

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

WRIT PETITION NO.2121 OF 2010

M/s. Karia Erectors Private Limited)
A-3, The Fifth Avenue, 5th Floor, Dhole Road,)
Pune – 411 001)Petitioner

V/s.

1. Union of India)
Aaykar Bhavan, 2nd Floor, Marin Lines,)
Mumbai)
2. Income Tax Settlement Commission)
Additional Bench, 2nd Floor,)
Mahalaxmi Chambers, Mahalaxmi,)
Mumbai – 400 034)
3. Assistant Commissioner of Income Tax)
Circle – 11(1), Pune, 4th Floor, 'C' Wing,)
Shankarshet Road, Swargate,)
Pune – 411 037)Respondents

Mr. Dharan V. Gandhi for petitioner.
Mr. Suresh Kumar for respondents.

**CORAM : K.R. SHRIRAM &
N.J. JAMADAR, JJ.
DATED : 25th FEBRUARY 2022**

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 Petitioner is challenging the legality and validity of the impugned orders dated 31st December 2007 passed by respondent no.2 under Section 245D(4) of the Income Tax Act, 1961 (the Act) to the extent applicable to Block Assessment Years 1985-1986 to 1996-1997 applying interest under Section 220(2) of the Act, the order dated 10th December 2008 confirming interest under Section 220(2) of the Act and applying surcharge under Section 113 of the Act and orders passed on 18th June 2008

by respondent no.3 while giving effect to the order dated 31st December 2007 passed by respondent no.2.

2 The Income Tax Department had, on 23rd November 1995, carried out search and seizure operations under Section 132 of the Act and thereafter, issued notice under Section 158BC of the Act. In response, petitioner filed on 11th November 1996 return of income for Block Period from 1st April 1985 to 11th November 1995 covering Assessment Years 1985-1986 to 1996-1997 and declaring undisclosed income of Rs.71,70,000/-. Thereafter, respondent no.3 passed block assessment order on 27th November 1996 under Section 158BC of the Act determining total income of Rs.6,24,54,530/-.

3 Petitioner made an application to respondent no.2 under Section 245C of the Act. The application came to be admitted by respondent no.2 by an order dated 9th April 1997 passed under Section 245D(1) of the Act. A final order under Section 245D(4) of the Act was passed by respondent no.2 on 31st December 2007 determining the total income of petitioner at Rs.1,67,82,072/- after making addition of Rs.96,12,072/- to the income of Rs.71,70,000/- as per block return of income filed on 20th November 1996. While passing the order under Section 245D(4) of the Act, respondent no.2 had issued directions to waive interest under Section 220(2) of the Act to the extent of 75%. Ofcourse, petitioner was unhappy with only this 75% waiver and wanted entire 100% to be waived.

Mr. Gandhi stated that petitioner is not pressing this issue.

4 Respondent no.3, by an order dated 18th June 2008, gave effect to the order dated 31st December 2007 passed by respondent no.2. While passing the said order quantifying interest under Section 220(2) of the Act at Rs.1,35,63,666/-, respondent no.3 computed interest for the period starting from the date of order under Section 158BC of the Act passed on 27th November 1996 till the date of final order dated 31st December 2007 passed by respondent no.2 under Section 245D(4) of the Act and levied surcharge under Section 113 of the Act at the rate of 15%.

5 This was followed by petitioner filing a rectification application under Section 154 of the Act to respondent no.2 requesting respondent no.2 to delete the levy of interest under Section 220(2) of the Act from the date of admission of the application under Section 245D(1) of the Act, i.e., 9th April 1997, to the date of final disposal order dated 31st December 2007 passed under Section 245D(4) of the Act and the levy of surcharge under Section 113 of the Act. This application of petitioner was rejected by respondent no.2.

