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

WRIT PETITION NO. 983 OF 2007

Indusind Bank Ltd.

....Petitioner

V/s.

Income Tax Settlement Commission and Ors.

...Respondents

Mr. Nishant Thakkar a/w Mr. Rajesh Poojary and Ms. Jasmin Amalsadvala
i/b Mulla & Mulla and Craigie Blunt & Caroe for Petitioner.

Mr. Suresh Kumar for Respondents.

CORAM : K.R. SHRIRAM &

FIRDOSH P. POONIWALLA, JJ.

DATED : 23rd JUNE 2023

P.C. :

1. Since in this matter the issue involved is the same as in Writ
Petition No. 982 of 2007 and the application to Settlement Commission was
disposed by a common order dated 28th February 2007 which was also
impugned in Writ Petition No. 982 of 2007, this petition is also disposed in
the same lines as per Writ Petition No.982 of 2007. The directions given
therein shall equally apply to this petition also. For ease of reference our
order dated 23rd June 2023 in Writ Petition No. 982 of 2007 is reproduced
below :

*1. Petitioner, a bank in the private sector filed its return of income
for Assessment Year 1997-98 on 1st December 1997. In the
computation, petitioner returned income of Rs.12,73,80,111/-
being interest accrued as due on Government securities and
debentures held by petitioner as on 31st March 1997.*

*2. By an order dated 28th March 2000 2nd Respondent (ACIT)
completed the Assessment for Assessment Year 1997-98. In the
Assessment Order among other adjustments, the 2nd Respondent*

held that a sum of Rs.25,17,19,849/- being interest on Government securities held by petitioner had accrued to petitioner as on 31st March 1997 and as such was liable to tax under Section 5 of the Act. The 2nd Respondent further held that a sum of Rs.12,73,80,111/- being interest received by petitioner in the Financial Year 1996-97 (Assessment Year 1997-98) and offered as income was in fact income of the preceding year, i.e., Assessment Year 1996-97 and was wrongly offered to tax in Assessment Year 1997-98. Accordingly 2nd Respondent brought to tax in Assessment Year 1997-98 a sum of Rs.12,43,39,738/- (incorrectly mentioned as Rs.12,46,39,738/-) being the difference between Rs.25,17,79,849/- accruing in Assessment Year 1997-98 and Rs.12,73,80,111/- offered by petitioner as income for Assessment Year 1997-98.

3. On 24th March 2000 petitioner filed an application under Section 245 C (Application for settlement of cases) of the Income Tax Act, 1961 (the Act) before the Settlement Commission in respect of Assessment Year 1997-98. The application was filed only for surrendering its claim for depreciation on certain leased assets.

4. Petitioner's application was admitted on 22nd November 2000 by 1st Respondent, viz., The Settlement Commission. The Commissioner of Income Tax, in reply to the Settlement Application, filed a report under Rule 9 of the Settlement Commission (Procedure) Rules, 1997, inter alia, praying for addition of Rs.12,43,39,738/- being the net amount of interest accrued be brought to tax placing reliance on the findings of 2nd Respondent in the Assessment Order. The Settlement Commission after hearing the parties passed an order dated 28th February 2007 disposing the Settlement Application. Aggrieved by this order dated 28th February 2007, petitioner has filed this petition seeking the following reliefs :

(a) That this Hon'ble Court be pleased to issue a Writ of Certiorari or any other writ order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the passing of the Impugned Order (Exhibit "I" hereto) and after going through the same and examining the question of legality thereof insofar as it relates to the addition and/or adjustment to Interest Income, quash, cancel and set aside the Impugned Order (Exhibit "I" hereto) inasmuch as it relates to the additions/ adjustments to Interest Income;

(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus or any other writ order or direction under Article 226 of the Constitution of India ordering and directing the 2nd Respondent to assess interest income on Government Securities as returned by the Petitioner;

(c) That this Hon'ble Court be pleased to

issue a Writ of Prohibition or any other writ order or direction under Article 226 of the Constitution of India ordering and directing the 2nd Respondent from taking any action in furtherance to the Impugned Order (Exhibit "I" hereto) insofar as it relates to the additions/adjustments to Interest Income.

(d) That the hearing and final disposal of this petition

(i) the operation of the Impugned Order insofar as it relates to the additions/adjustments to Interest Income be stayed; and

(ii) the 2nd Respondent, her successors in office, subordinates, servants and agents be restrained by an order and injunction of this Hon'ble Court from taking any steps to recover Rs.16,83,56,055/- being the demand raised pursuant to the Impugned Order insofar as it pertains to additions/adjustments to Interest Income.

(e) for ad-interim reliefs in terms of prayers (d) above;

(f) For costs of the Petition;

(g) For such other and further reliefs as this Hon'ble Court may deem fit.

