicitor General whether decision of this Court in ITSC (supra) has been appealed before the Supreme Court. However, he was not in position to give a categorical answer. Therefore, we proceed on the basis that the above decision is in force, not having been stayed by the Apex Court.

10. However, the learned Additional Solicitor General persisted in submitting that decision in ITSC (supra) would not apply. This for the reason that the Court therein had had only to consider whether or not service of the order passed by the Assessing Officer was complete, before the assessee therein had filed its application for settlement with the Commission. It did not have occasion to deal with the submission now being urged by him that Explanation (iiia) of Section 245A(b) of the Act, when strictly construed would not mean service of the assessment order but would only mean making of the order. This submission in turn is supported by the Parliament making use of different words herein then that of "service", "issue" or "communicated" as used in the other provisions of the Act. Therefore, this difference in language must be given a meaning and it cannot mean "service". These distinctions now being raised are of no avail as the Revenue had raised this very issue viz. the assessment was not pending on the date the application of settlement was filed with the Commission in ITSC (supra). This is evident from the following extracts therefrom :-

> *"7. The assessment order dated March 18, 2013, for the assessment year 2010-11* <u>*was not only passed*</u> *but also sent to the assessee-firm through registered speed post on March, 18,*

2013, itself and the necessary entry on the computerised system of the Department (AST) was also made on March 18, 2013, itself.

11. *In the report of the petitioner, filed under Section 245D(2B) of the Income-tax Act, it was brought to the notice of the Settlement Commission that there was no pending assessment for the assessment year 2010-11 as the assessment order was already issued before the filing of the settlement application under Section 245C of the Income-tax Act.*

13. ……. Thus, when a notice had been served and assessment order has been passed for two assessment years referred to above, the Settlement Commission had no jurisdiction to accept the application.

20. In the rejoinder, Mr. Chhotaray submits that the present writ petition questions the jurisdiction of the Settlement Commission to entertain the application and which was not meeting the requirements set out in law. If the statutory requirements are not complied with, then the Settlement Commission must dismiss the application at the threshold. In the present case, the Settlement Commission has erred in not noticing the fact that the assessment order is already passed and served on the assessee.

28. …. The term "case" is defined in Section 245A(b) to mean 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.

30. ….. *For the assessment year 2010-11, the notice under Section 143(2) was issued as above* *but the assessee's representative pointed out that the Assessing Officer passed the order on March 18, 2013, and on the date on which the application before the Settlement Commission was filed, a copy of the order has not been served on the applicant-second respondent".*

(emphasis supplied)

11. Therefore, the aforesaid issue was a subject matter of consideration including the definition of case as defined in Section 245A(b) of the Act, which contains the Explanation which specifies the date on which it (assessment order) is made to be the date when it ceases to be pending. The very issue urged by the Revenue before us, was subject of consideration before the Court as is noticed in paragraph nos. 7, 13, 20 and 28 as reproduced above. Therefore, the aforesaid decision can by no stretch be considered to have been rendered *sub-silentio*. A decision would be *sub-silentio* when a point does not fall for consideration. In the above case, this Court was concerned with the point / issue of when an assessment order was made for purposes of Chapter XIX A of the Act. In fact, this is an attempt by the Revenue to reopen a principle laid down by a co-ordinate bench of the Court and disturb the law of precedent. An authority i.e. a decision of the Court

does not lose its binding value as a precedent, merely because according to one of the parties (in this case the Revenue was also a party to the earlier proceedings) an issue had been inadequately argued. There is a difference between inadequately argued and not argued at all for the reason that the issue did not arise for decision.

12. In any event, the Rule of Law requires like cases to be decided alike. Therefore, the law of precedents. This Court in ITSC (supra) has declared that for purposes of making an application for settlement, a case i.e. an assessment would be pending till such time as the assessment order is served upon the assessee. The declaration of law by this Court is binding on all authorities within the State including the Commission. The petitioner was entitled to proceed on the basis that till the service of the assessment order, the case continues to be pending with the Assessing Officer. Therefore, it was open to him to invoke the provisions of Chapter XIXA of the Act on 30th March, 2016 as till that date the assessment order was not served upon him.

