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

+ **WP(C) 10313/2016**

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Reserved on: 30th November, 2018
Pronounced on: 17th January, 2019

**ORCHID INFRASTRUCTURE
DEVELOPERS PVT. LTD**

..... Petitioner

Through: Mr.Sameer Rohtagi with Mr.Akshit
Pradhan, Advocates

Versus

UNION OF INDIA & ORS.

..... Respondent

Through: Mr.Ruchir Bhatia, Advocate for the
Revenue

WP(C)12151/2016

AJAY KUMAR GUPTA & ORS.

..... Petitioner

Through: Mr.Sameer Rohtagi with Mr.Akshit
Pradhan, Advocates

Versus

UNION OF INDIA & ORS.

..... Respondent

Through: Mr.Kavindra Gill, Adv. for
respondent No.1 - UOI
Mr.Zoheb Hossain, Sr. St. Counsel & Mr.Piyush
Goyal, Advocate for Revenue

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J.

The aforecaptioned writ petitions raise a common issue of liability of the petitioners to pay interest under sub-section (2A) to Section 234B of the Income-Tax Act, 1961 ('Act' for short) and hence, we deem it appropriate and decide the same by this common judgment.

2. We would only notice the facts in brief as a legal issue relating to interpretation of sub-section (2A) to Section 234B arises and has to be decided. Sub-Section (2A) was inserted in Section 234B by Finance Act, 2015 with effect from 1st June, 2015.

WP(C)NO.12151/2016 [AJAY KUMAR GUPTA & ORS.]

3. The petitioners herein, 13 in number, had filed an application under Section 245 C (1) of the Act before the Settlement Commission on 14th May, 2015, which application was allowed to be proceeded with vide order dated 28th May, 2015 under Section 245 D (1) of the Act. The petitioners at the time of filing of the application had paid tax and interest payable on the additional or undisclosed income as mentioned in the applications.

4. The Settlement Commission by its final order dated 29th November, 2016 under Section 245 D (4) settled the case and had directed levy of interest on the enhanced amount under sub-section (2A) to Section 234 B of the Act.

W.P.(C) No. 10313/2016 [Orchid Infrastructure Developers Pvt. Ltd.]

5. Petitioner had filed an application for settlement under Section 245 C (1) of the Act before the Settlement Commission on 30th April, 2015. The said application was admitted by the Settlement Commission vide order

dated 8th May, 2015 under Section 245 D (1) of the Act. As noticed above, sub-section (2A) to Section 234 B was enacted and inserted in the statute by Finance Act, 2015 with effect from 1st June, 2015. The Settlement Commission vide its order dated 16th September, 2016 under Section 245 D (4) of the Act had settled the case, whereby further addition of Rs.17,40,82,296/- was made to the amount already disclosed to the Settlement Commission. Accordingly, the petitioner would be liable to pay tax on the enhanced amount. To this extent, however, there is no dispute. The dispute pertains to direction of the Settlement Commission for charging of interest on the additional tax payable under sub-section (2A) to Section 234 B, which it is stated amounts to Rs.1,98,66,722/-.

Submissions.

6. The *primary* contention of the petitioner is that sub-section (2A) to Section 234 B introduced by the Finance Act, 2015 is not retrospective and would not be applicable as the petitioner had filed the application for settlement before sub-section (2A) to Section 234B was enacted. Hence the petitioners' applications for settlement were governed by the law on the Statute Book i.e. the Income Tax Act as on the date when the applications were filed. It is contended that levy of interest, even if compensatory, is substantive and not procedural in nature as was held by the Supreme Court in *J.K. Synthetics Limited Vs. Commercial Taxes Officer* (1994) 4 SCC 276. Insertion of sub-section (2A) to Section 234B cannot be construed as declaratory or clarificatory since the Supreme Court had interpreted and held in *Brij Lal and Ors. Vs. Commissioner of Income-Tax, Jalandhar* (2011) 1 SCC that interest under Section 234B is applicable upto the stage

of Section 245 D(1) and not upto the stage of Section 245 D (4) of the Act. This was notwithstanding the legal position that interest under Section 234B of the Act was payable upto the date of the order under Sections 143 (1), 143 (3) and 144 of the Act. The reason is that there is difference between assessment in law, be it regular, re-assessment or intimation under Section 143 (1); and assessment by settlement under Chapter XIX-A of the Act. Clause 56 of the Explanatory Note pertaining to the provisions of the Finance Act, 2015 states that insertion of Section 234B (2A) was not retrospective.