5. Rule was issued on 3rd July 2007 and Ad-interim relief in terms of prayer clause (d) was granted.

6. Mr. Thakkar submitted :-

*(a) Since it is the order of the Settlement Commission, the law is well settled that a challenge to order of Settlement Commission when made in a petition under Article 226 of the Constitution of India the court should be concerned only with the legality of procedure followed and not with the validity of the order. But as held by the Hon'ble Apex Court in **Jyotendrasinhji vs. S.I. Tripathi and Ors.**¹, it is also well settled that the scope of an enquiry by the court should also consider whether the order of the Commission is in conformity with the provisions of law or contrary to the provisions and that such contravention has caused prejudice to petitioner. If the order of the Commission is contrary to the provisions of law certainly the court should interfere.*

(b) All the interest which the Assessing Officer (AO) wanted to add was on Government of India securities. The interest received was offered in the return of income as income, but the interest accrued was not offered as the same was neither due nor received.

¹ 1993 Supplementary (3) SCC 389 (SC)

This was because the interest which had not become due was not income in the real sense. It became due on fixed dates and till that date, the right to income did not crystalize.

(c) The Government of India securities provided for interest being paid on a particular date. When an agreement provides for payment of interest on a particular date the interest does not accrue to the holder thereof on any date prior thereto. Interest would accrue or arise only on the date specified in the instrument.

(d) A creditor has vested right to receive interest on a stated date in future does not constitute an accrual of the interest to him on any prior date.

(e) When the instrument provides for such payment of interest only on a particular date, even an action prior to such date filed would be dismissed as pre-mature and not disclosing any cause of action.

(f) Under such agreement the debtor is not bound to pay interest on a date earlier to one stipulated in the agreement. In the present case also the admitted position was that the interest was not payable on any date other than that mentioned in the security.

(g) The ITAT, in the case of petitioner's own case, for subsequent Assessment Years from 1998-99 onwards, has accepted the position that the interest accrues only on the specified open dates and not on day to day basis and the assessee cannot be prevented from urging in the returns that the interest in the Government securities accrued only on the specified open dates notwithstanding that credit has been taken in the Profit and Loss Account for the interest on day to day basis.

7. Per contra, it was the case of respondents that as the applicant was following mercantile system of accounting for interest paid on securities and deposits it could not follow the cash system of accounting for corresponding income.

8. Mr. Suresh Kumar submitted that there was nothing wrong in the procedure followed by the Commission and therefore the court should not interfere. Mr. Suresh Kumar also submitted that the conclusion arrived at by the Commission was a well reasoned conclusion and the assessee cannot pick and choose what is convenient to him and discard what is not convenient to him. Mr. Suresh Kumar submitted that as per the provisions of Section 5 of the Act the total income of any person who is resident in India includes all income from whatever sources derived which accrues or arises or is deemed to accrue or arise in India.

9. We do not agree with the submissions made by Mr. Suresh Kumar.

*10. As held by this court in **Mahindra and Mahindra Ltd. vs.***

*Union of India through Secretary and Ors.*², the High Court, after considering the judgment of the Hon'ble Apex Court in *Jyotendrasinhji (supra)*, has held that the law is very clear that though the order of the Commission is in the nature of a package deal and it may not be possible always to dissect its order and the assessee should not be permitted to accept what is favourable to him and reject what is not, if the Court is satisfied that the order of the Commission is contrary to the provisions of the Act, the Court should interfere.

11. We are satisfied that the order of the Commission on this aspect, i.e., interest accrued but not due is contrary to the provisions of the law. The Settlement Commission in our view has not given any reasons also. It has simply stated that it agrees with the CIT (D/R)'s view. The finding of the Commission reads as under :

4.3 Decision

We would agree with the CIT (D/R)'s view. Income having accrued and corresponding expenditure having been reckoned on mercantile basis, the interest income shall be taxed on accrual basis for both the years under consideration.

12. In *Director of Income Tax (International Taxation) vs. Credit Suisse First Boston (Cyprus) Ltd.*³ the question of law that came up for consideration was whether interest can be said to have accrued to the assessee on 31st March in respect of securities held by it on that day although the interest was not due or payable on that day. The court after considering various judgments came to the conclusion that the right to receive the interest on the Government securities vested in the respondent only on the due date mentioned in the securities. Consequently, the interest accrued on the securities only on the due date and cannot be said to have accrued to assessee on any date other than the dates stipulated therein. The court also rejected the contention of revenue that interest accrues for broken period between two consecutive dates stipulated in the agreement/instrument for payment of interest. The court went on to hold that if the assessee held the security upto 31st March and sold the same thereafter, but before the date on which interest was payable as stipulated in the security, interest cannot be said to have accrued to the assessee.