6 Petitioner preferred an appeal against the order of respondent no.3 under Section 246A of the Act before Commissioner of Income Tax (Appeals) in which petitioner challenged the levy of interest under Section 220(2) of the Act, which appeal, even today, is pending adjudication. Mr. Gandhi states that if the Court accepts the petition, then that appeal will

be rendered infructuous and within such time, as directed by the Court, petitioner will withdraw that appeal.

7 Thereafter, petitioner once again preferred an application for rectification on 2nd April 2008 under Section 154 of the Act before respondent no.3 for waiver of full interest under Section 220(2) of the Act and also for deletion of the levy of surcharge under Section 113 of the Act applied retrospectively on the amount of income tax paid under the block assessment. Various communications were exchanged between petitioner and respondent nos.2 and 3.

8 The crux of petitioner's case is that (a) interest under Section 220(2) of the Act is to be computed only upto the date of admission of application under Section 245D(1) of the Act by respondent no.2 and accordingly, interest shall be applicable for a much shorter period as against the huge interest liability computed by respondent no.3 while giving effect to the order of respondent no.2; and (b) the levy of surcharge at 15% under Section 113 of the Act is not applicable since the surcharge would be applicable only for searches conducted after 1st June 2002 since the proviso to Section 113 of the Act, under which surcharge is levied, was introduced with effect from 1st June 2002 and hence, cannot be made applicable retrospectively to search conducted prior to 1st June 2002.

This application has been rejected and hence, petitioner has approached this Court.

9 On the first aspect as to what period interest under Section 220(2) of the Act is applicable has been covered by a judgment of the Apex Court in ***Commissioner of Income Tax V/s. Damani Brothers***¹. The Apex Court held that interest under Section 220(2) of the Act has to be charged upto the date of the order under Section 245D(1) of the Act. Paragraphs 6, 7 and 11 of the said judgment read as under :

6. It has to be noted that the Commission exercises power in respect of income which was not disclosed before the authorities in any proceeding, but are disclosed in the petition under Section 245C. It is not that any amount of undisclosed income can be brought to the notice of the Commission in the said petition. Commission exercises jurisdiction if the additional amount of tax on such undisclosed income is more than a particular figure (which at different points of time exceeded rupees fifty thousand or rupees one hundred thousand, as the case may be). The assessee must have in addition furnished the return of income which he is or was required to furnish under any of the provisions of the Act. In essence the requirement is that there must be an income disclosed in a return furnished and undisclosed income disclosed to the Commission by a petition under Section 245C. A new Chapter XIX-A was introduced by the Taxation Laws (amendment) Act, 1975 (in short the 'Amendment Act') w.e.f. 1.4.1976. The Commission is constituted by the Central Government for the settlement of cases under Chapter XIX-A. The expression "case" as appearing in Section 245A(b) refers to any proceeding under the Act for the assessment or re-assessment of income of any person in respect of any year or years or by way of appeal or revision in connection with such assessment or re- assessment which may be pending before any income-tax authority on the date on which an the application under sub-section (1) of Section 245C is made. It further provides that where any appeal or application for revision has been preferred after the expiry of the specified period and which has not been admitted then the same shall not be deemed to be a proceeding pending within the meaning of clause (b) of Section 245A. Scheme of Chapter XIX- A shows that the filing of application by the assessee is a unilateral act, and the department may not be aware of the same. It has to be noted that if an application for settlement is filed under Section 245C, it is not automatically admitted. Section 245D deals with procedure on receipt of an

1. (2003) 259 ITR 475 (SC)

application under Section 245C. Under sub-section (1) thereof, the Commission after following the prescribed procedure can allow the application to be proceeded with or rejected. Only after the Commission allows the petition to be proceeded with, it exercises the power of settlement.