7. On the question of retrospective legislation reference was made to the observations of the Supreme Court in the Constitution Bench decisions in *Commissioner of Income-Tax (Central)-I New Delhi Vs. Vatika Township Private Limited* (2015) 1 SCC and *Director General of Foreign Trade and Anr Vs. Kanak Exports & Anr.* (2016) 2 SCC 226.

8. We begin first by referring to the provisions of Section 234 B of the Act, which reads as under:

“234B. (1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the

case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

Explanation 1.—In this section, "assessed tax" means the tax on the total income determined under sub-section (1) of section 143 and where a regular assessment is made, the tax on the total income determined under such regular assessment as reduced by the amount of,—

(i) any tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income;

(ii) any relief of tax allowed under section 90 on account of tax paid in a country outside India;

(iii) any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;

(iv) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and

(v) any tax credit allowed to be set off in accordance with the provisions of section 115JAA or section 115JD.

Explanation 2.—Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 3.—In *Explanation 1* and in sub-section (3) "tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

(2) Where, before the date of determination of total income under sub-section (1) of section 143 or completion of a regular assessment, tax is paid by the assessee under section 140A or otherwise,—

(i) interest shall be calculated in accordance with the foregoing provisions of this section up to the date on which the tax is so

paid, and reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section;

(ii) thereafter, interest shall be calculated at the rate aforesaid on the amount by which the tax so paid together with the advance tax paid falls short of the assessed tax.

(2A) (a) where an application under sub-section (1) of section 245C for any assessment year has been made, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of making such application, on the additional amount of income-tax referred to in that sub-section;

(b) where as a result of an order of the Settlement Commission under sub-section (4) of section 245D for any assessment year, the amount of total income disclosed in the application under sub-section (1) of section 245C is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of such order, on the amount by which the tax on the total income determined on the basis of such order exceeds the tax on the total income disclosed in the application filed under sub-section (1) of section 245C;

(c) where, as a result of an order under sub-section (6B) of section 245D, the amount on which interest was payable under clause (b) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly;

(3) where, as a result of an order of reassessment or recomputation under section 147 or section 153A, the amount on which interest was payable in respect of shortfall in payment of advance tax for any financial year under sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April next following such financial year and ending on the date of the reassessment or recomputation under section 147 or section 153A, on the amount by which the tax on the total income

determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the regular assessment as referred to in sub-section (1), as the case may be;

(4) where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264, the amount on which interest was payable under sub-section (1) or sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and—

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded;

(5) the provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.”

As noticed above, sub-section (2A) to Section 234 B of the Act was inserted by the Finance Act, 2015 with effect from 1st June, 2015. We have to examine whether the inserted sub-section (2A) would be applicable to pending applications before the Settlement Commission as on the date of insertion i.e. 1st June, 2015, or sub-section (2A) would only apply to settlement applications filed after insertion of sub-section (2A) to Section 234B on 1st June, 2015. In other words, we have to examine whether the said Sub-Section would be applicable to pending cases.

9. We begin by elucidating on the object and the scheme of levy of interest under Section 234 B of the Act. Section 234 B, in clear terms, imposes a mandate to pay interest at the rates stipulated, on failure or

shortfall in payment of advance tax. The expression 'shall' used in the said section makes levy of interest mandatory and the levy of interest is not discretionary or optional.

10. Dispute had arisen whether the Settlement Commission could waive mandatory interest under Section 234 B or under similar provisions, namely Section 234A and Section 234C of the Act. Examining the three sections as well as the power of settlement as contemplated in Chapter XIX-A of the Act, a Constitution Bench of the Supreme Court in ***Commissioner of Income Tax Vs. Anjum M.H. Ghaswala & Ors.*** (2001) 252 ITR 1 held that Settlement Commission had not been expressly or impliedly conferred the power to waive or reduce the mandatory interest contemplated under Section 234 A, Section 234 B and Section 234 C of the Act. Reduction of interest under the said Section is outside the purview of the Settlement Commission. Reliance placed by the assessee on Sub-Section (6) to Section 245-B was rejected by the Supreme Court observing that the said provision was only procedural in nature since it provides fixing of the terms by which the amount settled in terms of Sub-Section (4) to Section 245D will have to be paid. The said Sub-Section did not empower the Settlement Commission to either waive or reduce the interest either under Sub-Sections 234 A, 234 B or 234 C of the Act. The mandate of Sub-section (4) to Section 245 D requires the final settlement order should be in conformity with the Act and not contrary to/or in conflict with the provisions of the Act. Object of settlement was not to give amnesty to a tax-evader and hence, it would be preposterous to hold that the Settlement Commission has power to either waive or reduce the tax or the mandatory interest due and payable in accordance with the provisions of the Act. However, the Settlement

