**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**WRIT PETITION NO.919 OF 2008**

Mrs. Sitadevi Satyanarayan Malpani & Ors ….Petitioners

V/s.

Income Tax Settlement Commission & Ors …Respondents

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Mr. Nitesh Joshi a/w Ms Sheetal Shah and Ms Dimple D Bitra i/b Mehta & Girdharilal for Applicant/original Petitioner.
Mr. Suresh Kumar for Respondents.

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**CORAM : K.R. SHRIRAM &**
**FIRDOSH. P. POONIWALLA, JJ**
**DATED : 30th JUNE 2023**

**P.C. :**

1 This Petition was filed by one Mr. S. N. Malpani (original petitioner). In view of the death of the original petitioner, his Legal heirs viz; his widow and three children were brought on record as petitioners. The widow of original petitioner expired on 6th January 2023 and in view thereof, petition has been further amended to delete the name of the widow of the original petitioner.

2 Petitioners are aggrieved by an order dated 3rd January 2008 passed by the Income Tax Settlement Commission dismissing the application of the original petitioner for AY-1989-1990 to 1996-1997 on the ground that provisions of Section 245D(2D) of the Income Tax Act 1961 (the Act) cast an obligation on original petitioner to pay, on or before 31st July 2007, the additional tax on the income disclosed before the Settlement Commission and interest thereon notwithstanding any extension of time already granted by the commission. It is petitioners' case that on facts it is an erroneous

finding because original petitioner had infact paid more than the amount he was required to pay.

3 At the outset, Mr. Joshi stated that petitioner is not pressing prayer clause (d) by which petitioner was challenging the constitutional validity of Section 245HA and Section 245D(2D) of the Act. Rule was issued on 24th March 2008.

4 Original petitioner, as sole proprietor, carried on business as builder and developer in the name and style M/s Gopal Constructions. On or about 27th July 1993 there was a search carried out at the residence and the business premises of original petitioner under Section 132 of the Act. On 25th April 1997 petitioner filed settlement application under Section 245C(1) of the Act for AY-1989-90 to 1996-1997. The application was admitted on 22nd April 1998 under Section 245D(1) of the Act. As per the said order of admission of the Settlement Commission, original petitioner was required to pay the additional amount of income tax payable on the income disclosed within 35 days of the receipt of the order. Original petitioner paid additional tax and, by a letter dated 7th May 1998 furnished the copies of challans.

5 Original petitioner's application was thereafter proceeded with. During the pendency of the application, original petitioner, by a letter dated 17th July 2007 approached respondent nos.2 and 3 that was received on 23rd July 2007 by respondent nos.2 and 3 for verification of the working of tax and interest payment. Original petitioner also informed that if any short fall

is found he is ready and willing to pay the same. A similar letter also dated 17th July 2007 was also addressed to respondent no.1 and filed on 23rd July 2007. Respondent no.2 responded by a letter dated 28th July 2007 and informed original petitioner that a sum of Rs.55,03,494/- was payable by original petitioner on account of tax and interest. Original petitioner by a letter dated 7th August 2007 objected and submitted that various payments made by original petitioner had not been considered by respondent no.2. Original petitioner furnished copies of challans and requested respondent no.2 to revise the calculations.

6 During the hearing on 5th November 2007 before the Settlement Commission, original petitioner has informed that original petitioner has not complied with the mandatory requirement of Section 245D(2D) of the Act. The matter was thereafter stood over to 5th December 2007. Original petitioner received a letter dated 7th November 2007 from respondent no.2 asking petitioner to produce the proof of payment to tax and interest and working and that was to be submitted on or before 14th November 2007. Original Petitioner was also informed by respondent no.2 vide letter dated 29th November 2007, that a balance amount of Rs.1,16,511/- was payable. To cover the shortfall, original petitioner made payment of Rs.1,30,000/- on 5th December 2007 and by a letter dated 10th December 2007 intimated the same to respondent nos.1 and 2 .

7 On 3rd August 2008, the impugned order came to be passed by respondent no.1 holding that petitioner having failed to comply with the

amended provisions of Section 245D(2D) of the Act, the application of original petitioner was not maintainable and the application was held to have abated under Section 245HA(1)(ii) of the Act.

8 Mr. Joshi submitted that the conclusion of respondent no.1 that petitioner had not complied with the amended provisions of Section 245D(2D) of the Act as amended was factually incorrect.

9 Mr. Suresh Kumar of course stood by what the affidavit in reply contained, justifying the impugned order.

10 We have with the assistance of Mr. Joshi and Mr. Suresh Kumar perused the petition and affidavits in reply filed and also the rejoinder. The only issue remains in the petition, petitioner having withdrawn the constitutional challenge to Section 245HA and 245D(2D), is whether original petitioner had paid the amounts of tax and interest on or before 31st July 2007.