7. The stand of the assessee is that before the Commission decides to proceed with the matter, it exercises the functions of the income-tax authority and after deciding to proceed with the petition exercises dual function as the Commission and the income-tax authority. The plea is untenable for more reasons than one. Before the Commission decides to proceed with the petition, it cannot complete assessment in respect of a return which is pending before the assessing officer or even cannot act as an appellate or revisional authority. The return filed is in respect of disclosed income. Similar is the position vis--vis the appellate and the revisional authority. The petition before the Commission is in respect of undisclosed income, therefore, the situation is different till the Commission decides to proceed with the matter. That being the position, the income-tax authorities are free to proceed in the prescribed manner till the Commission decides to proceed with the petition. Emphasis was laid by the assessee on certain observations made by this Court in Commissioner of Income Tax v. Express Newspapers Ltd. (1994 (206) ITR 443). Observations to the effect that the proceedings before the Commission are not confined to the income disclosed before it, does not mean that even before the Commission decides to proceed with the case, it can deal with disclosed income. While determining the total income, the Commission has to take note of both the disclosed income and the undisclosed income. This is logical because there cannot be two different total incomes for the same assessment year i.e. disclosed total income and undisclosed total income. Aggregation of both the disclosed and undisclosed income is also necessary because in several years different rates of tax for various slabs of income are provided. By way of an illustration, it may be said that supposing the disclosed income is rupees two lakhs and the undisclosed income is five lakhs, the rate of tax levied on rupees two lakhs may be one but may be different for an income of rupees seven lakhs. For the purpose of computation of taxes, there is a requirement to club both the disclosed and undisclosed income. But that does not empower the Commission to deal with the disclosed income before deciding to proceed with the petition.

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11. To put it differently, the interests charged in terms of Sections 234A, B and C become payable on the income already disclosed in the returns filed, together with the

income disclosed before the Commission. The concerned interest as aforesaid shall be on the consolidated amount of income, i.e. both disclosed and undisclosed. As indicated above, such interests shall be charged till the Commission acts in terms of Section 245D. Thereafter, the prescription relating to charging of interests etc. becomes operative, after the Commission allows the application for settlement to be proceeded with. In such event, there is no further charge of interest in terms of Sections 234A, B and C. The interest charged in terms of Section 245D is a separate levy and not in terms of interest chargeable under Sections 234A, B and C. Therefore, the apprehension that there is scope for charging of interest on interest is without any basis.

10 This was also followed by a Division Bench of this Court in ***Commissioner of Income Tax V/s. Smt. Leonie M. Almeida***² where the Court held that interest can be charged pursuant to proceedings in normal course up to the date of decision under Section 245D(1) of the Act to proceed with the application. Paragraphs 1, 8 and 9 of the said judgment read as under :

1. The appellant purports to pose question of law referred to herein below:-

"Whether on the facts and circumstances of the case and in law, the Tribunal was right in holding that the interest under Section 220(2) will be legally leviable from the date of default in payment of demand by the assessee till the date of admission of application by the assessee by settlement Commission under section 245D(1) and not till the final order of settlement commission under section 245D (4)?"

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8. The position as far as charging interest under Section 220 (2) is concerned is no longer res integra. It has been made clear under the decision in the case of Damani Brothers (supra) as also in the decision of the Hon'ble Supreme Court in the case of Brij Lal and Ors v. Commissioner of Income-tax reported in [2010] 328 ITR 477 (SC) which is a case relating to levy of interest under section 234B of the Income Tax Act, 1961, relied upon by the assessee, observing;

"As stated, till the Settlement Commission decides to admit the case under section 245D (1) the proceedings

2. (2015) 60 taxmann.com 387 (Bombay)

under the normal provisions remain open. But, once the Commission admits the case after being satisfied that the disclosure is full and true then the proceedings commence with the Settlement Commission. In the meantime, the applicant has to pay the additional amount of tax with interest without which the application for settlement would not be maintainable. Thus, interest under section 234B would be payable up to the stage of section 245D (1)".

9. The position that interest can be charged pursuant to proceedings in normal course up to the date of decision under Section 245 D (I) of the Income Tax Act to proceed with the application appears to be prevailing.