Commission can take notice of the Circular issued under Section 119 (2) of the Act to relax the rigors of Sections 234A, 234B and 234C while passing the order of Settlement. But, while doing so, the Settlement Commission cannot act and exercise power conferred on the Board under Section 119 (2) of the Act.

11. As noticed above, the petitioners have placed reliance on the decision of the Supreme Court in *Brij Lal and Ors.* (*supra*). At the outset we must record that the Supreme Court in the said case has examined and answered the following question:

“2. For the sake of convenience, after hearing the learned counsel on both sides, we reframe the above questions:

(I) Whether Section 234B applies to proceedings of the Settlement Commission under Chapter XIX-A of the said Act?

(II) If answer to the above question is in the affirmative, what is the terminal point for levy of such interest — whether such interest should be computed up to the date of the order under Section 245-D(1) or up to the date of the order of the Commission under Section 245-D(4)?

(III) Whether the Settlement Commission could reopen its concluded proceedings by invoking Section 154 of the said Act so as to levy interest under Section 234B, though it was not so done in the original proceedings?”

Question no.II which is of relevance and importance for our decision refers to the terminal point for levy of such interest under section 234B of the Act. The issue raised before the Supreme Court was whether interest should be computed upto the date of order under Section 245 D (1) or upto the date of the order under Section 245D (4) of the Act? The Supreme Court was not examining and answering the question i.e. the quantum of total income on

which interest under Section 234B would be payable. The reason was that the issue with regard to quantum or amount of tax on which the interest would be payable was not the subject matter before the Supreme Court. *Anjum M.H. Ghaswala*(*supra*) decided by the Supreme Court was also a decision of the Constitution Bench of five judges and was earlier in point of time had held that levy of interest under the three sections was mandatory. It is in this context we have reproduced paragraph 2 of the judgment passed in *Brij Lal and Ors.* (*supra*), in which the Supreme Court had specifically and carefully recorded the questions posed and answered them. We have quoted Section 234 B and Sub-Section 4 to the said Section as originally enacted, which states that increase or reduction of interest subsequent to an order of Settlement Commission under Section 235 D (4) would be made, depending upon the increase or reduction of amount of tax payable.

12. The legal issue and question posed in paragraph 2 and answer being confined to the legal issue was subsequently again noticed by the Supreme Court in paragraph 16 in their judgment in *Brij Lal and Ors.* (*supra*), which reads as under :

“16. On the other hand, interest for defaults in payment of advance tax falls under Section 234B, apart from Sections 234-A and 234-C, in Part F of Chapter XVII. Thus, levy of interest is incidental to the liability and computation of advance tax. It is interesting to note that Section 234-A(4) in turn refers to the increase or reduction of interest subsequent to the order of the Commission under Section 245-D(4) increasing or reducing the amount of tax payable and so also Section 234B(4).”

Thereafter referring to question no.II and the answer given, the Supreme Court observed that an application under Section 245 C (1) for settlement is

not maintainable without full and true disclosure of income and the manner in which such undisclosed income is derived. The applicant has to pay additional tax and interest due thereon while making an application, as per Section 245 C (1B) of the Act. The words 'regular assessment' were not to be found in Section 245-C (1B). Further under Section 245 D (2A), the applicant is required to pay additional amount of income-tax payable on the income disclosed in the application within 35 days of receipt of the copy of the order passed by the Settlement Commission under Section 245 D(1), allowing the application to be proceeded with. The aforesaid observations made in paragraph 20 of the judgment were with reference to the provisions of law then applicable as the Supreme Court was not examining the insertion by Finance Act, 2010, that are applicable in the present cases. The Supreme Court on analysis of Sub-Sections 1 and 4 to Section 245 D has held that there were two distinct stages, one allowing the application to be proceeded with or rejected, and the other of disposal of the application by appropriate orders being passed by the Settlement Commission. Order under Section 245D (4) is final and conclusive as to the matter contained therein and cannot be reopened except in the case of fraud or misrepresentation. Referring to Sections 245 C (1B) and (1C) which stipulate that additional amount of Income-tax payable on undisclosed income shall be on the total income as calculated under Section 245 C (1B), it was held that interest flows on such computation. Sub-section (2) to Section 234 B deals with a situation where before determination of total income under Sections 143 (1), 143(3) etc., interest has to be calculated in accordance with Section 234 B (1) on the date when the tax is paid. In this sense application under Section 245C(1) is a return. It was further held:

“34. There is one more way of looking at the Act. Chapter XIX-A refers to the procedure of settlement [see Section 245-D(1)]. As stated above, Section 245-D(1) provides for expeditious recovery of tax by way of pre-assessment collection. Interest on default in payment of advance tax comes under Sections 234-A, 234-B, 234-C, which fall in Chapter XVII which deals with collection and recovery of tax. It is important to note that interest follows computation of additional payment of income tax under Sections 245-C(1-B) and (1-C). This is how Sections 234-A, 234-B and 234-C get engrafted into Chapter XIX-A at the stage of Section 245-D(1).

36. The question is — what happens in cases where 90% of the assessed tax is paid but on the basis of the Commission's order under Section 245-D(4) the advance tax paid turns out to be less than 90% of the assessed tax as defined in the Explanation to Section 234-B(1)?

37. As held hereinabove, under Section 245-C(1) read with Section 245-C(1-B)(ii) and Section 245-C(1-C)(b), the additional amount of income tax payable is to be calculated on the aggregate of total income returned and the income disclosed in the settlement application as if such aggregate is the total income. Thus, the scheme of the said sections is based on computation of total income and in that sense we have stated that such application for settlement is akin to a return of income. The said provision deals with “total income”. Thus, as stated above, Sections 234-A, B and C are applicable up to the stage of Section 245-D(1) order passed by the Settlement Commission. However, Parliament has not extended the provisions and the liability to pay interest beyond the date of application for settlement. This is the position even after the Finance Act of 2007.

39. Moreover, as stated above, under the Act, there is a difference between assessment in law [regular assessment or assessment under Section 143(1)] and assessment by settlement under Chapter XIX-A. The order under Section 245-D(4) is not an order of regular assessment. It is neither an order under Section 143(1) or Section 143(3) or Section 144. Under Sections 139 to 158, the process of assessment involves the filing of the return under Section 139 or under Section 142; inquiry by the AO under Sections 142 and 143 and

making of the order of assessment by the AO under Section 143(3) or under Section 144 and issuing of notice of demand under Section 156 on the basis of the assessment order. The making of the order of assessment is an integral part of the process of assessment. No such steps are required to be followed in the case of proceedings under Chapter XIX-A. The said chapter contemplates the taxability determined with respect to undisclosed income only by the process of settlement/arbitration. Thus, the nature of the orders under Sections 143(1), 143(3) and 144 is different from the orders of the Settlement Commission under Section 245-D(4).

40. Even in *CIT v. Anjum M.H. Ghaswala* [(2002) 1 SCC 633 : (2001) 252 ITR 1] there is no finding by this Court that the order of the Settlement Commission under Section 245-D(4) is an order of assessment under Section 143(3) or under Section 144. In *Ghaswala case* [(2002) 1 SCC 633 : (2001) 252 ITR 1] the only question decided by this Court is that the interest under Section 234-B is mandatory in nature and that the Settlement Commission, therefore, had no authority to waive it.

41. Further, as stated above, the jurisdiction of the AO is not fettered merely because the applicant has filed the settlement application. The Act does not contemplate stay of the proceedings during that period i.e. when the Settlement Commission is deciding whether to proceed or reject the settlement application. The jurisdiction of the Settlement Commission to proceed commences only after an order is passed under Section 245-D(1). That, after making an application for settlement the applicant is not allowed to withdraw it [see Section 245-C(3)]. Once the case stands admitted, the Settlement Commission shall have exclusive jurisdiction to exercise the powers of the Income Tax Authority.”