11 As noted earlier by its letter dated 29th November 2007, respondent no.2 had provided to petitioner a statement containing the working of tax and interest payable. The same, for ease of reference is reproduced hereinbelow and marked Statement-A.

**Statement A**

**Shri S. N. Malpani**
TOTAL TAX AND INTEREST PAYABLE

| Sr | A.Y | Income Offered | Tax Payable | 234 A | 234 B | Total |
|---|---|---|---|---|---|---|
| 1. | 1989-90 | 1,56,945 | 60,611 | 19,517 | 81,640 | 1,61,768 |
| 2. | 1990-91 | 1,47,970 | 57,116 | 13,614 | 63,568 | 1,34,298 |
| 3. | 1991-92 | 6,24,220 | 3,24,475 | 1,10,691 | 4,21,914 | 8,57,080 |
| 4. | 1992-93 | 6,84,723 | 3,58,355 | 1,61,983 | 2,80,,890 | 8,01,228 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 5. | 1993-94 | 6,22,240 | 2,55,692 | 1,00,825 | 13,3852 | 4,90,369 |
| 6. | 1994-95 | 16,13,796 | 6,9,943 | 16,569 | 36,064 | 7,52,096 |
| 7. | 1995-96 | 2,34,170 | 68,668 | 9,710 | 15,171 | 93,549 |
| 8. | 1996-97 | 3,84,980 | 1,27,992 | 13,669 | 23,909 | 1,69,570 |
| | | 44,69,044 | 19,52,372 | 4,46,578 | 10,57,008 | 34,55,958 |

**TOTAL TAX PAID**

| Sr | A.Y | TDS | Advance Tax | S A | Total | S A Paid on Dt 10.07.07 |
|---|---|---|---|---|---|---|
| 1. | 1989-90 | | 9,250 | 57,460 | 66,710 | 55,855 |
| 2. | 1990-91 | | 8,500 | 32,522 | 41,022 | 69,782 |
| 3. | 1991-92 | | 17,000 | 75,000 | 92,000 | 6,45,782 |
| 4. | 1992-93 | | 69,100 | 4,00,000 | 4,69,100 | 2,37,023 |
| 5. | 1993-94 | | 45,640 | 2,00,000 | 2,45,640 | 1,31,486 |
| 6. | 1994-95 | 728 | 6,50,000 | 3,00,000 | 9,50,728 | 31,068 |
| 7. | 1995-96 | 3,326 | 35,000 | | 38,326 | 56,891 |
| 8. | 1996-97 | 3,940 | 25,000 | 73,814 | 1,02,754 | 55,803 |
| Total | | 7,994 | 8,59,490 | 11,38,796 | 20,06,280 | 12,83,690 |

| | | |
|---|---|---|
| Total Tax Payable | | Rs. 34, 55, 958/- |
| Taxes Paid | Rs.20,06,280/- | |
| Interest Paid On 10/07/07 | Rs. 12,83,690/- | |
| Refund Adjusted | Rs. 49,477/- | Rs. 33,39,447/- |
| | Balance Payable | Rs. 1,16,511/- |

(S.H.B.Inamdar)
Income Tax Officer
18(1)(3), Mumbai

From this statement, it is evident that respondent no.1 have adjusted a sum of Rs.49,477/- which was a refund that admittedly respondents had to pay to petitioner and has arrived at a balance figure of Rs.1,16,511/- as payable. Mr. Joshi tendered a statement of tax and interest payable, paid refund and interest on refund etc; which is reproduced hereinbelow and marked Statement-B.