11 On the second issue, i.e., whether surcharge at 15% under Section 113 of the Act was payable, in the facts and circumstances of the case, Mr. Gandhi, relying upon a judgment of the Apex Court in ***Commissioner of Income Tax (Central)-I, New Delhi V/s. Vatika Township (P) Ltd.***³ submitted that it was not payable.

12 We have considered *Vatika Township* (Supra). The Apex Court has held that Chapter XIVB is a complete code in itself providing for self contained machinery for assessment of undisclosed income for the block period of 10 years or 6 years, as the case may be. In case of regular assessments, for which returns are filed on yearly basis, Section 4 of the Act is the charging Section. At what rate the income is to be taxed is specified every year by the Parliament in the Finance Act but when it comes to payment of tax on the undisclosed income relating to the block period, rate is specified in Section 113 of the Act. The Court held that Chapter XIVB

3. (2014) 49 taxmann.com 249 (SC)

comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes Section 156BA(2) as the charging Section and even the rate at which such income is to be taxed is mentioned in Section 113 of the Act. Since there is no surcharge prescribed under Section 113 of the Act, the question of charging any surcharge on the block assessment relating to undisclosed income would not arise. The Court also held that the question of law which has fallen for consideration is as to whether the proviso appended to Section 113 of the Act, which was inserted in that Section by the Finance Act, 2002, is to operate prospectively or is clarificatory and curative in nature and, therefore, has retrospective operation. The Court held that the proviso to Section 113 of the Act cannot be treated as clarificatory in nature, thereby having retrospective effect. Paragraphs 27, 28, 29, 34 and 38 of the said judgment read as under :

27. Before we proceed to answer the question, it would be necessary to keep in mind the scheme of block assessment introduced in Chapter XIVB to Finance Act, 1995 w.e.f. 1st July, 1995. As already mentioned in brief by us, Chapter XIVB of the Act which deals with block assessment lays down a special procedure for search cases. The main reason for adding these provisions in the Act was to curb tax evasion and expedite as well as simplify the assessments in such search cases. Undisclosed incomes have to be related in different years in which income was earned under block assessment. This is because in such cases, the "block period" is for previous years relevant to 10/6 assessment years and also the period of the current previous year up to the date of the search, i.e., from April 1, 2000, to January 17, 2001, in this case. The essence of this new procedure, therefore, is a separate single assessment of the "undisclosed income", detected as a result of search and this separate assessment has to be in addition to the normal assessment covering the

same period. Therefore, a separate return covering the years of the block period is a pre-requisite for making block assessment. Under the said procedure, the Explanation is inserted in section 158BB, which is the computation section, explaining the method of computation of “undisclosed income” of the block period. It is now well accepted that this Chapter is a complete code in itself providing for self-contained machinery for assessment of undisclosed income for the block period of 10 years or 6 years, as the case may be. In case of regular assessments for which returns are filed on yearly basis, Section 4 of the Act is the charging section. However, at what rate the income is to be taxed is specified every year by the Parliament in the Finance Act. In contradistinction, when it comes to payment of tax on the undisclosed income relating to the block period, rate is specified in Section 113 of the Act. It remains static at 60% of the undisclosed income which is the categorical stipulation in the Section 113 of the Act. Section 158BA(2) of the Act clearly states that the total undisclosed income relating to the block period “shall be charged to tax” at the rates specified under Section 113 as income of the block period irrespective of previous year or years. Under Section 113 of the Act, the undisclosed income is chargeable to tax at the rate of 60%.