13. Moreover, the petitioner brought to our notice that even the Commission had on its website represented that an application for settlement could be filed with it, till such time the assessment order is

served upon the petitioner. By this representation under caption F.A.Q., the Commission admittedly held out that an application for settlement would be accepted till service of the assessment order. Admittedly, this representation was made till the impugned order was passed on 12th April, 2016. We find that in the present facts, the petitioner was entitled to act upon the above representation. It is not fair for the State to now take up the stand that on the proper interpretation of the provisions of law, the representation made by it is not in accordance with law. At the very highest, even according to the Revenue, the issue is not clear as it is subject to interpretation, at the very least, therefore, the Commission must be held bound by its representation. As it was its understanding on interpretation of Chapter XIX A of the Act. In any case, the petitioner could not be prejudiced for acting in terms of the representation. We are informed that the above representation is withdrawn by the Commission post 12th April, 2016. Therefore, on the above ground also in the present facts, the impugned order is not sustainable.

14. The learned Additional Solicitor General also sought to support the impugned order of the Commission on the basis that CBDT Circular No.14 of 2014 which clarifies that for the purpose of Chapter XIXA of

the Act, an assessment would cease to be pending case, when an assessment order is passed. This is in substitution of the earlier Circular No.3 of 2008 which provided that an assessment order would be said to have been made only on it being served upon the assessee for the purpose of Chapter XIX A of the Act. There is no merit in the above submission. Firstly, a CBDT Circular cannot overrule a decision of a Court of law. Secondly, this Circular was available when this Court rendered the decision in ITSC (supra) and yet it does not seem to have relied upon. This possibly for the reason that a CBDT Circular interpreting a statutory provision is binding upon the Officers of the Revenue only when it is beneficial to the assessee and not otherwise.

15. It needs to be pointed out that Mr. Mistri, the learned Senior Counsel during the course of his submission placed reliance upon the decision of the Kerala High Court in ***Commissioner of Agricultural Income-Tax Vs. Kappumalai Estate 234 ITR 187.*** The Kerala High Court in the above case, consider an identical provision also found in Section 35(2) of the Agricultural Income Tax which provided that no order of assessment and / or reassessment shall be made after the expiry of four years from the end of the year for which the agricultural income was first assessable. The Court held that to make the order

complete and effective it should be issued so as to be 'beyond the control' of the authority concerned for any possible change or modification. In this case, admittedly, the assessment order was issued on 31st March, 2016 by the Assessing Officer. Therefore, it is submitted that even on the test of issue of the assessment order, the application for settlement was made to commission before the date of issue. On the other hand, the learned Additional Solicitor General also placed reliance upon the decision of the Madras High Court in ***Rm.P.R. Viswanathan Chettiar Vs. Commissioner of Income-tax, 25 ITR 79*** wherein the period within which the assessment order had to be passed / made was to be not more than 4 years from the closing of the relevant assessment year. The contention of the assessee therein was that making of the order would be only when it was communicated to the assessee. However, the Madras High Court negatived the same by holding that the assessment would be completed / made when the assessment is completed by the Assessing Officer and not when the order of assessment was communicated to the assessee.

16. However, we need not dilate on the above two decisions cited at the Bar as the controversy before this Court stands concluded by a binding decision of a co-ordinate bench of this Court in ITSC (supra)

which holds that the assessment order for purposes of Chapter XIX A of the Act can be said to have been made when it is served upon assessee concerned. This considered view of a co-ordinate bench was rendered keeping in view the object and purpose of introducing Chapter XIX A into the Act i.e. Settlement provisions. We see no reason to differ from the above view.

17. Therefore, the impugned order dated 12th April, 2016 of the Commission being Exh.G. to the petition is quashed and set aside. The application for settlement is restored to the file of the Commission at the stage of 245D(1) of the Act. The period of 14 days as provided in Section 245D(1) of the Act, will run from the date this order is first communicated by either of the parties to the Commission.

18. Petition disposed of in the above terms. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**