## Statement B

**Mr. Satyanarayan Malpani**

**Assessment years: 1989-90 to 1996-97**

| 1. | 2. | 3. | 4. | 5. | 6. | 7. | 8. | 9. | 10. | 11. | 12. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Sr | Y. | Tax | 234A | 234B | Total Tax and Interest | Taxes paid upto 245D(1) Order | Amount paid on 10.07.2007 | Refund as considered by AO | Interest on Refund | Refund not considered by AO | Interest on refund |
| 1. | 1989-90 | 60,611 | 19,517 | 81,640 | 1,61,768 | 66,710 | 55,855 | | | | |
| 2. | 1990-91 | 57,116 | 13,614 | 63,568 | 1,34,298 | 41,022 | 69,782 | | | | |
| 3. | 1991-92 | 3,24,475 | 1,10,691 | 4,21,914 | 8,57,080 | 92,000 | 6,45,782 | | | | |
| 4. | 1992-93 | 3,58,355 | 1,61,983 | 2,80,,890 | 8,01,228 | 4,69,100 | 2,37,023 | | | | |
| 5. | 1993-94 | 2,55,692 | 1,00,825 | 13,3852 | 4,90,369 | 2,45,640 | 1,31,486 | | | | |
| 6. | 1994-95 | 6,99,463 | 16,569 | 36,064 | 7,52,096 | 9,50,728 | 31,068 | | | | |
| 7. | 1995-96 | 68,668 | 9,710 | 15,171 | 93,549 | 38,326 | 56,891 | | | | |
| 8. | 1996-97 | 1,27,992 | 13,669 | 23,909 | 16,9570 | 1,02,754 | 55,803 | | | | |
| | | | | | | | | | | | |
| 9. | 1997-98 | | | | | | | 37,339 (pg 93) | 40,138 | | |
| 10 | 1998-99 (Appeal effect) | | | | | | | | | 3,297 (paragraph 4 and 7.5 of Reply) | 1,153 (paragraph 4 and 7.5 of Reply) |
| 11 | 1999-2000 | | | | | | | 8,384 (pg 97) | 4,736 | | |
| 12 | 2000-2001 | | | | | | | 3,754 (pg 100) | 1,709 | | |
| 13 | 2003-2004 | | | | | | | | | 18,701 (pg 92) | 2,992 (paragraph 5 and 7.5 of Reply) |
| | Total | 19,52,372 | 4,46,578 | 10,57,008 | 34,55,958 | 20,06,280 | 12,83,690 | 49,477 | 46,583 | 21,998 | 4,145 |

Upto column 9 the total of figures are available from the statement supplied by respondent no.2 as quoted above. The break up for column 9, i.e., Refund as considered by AO, of Rs.49,477/- is available in paragraph 6 of the affidavit in reply affirmed on 31st August 2009 by one Gurbinder Singh on behalf of respondents (the said affidavit). The break up as provided in paragraph 6 of Rs.49,477/- is Rs.37,339/- for AY-1997-1998, Rs.8,384/- for AY-1999-2000, Rs.3,754/- for AY-2000-2001. The total of Rs.37,339/- + Rs.8,384 + Rs.3,754/- is Rs.49,477/-. In paragraph 6, respondent no.2, however, has stated that these refund amounts including the interest were adjusted already. If interest had already been adjusted, that in our view would have reflected in the Statement-A made available by respondent no.2 vide his letter dated 29th November 2007. Since only credit for Rs.49,477/- as refund adjusted has been given in the statement, it is quiet evident that interest on the amount has not been factored in. As per the Statement-B given by Mr. Joshi today, the interest on these three figures would work out to Rs.46,583/-.

12 As regards columns 11 and 12 in paragraph 4 read with paragraph 7.5 of the said affidavit of Gurbinder Singh, it is stated that even if the credit for the refund is granted that would total to amount of Rs.26,143/-. Of course the said Gurbinder Singh claims that the matter was very old and he had to verify. Mr. Joshi is correct in saying that if the effect of the refund and interest thereon had been granted, it would have reflected in the Statement-A provided by respondent no.2 alongwith his letter dated 29th November 2007.

13 That would still leave a sum of Rs.50,674/- which also, Mr. Joshi claims, the original petitioner has already paid. Mr. Joshi states that original

petitioner had paid an excess tax on self assessment. From the Statement-A made available by respondent no.2 along with letter dated 29th November 2007, it is clear that the tax payable was only Rs.19,52,372/- whereas the total tax paid was Rs.20,06,280/- which would leave excess amount of Rs.53,098/- as paid. In paragraph 7.3 of the said affidavit of Gurbinder Singh, it is not denied that there was an excess tax paid of Rs.53,098/- but the stand of respondent no.2 is that credit for such excess tax paid has already been granted to original petitioner but no interest was payable on the same as the excess tax paid is arising out of self assessment tax paid by original petitioner which is not eligible for any interest. A Division Bench of this court in ***Stock Holding Corporation of India Ltd Vs. N. C. Tewari & Ors.***[1] has held that tax paid on self assessment would fall under Section 244A(1)(b) of the Act, i.e., residuary clause covering refunds of amount not falling under Section 244A(1) of the Act and as confirmed by a circular issued by the CBDT referred to in the judgment, the said payment should be considered to be a tax and interest thereon would be payable to the assessee. Paragraph nos. 7 and 8 of *Stock Holding Corporation* (Supra) read as under:

> *" 7. We have considered the rival submissions. On a bare analysis of Section 244A(1) of the Act it is clear that amount paid by the petitioner as tax on self assessment would not stand covered by Section 244A(1)(a) of the Act. This is so as it is neither the payment of tax by way of advance tax or by way of tax deducted at source. Thus tax paid on self assessment would fall under Section 244A(1)(b) of the Act, i.e. a residuary clause covering refunds of amount not falling under Section 244A(1) of the Act. The revenue contends that in the absence of tax on self assessment finding mention in Section 244A(1)(a) of the Act, no interest is payable under Section 244A(1)*