13. In view of the aforesaid discussion we hold that in ***Brij Lal and Ors.*** (*supra*), the Supreme Court has laid down that the terminal point for levy of interest would be the order under Section 245 D(1) of the Act. However, the Supreme Court in this decision did not deal with the issue in question

namely on the quantum of tax on which interest would be paid. The Supreme Court did not therefore hold that the quantum of tax would not determine the interest. This would necessarily follow from sub-section (6) to Section 245 D under which the computation sheet is made following the order under Section 245 D (4) of the Act. The computation-sheet under Sub-Section (6) to Section 245 D has to separately compute the tax payable which could in a given case include the enhanced amount as well as interest due on the said amount.

14. Counsel for the petitioner is correct in its proposition that imposition of interest, even if compensatory would be substantive enactment and not a mere procedural change, as was held by the Supreme Court in ***J.K. Synthetics Limited*** (*supra*), and as is clear from paragraph 16 of the judgment which reads as under:

“6. Now Section 7(2) says that every ‘such’ return, meaning thereby the return referred to in Section 7(1), shall be accompanied by a receipt showing the deposit of the full amount of tax due “on the basis of the return”. In other words the dealer is required to pay the full amount of tax that becomes due on the basis of the particulars in regard to the turnover and taxable turnover disclosed in the return. Sub-section (2-A) begins with a non obstante clause, namely, notwithstanding anything contained in sub-section (2), and provides that any dealer or class of dealers specified in the notification may pay the tax at intervals shorter than those prescribed under sub-section (1), in which case the tax shall be deposited at the intervals specified in the notification in advance of the return and the return shall be accompanied by the receipt for the full amount of tax due “shown in the return”. Although the phraseology used in sub-sections (2) and (2-A) of Section 7 is

not the same, the content and purport of the two sub-sections is more or less identical, namely, both the sub-sections require that the return shall be accompanied by a receipt evidencing the deposit of the “full amount of tax due” on the basis of the return or on the basis of the information shown in the return. The full amount of tax due and payable prior to the submission of the return is clearly relatable to the information furnished in the return. Undoubtedly, the information to be furnished in the return must be “correct and complete”, that is, true and complete to the best of knowledge and belief; without the dealer being guilty of wilful omission. This is the essence of the verification clause found at the foot of Form ST 5. Rule 25 expects the verification of the return to be in the manner indicated in Form ST 5. Therefore, on a conjoint reading of Section 7(1), (2) and (2-A), Rule 25, the information to be furnished under Form ST 5 and the form of verification, it becomes clear that the dealer must deposit the full amount of tax due on the basis of information furnished, which information must be correct and complete to the best of the dealer's knowledge and belief without he being guilty of wilful omission. If the dealer has furnished full particulars in respect of his business, without wilfully omitting or withholding any particular information which has a bearing on the assessment of tax, which he honestly believes to be “correct and complete”, it would be difficult to hold that the dealer had not acted “bona fide” in depositing the tax due on that information before the submission of the return. Of course the tax so deposited is to be deemed to be provisional and subject to necessary adjustments in pursuance of the final assessment. Section 7-AA empowers levy of penalty if the assessing authority is satisfied that any dealer has “without reasonable cause” failed to furnish the return under Section 7(1) within the time allowed. The use of the words “without reasonable cause” clearly implies that if the

dealer can show reasonable cause for his lapse he cannot be visited with the penalty prescribed by Section 7-AA. To put it differently if reasonable cause is shown by the dealer for the lapse, he cannot be visited with penalty under this provision. This is also suggestive of the fact that the legislature desired to be harsh with wilful defaulters or those guilty of wilful omission of material information and not with dealers who failed to supply some information under the “bona fide” belief that the same was not necessary or those who had failed to pay the full tax due not with a view to evading or avoiding the liability to pay the tax but because they bona fide believed that they were liable to pay the tax assessed by them on the basis of the return and no more. If at a later date on the basis of a different interpretation put on the language of the relevant provisions of the law, the dealer becomes liable to pay tax in excess of that already paid, he may be called upon to make good the difference but he cannot be visited with penalty under Section 7-AA unless it is shown that the dealer had withheld payment of the differential tax by wilfully withholding material information or had acted without reasonable cause in committing the default. The assessee, therefore, contends that there was no wilful omission in not including the freight charges in the price of the commodity on the basis whereof the tax was assessed before filing of the returns; on the contrary, contends the assessee, it had acted “bona fide” having regard to the ratio of this Court's decision in *Hyderabad Asbestos Cement Products Ltd. v. State of A.P.* [(1969) 24 STC 487 : (1969) 1 SCWR 560] Counsel for the Revenue, however, points out that considerations for the levy of penalty under Section 7-AA are different from those which guide the recovery of interest under Section 11-B and while in a given case levy of penalty may not be permissible, recovery of interest on unpaid tax amount may still be justified.”