13. The Commission has not articulated as to why it did not agree with the submissions made by the assessee's representative. The assessee's representative admittedly had also relied upon the judgment in *E.D. Sassoon & Co. Ltd. & Ors. vs. CIT*⁴ where the Hon'ble Apex Court held "Unless and until the assessee acquires a right to receive income, the income cannot be said to have been accrued to him". Following this judgment of the Hon'ble Apex

² 2022 SCC OnLine Bom 3155

³ (2013) 351 ITR 323 (Bom)

⁴ (1954) 26 ITR 27 (SC)

Court, the ITAT, Jaipur Bench in **State Bank of Bikaner & Jaipur vs. Deputy Commissioner of Income Tax**⁵ held that “in the case of interest on securities, the income fructifies to the assessee only when the securities yield interest”. The ITAT had also relied upon **CIT vs. Shoorji Vallabhdas & Co.**⁶ where the Hon’ble Apex Court has held that “if income does not result at all, there cannot be a tax, even though in book keeping, an entry is made about “hypothetical income” which does not materialise”. The Settlement Commission has not dealt as to why these judgments in case of *E.D. Sassoon & Co. Ltd.* (supra) and *State Bank of Bikaner & Jaipur* (supra) are not applicable. As held by the Bombay High Court in *Credit Suisse First Boston (Cyprus) Ltd.* (supra) the right to receive interest on Government securities vested in assessee only on the due date mentioned in the securities. Consequently, the interest accrued on the securities only on the due dates and cannot be said to have accrued to assessee on any date other than the dates stipulated therein. Therefore, in our view the conclusion arrived at by the Settlement Commission under this head is not in conformity with the provisions of law and certainly such a contravention would prejudice petitioner.

14. Mr. Suresh Kumar had also submitted that the judgment of the Bombay High Court in *Credit Suisse First Boston (Cyprus) Ltd.* (supra) was a later judgment, delivered much after the Settlement Commission passed the impugned order. Mr. Suresh Kumar also stated that the judgment of the High Court relied upon by Mr. Thakkar as also the orders passed by ITAT for subsequent Assessment Years from 1998-99 onwards were passed after the order of the Settlement Commission. These submissions of Mr. Suresh Kumar are not acceptable. The Hon’ble Apex Court in **Assistant Commissioner of Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Ltd.**⁷ has held that a judicial decision acts retrospectively. The Judges do not make law, they only discover or find the correct law. The law has always been the same and if a subsequent decision alters the earlier one, the later decision does not make a new law. It only discovers the correct principle of law which has to be applied retrospectively. The Hon’ble Apex Court held that even an earlier decision of the court operated for quite sometime, the decision rendered later on would have retrospective effect, clarifying the legal position which was earlier not correctly understood. Paragraph no. 40 to 44 of the said judgment read as under :

40. The core issue, therefore, is whether non-consideration of a decision of Jurisdictional Court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a "mistake apparent from the record"? In our opinion, both - the Tribunal and the High Court - were right in holding that such a mistake can be said to be a "mistake apparent from the record" which could be rectified under Section

⁵ 74 ITD 203 (Jaipur)

⁶ (1962) 46 ITR 144 (SC)

⁷ (2008) 305 ITR 227 (SC)

254(2).

41. A similar question came up for consideration before the High Court of Gujarat in *Suhrid Geigy Ltd.'s case* (*supra*). It was held by the Division Bench of the High Court that if the point is covered by a decision of the Jurisdictional Court rendered prior or even subsequent to the order of rectification, it could be said to be "mistake apparent from the record" under Section 254(2) of the Act and could be corrected by the Tribunal.

42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a 'new rule' but to maintain and expound the 'old one'. In other words, Judges do not make law; they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

43. *Salmond* in his well-known work states;

"(T)he theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are *res judicata* or accounts that have been settled in the meantime". (emphasis supplied)

44. It is no doubt true that after a historic decision in *Golak Nath v. State of Punjab* AIR 1967 SC 1643, this Court has accepted the doctrine of 'prospective overruling'. It is based on the philosophy: "The past cannot always be erased by a new judicial declaration". It may, however, be stated that this is an exception to the general rule of the doctrine of precedent.

15. Before we part, we should also note, in our view no reasons have been given by the Settlement Commission. In *Jyotendrasinhji* (*supra*) Revenue had argued that the Commission is not even required or obligated to pass a reasoned order. The Hon'ble Apex Court held that the principle of natural justice (*audi alteram partem*) has been incorporated in Section 245 D itself which should

mean, in our view, reasons have to be given. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at.

16. The Hon'ble Apex Court in **Uttar Pradesh State Road Transport Corporation vs. Jagdish Prasad Gupta**⁸ has stated reasons introduce clarity in an order. The order howsoever brief, should indicate an application of mind all the more when the same could be further challenged. Paragraph No. 8 of Uttar Pradesh State Road Transport Corporation (*supra*) read as under :

8. "5.... Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the [High Court's judgment] not sustainable.

6. Even in respect of administrative orders Lord Denning M.R. in *Breen v. Amalgamated Engg. Union*¹ observed: (WLR p. 750 G) "The giving of reasons is one of the fundamentals of good administration". In *Alexander Machinery (Dudley) Ltd. v. Crabtree*² it was observed:

"Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at".

Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

17. In view of the above, we set aside the impugned order to this extent. Consequently, the Assessment Order also, to the extent mentioned above, is quashed and set aside.

18. In the circumstances, on this issue we direct that the matter be

⁸ (2009) 12 Supreme Court Cases 609

sent to the Interim Board for Settlement constituted for the settlement of pending applications as contemplated under Section 245 AA of the Act. The Interim Board may pass such orders as it deems fit in accordance with law after hearing the parties.

19. Petition disposed.

2. Petition disposed.

(FIRDOSH P. POONIWALLA, J.)

(K.R. SHRIRAM, J.)