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*of the Act and Section 244A(1)(b) of the Act would have no application. This contention is opposed to the meaning of the provision disclosed even on a bare reading. If the tax paid is not covered by clause (a) of Section 244A(1), it falls within clause (b), which is a residuary clause. Besides, this contention stands negatived by the CBDT Circular bearing No.549 dated 31 October 1989 wherein reference is made to Section 244A and para 11.4 thereof reads as under :-*

*11.4 The provisions of the new section 244A are as under:*

*(i) Subsection (1) provides that where in pursuance of any order passed under this Act, refund of any amount becomes due to the assessee then-*

*(a) if the refund is out of any advance tax paid or tax deducted at source during the financial year immediately preceding the assessment year, interest shall be payable for the period starting from the 1st April of the assessment year and on the date of grantof the refund. No interest shall, however, be payable, if the amount of refund is less than 10 per cent of the tax determined on regular assessment;*

*(b) if the refund is out of any tax, other than advance tax or tax deducted at source or penalty, interest shall be payable for the period starting from the date of payment of such tax or penalty and ending on the date of the grant of the refund. (Refer to example III in para 11.8)."*

*(Emphasis supplied)*

*The inferences to be drawn from the Board's circular is clear that if refund is out of any tax other than out of advance tax or tax deducted at source, interest shall be payable from the date of payment of tax and ending on the date of the grant of refund. It is to be noted that nowhere does the CBDT even remotely suggest that interest is not payable by the Department on self-assessment tax. Moreover, the amount paid under Section 140A of the Act on self assessment is an amount payable as and by way of the tax after noticing that there is likely to be shortfall in the taxes already paid. Thus this payment is considered to be a tax under the aforesaid provision.*

8. The contention of revenue is that no interest at all is payable to the petitioner under Section 244A(1)(a) and (b) of the Act unless the amounts have been paid as tax. It would not cover cases where the payment is gratuitous as is evident from the fact that the petitioner in its computation after paying tax on self assessment of Rs.2.60 crores seeks a refund of Rs.47 lacs. According to him it has to be refund of amounts paid as tax. We find that Section 244A(1) of the Act commences with the word "when refund of any amount becomes due to the assessee under this Act...". Subclause (b) thereof commences with the words "in any other case....". The words used in Section 244A(1) of the Act are clear inasmuch as it provides that refund of any amount that become due to any assessee under the Act will entitle the assessee to interest. In any case in the present facts, the amount on which the refund is being claimed was originally paid as tax on selfassessment under Section 140A of the Act and evidence of

*the same in the form of challan was enclosed to the Return of Income. In fact when the Assessing Officer passed the Assessment Order on 31 December 1996, he accepted the entire amount paid as tax on self assessment as a payment of tax. One more feature to be noticed is that when any refund becomes due to an assessee out of tax paid, it becomes so only after holding that it is not the tax payable. Thus we find no substance in the first objection of the revenue that the amount paid as tax on self assessment is not tax and therefore no interest can be granted on refund of such amounts which are not tax."*

14 In the circumstances, the original petitioner would be entitled to interest on the excess payment of Rs.53,098/- which according to petitioner is Rs.50,674/-. If we add together the amount of Rs.46,583/- interest on refund of AY-1997-1998, 1999-2000 and 2000-2001, Rs.26,143/- towards refund and interest thereon relating to AY-1998-1999 and 2003-2004 and interest of Rs.50,674/- on excess payment of tax of Rs.53,908/-, the original petitioner would have paid Rs.1,23,400/- (Rs.46,583/- + Rs.26,143/- + Rs.50,674/-), which is more than the short fall of Rs.1,16,511/- indicated by respondent no.2 in Statement-A, vide his letter dated 29th March 2007. Therefore, we are satisfied that original petitioner has complied with his obligations under the provisions of Section 245D of the Act.

15 In the circumstances, we are quashing and setting aside the impugned order dated 3rd January 2008. We direct the matter be placed before the Interim Board for Settlement constituted under Section 245AA for consideration. Since the matter is old, petitioners shall file a copy of the settlement application that was originally filed on 27th April 1997 before the Board within two weeks of this order being uploaded. The photocopy shall be certified as true copy by the Advocates / Chartered Accountant of

petitioners. The Interim Board shall dispose the application on merits in accordance with law.

16 We of course hasten to state that we have not considered the matter on merits and the only issue we have considered was whether petitioner had infact complied with the mandatory requirements of Section 245D(2D) of the Act.

17 Petition disposed.

**(FIRDOSH P POONIWALLA, J.)** **(K.R. SHRIRAM, J.)**