15. Counsel for the petitioner is also correct in his submission that the amendment and insertion of sub-section (2A) to Section 234 B is not declaratory or clarificatory in nature as was asserted by counsel for the respondents. The reason is simple and clear that Section 234 B was interpreted by the Constitution Bench in ***Brij Lal and Ors.*** (*supra*), and the said declaration of law would be binding on the authorities. Legislation could not, by a clarification or declaration over-turned and over-ruled decision of the Supreme Court in ***Brij Lal and Ors.*** (*supra*), interpreting the applicable statutory provisions i.e. Section 234 B read with provisions of Chapter XIX-A of the Act. Legislature in this case did not amend the Statute with retrospective effect to change the law with retrospective effect [See ***National Agricultural Cooperative Vs. Union of India & Anr.***, (2003) 260 ITR 458 (SC)].

16. This brings us to the moot question; whether the amendment inserted by the legislature through Finance Act, 2015 enacting sub-section (2A) to Section 234B would be applicable to pending proceedings before the Settlement Commission. Law in this regard appears to be well settled. We would begin by referring to the decision of the Constitution Bench in ***Mohanlal Jain Vs. His Highness Maharaja Shri Sawai Mansinghji***, AIR 1962 SC 73, which had examined the question whether Section 87B inserted by Section 12 of the Code of Civil Procedure (Amendment) Act, 1951, stating that provisions of Section 85 and Sub-sections (1) and (2) of Section 86 of the Code would apply to the rulers of former Indian States would apply prospectively or would even apply to pending suits. On principles discernible on the question of retrospectivity of law, reference was made to ***United Provinces Vs. Atiqa Begum's*** case 1940 F.C.R. 1102 to observe that

when vested rights are affected amended law should not be presumed to be retrospective and that the rights of the parties to an action would ordinarily be determined in accordance with law as it stood on the date of commencement of the action. The above rule is however subject to the second rule as pointed out by the Privy Council in ***K.C. Mukherjee Vs. Mst. Ram Ratan Kuer*** (1935) I.L.R. 15 (Patna) that the language of the enactment might be sufficient to rebut the first principle. When the language of the enactment includes pending actions the second principle would apply i.e. the amending enactment would apply to pending cases unless the enactment itself says that the pending actions are saved. In the context of section 87B of the Code the expression ‘sued’ used in past tense in the enactment was to include and cover the entire proceedings in action i.e. even pending proceedings. We would like to reproduce the relevant portion of the said judgment :

“15. It is next contended that Section 87-B only applies the provisions of sub-sections (1) and (3) of Section 86, that the words of the latter section are not retrospective, that the suit was filed before the enactment of Section 87-B, and that the substantive right of the plaintiff to continue his suit could not be taken away in the absence of express language or clear intendment. The words of Section 86(1) are “No Ruler of a foreign State may be sued in any court....” “This precludes, it is said, only the initiation of a suit and not the continuance of a suit already filed before the section was enacted. In our opinion, these arguments cannot be accepted. The word “sued” means not only the filing of a suit or a civil proceeding but also their pursuit through Courts. A person is sued not only when the plaint is filed, but is sued also when the suit remains pending against him. The word “sued” covers the entire proceeding in an action, and the person proceeded against is sued throughout the duration of the action. It follows that