28. From the above, it becomes manifest that Chapter XIVB comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes Section 156BA(2) as the charging section and even the rate at which such income is to be taxed is mentioned in Section 113 of the Act. No doubt, Section 4 of the Act is also a charging section which is made applicable on 'total income of previous year'. As per Section 2 (45), 'total income' means the total amount of income referred to in Section 5, computed in the manner laid down in the Act. Section 5 of the Act enumerates the scope of total income and prescribes, inter alia, that it would include all income which is received or is deemed to receive in India in any previous year by or on behalf of a person who is a Resident. No doubt, undisclosed income referred to in Chapter XIVB is also an income which was received but not disclosed, therefore, in the first blush, argument of the Department that undisclosed income referred to in Chapter XIVB is also a part of total income and consequently Section 4 becomes the charging section in respect thereof as well. However, a little closer scrutiny leads us to conclude that that is not the position as per the scheme of Chapter XIVB. In the first place, income referred to in Section 5 talks of total income of any 'previous year'. As per Section 2 (34) of the Act, 'previous year' means previous year as defined in Section 3. Section 3 lays down that previous year means 'the financial year immediately preceding the assessment year'. Undisclosed income referred to in Chapter

XIVB is not relateable to the previous year. On the contrary, it is for the block period which may be 6 years or 10 years, as the case may be. Consequently, as already mentioned, while analyzing the scheme of Chapter XIVB, such Chapter is a complete code in respect of assessments of 'undisclosed income'. Not only it defines what is undisclosed income, it also lays down the block period for which undisclosed income can be taxed. Further, it also lays down the procedure for taxing that income. It is very pertinent to note at this stage that for this purpose, specific provision in the form of Section 158BA(2) is inserted making it a charging section. Thus, a diagnostic of Chapter XIVB of the Act leads to irresistible conclusion that it contains all the provisions starting from charging section till the completion of assessment, by prescribing special procedure in relation thereto, making it a complete Code by itself. Looking it from this angle, the character and nature of 'undisclosed income' referred to in Chapter XIVB becomes quite distinct from 'total income' referred to in Section 5. It is of some significance to observe that when a separate charging section is introduced specifically, to assess the undisclosed income, notwithstanding a provision in the nature of Section 4 already on the statute book, this move of the legislature has to be assigned some reason, otherwise, there was no necessity to make a provision in the form of Section 158BA(2). It could only be that for assessing undisclosed income, charging provision is Section 158BA(2) alone.

29. Notwithstanding the aforesaid position clarified with us, we are of the opinion that dehors this discussion, in any case on the application of general principles concerning retrospectivity, the proviso to Section 113 of the Act cannot be treated as clarificatory in nature, thereby having retrospective effect. To make it clear, we need to understand the general principles concerning retrospectivity.

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34. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the

rule is no more than a presumption, and thus could be displaced by out weighing factors.

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38. When we examine the insertion of proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as declaratory/statutory or curative in nature. There are various reasons for coming to this conclusion which we enumerate hereinbelow.

13 In this case, since the search was carried out on 23rd November 1995 and the proviso to Section 113 of the Act, which provides for levy of surcharge, was introduced only with effect from 1st June 2002, as held by the Apex Court in *Vatika Township (P) Ltd.* (Supra), the levy of surcharge cannot be made applicable retrospectively to search conducted in petitioner's case.

14 In the circumstances, we allow the petition which was admitted on 30th November 2010.

15 Petition disposed accordingly.

16 Respondent no.3 is directed to issue a fresh assessment order recalculating the tax and interest payable, within four weeks from the date of this order being uploaded/a copy of the order is submitted by petitioner, by not including surcharge at 15% and limiting the interest payable from 5th January 1997, which is the 36th day after the impugned assessment order dated 27th November 1996 was passed, upto 9th April 1997 when petitioner's application came to be accepted under Section 245D(1) of the Act.

Petitioner shall pay the amount, if any, payable within seven days of receiving a copy of the fresh demand. If the amount is not so paid, petitioner shall pay interest at 18% p.a. on the amount from the date of the fresh assessment order until payment/ realisation. After the calculation, if any amount is refundable, such refund shall be processed and paid over to petitioner within four weeks of the fresh assessment order being passed.

17 The undertaking of Mr. Gandhi to withdraw the appeal referred to in paragraph 6 above, within two weeks from today, is accepted.

(N.J. JAMADAR, J.)

(K.R. SHRIRAM, J.)