consent is necessary not only for the filing of the suit against the ex-Ruler but also for its continuation from the time consent is required. In view of the amplitude of the word “sued”, it is not necessary to consider generally to what extent pending cases are affected by subsequent legislation or refer to the principles laid down in *United Provinces v. Atiqa Begum* [(1940) FCR 110], *Venugopala Reddiar v. Krishnaswamy Reddiar* [(1943) FCR 39] or *Garikapatti Veeraya v. N. Subbiah Choudhury* [(1957) SCR 488] . If the language of Section 86 read with Section 87-B were applicable only to the initiation of a civil suit, these cases might have been helpful; but since the words “may sue” include not only the initiation of a suit but its continuation also, it is manifest that neither the suit could be filed nor maintained except with the consent of the Central Government. In *Atiqa Begum case* [(1940) FCR 110] Varadachariar, J., referred to the two principles applicable to cases where the question of retrospectivity of a law has to be considered. They are that vested rights should not be presumed to be affected, and that the rights of the parties to an action should ordinarily be determined in accordance with the law, as it stood at the date of the commencement of the action. But, the learned Judge pointed out that the language of the enactment might be sufficient to rebut the first, and cited the case of the Privy Council in *K.C. Mukherjee v. Mst Ram Ratan Kuer* [(1935) ILR 15 Pat 268] . Here, the matter can be resolved on the language of the enactment. The language employed is of sufficient width and certainty to include even pending actions, and the contrary Rule applies, namely, that unless pending actions are saved from the operation of the new law, they must be taken to be affected. The word “sued”, as we have shown, denotes not only the start but also the continuation of a civil action, and the prohibition, therefore, affects not only a suit instituted after the enactment of Section 87-B but one which, though instituted before its enactment, is pending. In our judgment, the present suit was incompetent against the first defendant, the ex-Ruler of Jaipur.”

17. The aforesaid dictum and principle was earlier elucidated in *Shyabuddinsab Mohidinsab Akki Vs. The Gadag-betgeri Municipal Borough & Ors.* AIR 1955 SC 314 wherein the question whether the amendments would be retrospective as to cover and affect the pending proceedings it was held should be answered with reference to the Statute enacted. Further, express words are not required in the amending Statute to the effect that the amendments shall apply to the pending proceedings also. On the other hand reference was made to the dictum of Lord Reading C.J. in the case of *The King Vs. The General Commissioners of Income-tax for Southampton* [2016] 2 K.B. 249:

“I cannot accept the contention of the applicant that an enactment can only take away vested rights of action for which legal proceedings have been commenced if there are in the enactment express words to that effect. There is no authority for this proposition, and I do not see why in principle it should be the law. But it is necessary that clear language should be used to make the retrospective effect applicable to proceedings commenced before the passing of the statute.”

18. Referring to this decision, the Supreme Court has held that in every case the language and the manner of the Statute has to be examined to find out whether the legislature clearly intended the provision to apply to pending proceedings, which would be then be affected by the new provision. Reference was thereafter made to the decision of the K.C. *Mukerjee Vs. Mst. Ramratan Kuer* (supra), to observe as under:

“In that case while an appeal had been pending before the Judicial Committee the amending Act had been passed clearly showing that the Act was retrospective in the sense that it applied to all cases of a particular description, without

reference to pending litigation. In those circumstances their Lordships pointed out that if any saving were to be implied in favour of pending proceedings, then the provisions of the statute would largely be rendered nugatory. Those observations apply with full force to the present case, inasmuch as if any saving were to be implied in favour of cases pending on the date of the amendment, the words “all elections to the office of the president or Vice-President, held on or after the said date and before the coming into force of this Act, shall be deemed to be valid” could not be given their full effect.

As there are no such saving clauses in express or implied terms, it must be held that the amendment was clearly intended by the legislature to apply to all cases of election of president or Vice-President, whether or not the matter had been taken to court. It is the duty of courts to give full effect to the intentions of the legislature as expressed in a statute. That being so, it must be held that the amending Act had the effect of curing any illegality or irregularity in the elections in question with reference to the provisions of Section 19 of the Act.”

19. Similarly, in *Lakshminarayan Guin & Ors. Vs. Niranjana Modak* AIR 1985 SC 111, while dealing with the question of applicability of rent control legislation, referring to the language of the Statute, Supreme Court had considered whether the protection under the rent control legislation would cover decrees for recovery of possession which have already been passed or only to new institution of suits. It was emphasized that when new law speaks in language which expressly or by clear intendment takes in even pending matters in its ambit, the court of trial as well as the court of appeal must have regard to the intention so expressed. In fact the Court of appeal may give effect to such law even after the judgment of the court of first instance. In *Safali Roy Choudhary & Ors. Vs. Amarendra Kumar Dutta* (1976) SC 1810, the Supreme Court has observed that the section in the rent

legislation having been enacted must be given effect to, to cover and include proceedings which have been initiated before the date of enactment. It will apply to pending proceedings as well. We would also make reference to the decision of the Supreme Court in *Union of India & Ors. Vs. ITC Ltd.* 1993 Supl. (4) SCC 326, wherein with reference to provisions to Section 11 B regulating refund of Central Excise Duty, which had undergone a change by introduction of provisions against unjust enrichment after amendment by Central Excise and Customs Laws (Amendment) Act, 1991 with effect from 20th September, 1991, it was observed that the provisions as enacted would have to be applied and it could, in a given case, apply to pending proceedings when the statute so requires. Appropriate in this regard would be the dictum and principle which is to be found in an old decision of 1982 in *Quilter Vs. Mapleson* [L.R.] 9 Q.B.D. 672, wherein Jessel, M.R. had held as under:

“Then does the enactment apply to pending proceedings? I think it does. The second sub-section only applies where the landlord has not re-entered. This is important to be observed. On an ejectment under the Common Law Procedure Act, 1852 (15 and 16 Vict. C. 76), s. 210, a tenant could obtain relief against forfeiture for non-payment of rent at any time within six months after execution. No such period is allowed by the Act of 1881, s. 14, sub-s. 2, and the tenant must proceed under that enactment before the landlord has re-entered. We must, therefore, in furtherance of the objects of the Act, hold the enactment to apply to pending proceedings, unless there is something in the words to prevent our doing so. Mr. Greene argued that this sub-section cannot apply to pending proceedings, because it refers to the conduct of the parties under the foregoing provisions which can only relate to matters after the Act comes into operation; but I think we must treat those words as referring to the conduct of the parties under the

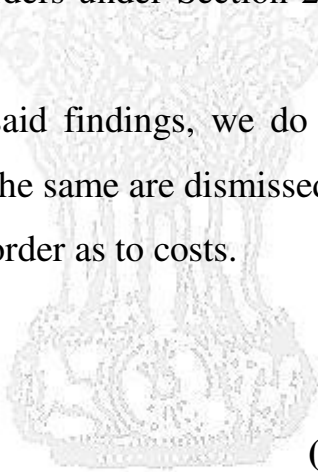
preceding provisions, when and so far as the previous provisions are applicable. I think, therefore, that the sub section is applicable to pending proceedings, and that we have jurisdiction under it, unless the fact of this being an appeal prevents our having it.”

20. We would now turn to the sub-section (2A) to Section 234B and examine whether same states that it would be applicable to pending proceedings. Clause (a) of the said Sub-Section states that where an application under Sub-Section 245C for any assessment year *has been made*, the assessee shall be liable to pay simple interest at the rate specified for every month or part of the month comprised in the period commencing on 1st day of April of the assessment year and ending with the date of making such application. This refers to the application that has been made. It would apply to all applications that have been made. Clause (b) states that whereas as a result of order of the Settlement Commission in Sub-Section (4) to Section 245 D the amount of total income disclosed in the application under Sub-Section (1) to Section 245C is increased, the assessee would be liable to pay simple interest for every month or part of the month comprised in the period commencing from 1st day of April of such assessment year and ending with the date of the order on the amount by which the tax on the total income determined on the basis of such order exceeds the tax on the total income disclosed in the application filed under Sub-section (1) to Section 245C of the Act. The provision clearly uses the *present tense* i.e. where application under Sub-Section (1) to Section 245C of the assessment year *has been made*. Clause (a) is therefore clearly intended to cases where application was pending and orders had not been passed when sub-section (2A) to Section 234B was enacted. Clause (b) refers to the date of order i.e.

as a result of Sub-Section (4) to Section 245D of the Act, which should be after insertion of sub-section (2A) to Section 234B of the Act.

21. As a sequitur and consequence it would follow that the amendment was intended to apply to *all pending proceedings* in which orders under Section 245 D(4) are passed after sub-section (2A) was introduced and made part of the Statute. The intendment of the legislature is therefore, clear and it would apply to pending proceedings. Therefore the second principle as per the above dictum is applicable. Accordingly, we hold that sub-section (2A) to Section 234B would be applicable to all proceedings in which orders are pending and /or in which orders under Section 245 D (4) are passed on or after 1st June, 2015.

22. In view of the aforesaid findings, we do not find any merit in the aforesaid writ petitions and the same are dismissed. However, in the facts of the case, there would be no order as to costs.



(SANJIV KHANNA)
JUDGE

(ANUP JAIRAM BHAMBHANI)
JUDGE

JANUARY 17th, 2019
ssn/NA