

Settlement of Tax Cases

Some Key Points : Recent Amendments

Substantial interest to be determined on the basis of beneficial ownership of shares carrying not less than 20% voting power/ beneficial entitlement to profits on the date of search [Explanation to Section 245C]

- (i) As per clause (a) of *Explanation* to section 245C, if any individual who has substantial interest in the business or profession of the specified person, then, he and his relative would be treated as an applicant in relation to the specified person.

Likewise, the *Explanation* also specifies as to who can be the applicant in case of other entities (like, firms, companies, etc.) having substantial interest in the business or profession of the specified person.

- (ii) Further, a person is deemed to have a substantial interest in a business or profession, in case the person is the beneficial owner of shares carrying not less than 20% voting power or he is beneficially entitled to not less than 20% of profits of such business or profession at **any time during the previous year**.
- (iii) The *Explanation* to section 245C has been amended to provide that for deeming a person to have a substantial interest in a business or profession, the beneficial ownership of shares carrying not less than 20% of the voting power or the beneficial entitlement to not less than 20% of profits shall be determined with reference to the **date of search** (instead of at any time during the previous year).
- (iv) Therefore, an applicant in relation to the specified person can apply to the Settlement Commission, *inter alia*, if he has substantial interest in the business or profession of the specified person **on the date of search**.

Threshold limit for “additional amount of income-tax payable on income disclosed in the application” for admission of a case by an entity related to the tax-payer who is the subject matter of search

- (i) Section 245A was amended by the Finance Act, 2010 to provide that the proceedings for assessment or reassessment resulting from search/requisition would fall within the definition of a “case” which can be admitted by the Settlement Commission.
- (ii) Consequent amendment was made in section 245C to provide that the additional amount of income-tax payable on income disclosed in the application should exceed ₹ 50 lakh, for an application to be made before the Settlement Commission in such cases.
- (iii) Therefore, if proceedings have been initiated against the applicant (hereinafter referred to as specified person) under section 153A or under section 153C as a result of search or a requisition of books of account, an application can be made before the

Settlement Commission if the additional amount of income-tax payable on the income disclosed in the application exceeds ₹ 50 lakh. In any other case, the additional amount of income-tax payable on the income disclosed in the application should exceed ₹ 10 lakh.

- (iv) Thereafter, the Finance Act, 2011 provided that an application can also be made, where the applicant is related to the specified person (mentioned in (iii) above) and in whose case also proceedings have been initiated as a result of search, provided the additional income-tax payable on the income disclosed in the application exceeds ₹ 10 lakh.
- (v) Therefore, the limit of ₹ 50 lakh would be applicable to the tax payer who is the subject matter of search and the limit of ₹ 10 lakh would be applicable to entities related to such a tax payer, who are also the subject matter of search.

Time limit for passing of order by the Settlement Commission [Section 245D(4A)]

- (a) In respect of application made on or after 01.06.2007 but before 01.06.2010, within 12 months from the end of the month in which the application was made.
- (b) In respect of application made on or after 01.06.2010, within 18 months from the end of the month in which the application was made.

Settlement Commission specifically empowered to amend any order to rectify a mistake apparent from record within six months from date the of its order [Section 245D(6B)]

- (i) Section 245D(4) stipulates that the Settlement Commission shall pass an order after giving an opportunity of being heard to the applicant and the Commissioner.
- (ii) Under section 245F(1), the Settlement Commission has been conferred all the powers which are vested in an income-tax authority under the Act. Under section 154, an income-tax authority has the power to amend any order passed by it in order to rectify any mistake apparent from the record.
- (iii) However, there are High Court rulings holding that the order made by the Settlement Commission is conclusive and final and therefore, the same cannot be rectified under section 154. However, this view does not convey the true legislative intent.
- (iv) Therefore, in order to reflect the correct intention of the legislature, section 245D(6B) specifically provides that the Settlement Commission may amend any order passed by it under section 245D(4) to rectify any mistake apparent from the record.
- (v) However, the time limit for effecting such amendment is within six months from the date of its order, as against the permissible time limit of four years provided for under section 154(7).
- (vi) Further, the Settlement Commission should not make a rectification which has the effect of modifying the liability of the applicant, without –
 - (1) giving a notice to the applicant and the Commissioner of its intention to do so; and
 - (2) allowing the applicant and the Commissioner an opportunity of being heard.

Question 1

On an application made by Mr. Pandey, an order was passed by the Settlement Commission on 03-01-2013 under Section 245D. The said order had a mistake apparent on record. The Settlement Commission passed an amended order dated 30-04-2013 which resulted in modifying the liability of Mr. Pandey.

Mr. Pandey is of the view that order of the Settlement Commission is final and conclusive and it has no power to rectify the said mistake.

You are required to examine the following:

- (i) *Correctness of claim made by Mr. Pandey*
- (ii) *Validity of the order amended by the Settlement Commission*

Answer

- (i) Under section 245F(1), the Settlement Commission has been conferred all the powers which are vested in an income-tax authority under the Act. Under section 154, an income-tax authority has the power to amend any order passed by it in order to rectify any mistake apparent from the record. Therefore, the Settlement Commission's power to amend an order to rectify any mistake apparent from the record is embedded in section 245F(1).

Further, in order to reflect the correct intention of the legislature, sub-section (6B) has been inserted in section 245D to specifically provide that the Settlement Commission may, at any time within a period of six months from the date of the order, amend any order passed by it under section 245D(4) to rectify any mistake apparent from the record. In this case, the rectification order was passed by the Settlement Commission within six months of passing the original order.

Therefore, Mr. Pandey's view is not correct.

- (ii) In this case, the rectification has the effect of modifying the liability of Mr. Pandey. Therefore, as per the proviso to section 245D(6B), the Settlement Commission, before passing the amended order, should have –

- (1) given a notice to the applicant and the Commissioner of its intention to make such an amendment; and
- (2) allowed the applicant and the Commissioner an opportunity of being heard.

If these conditions are fulfilled, the order amended by the Settlement Commission would be a valid order, since the amended order is passed by the Settlement Commission within the permitted time limit i.e., within six months from the date of its original order.

However, if the Settlement Commission has not given notice of its intention to make such an amendment or has not allowed the applicant and the Commissioner an opportunity of being heard, then, the amended order passed by it will not be valid.

Question 2

Seizures were made from Mr. Sunder pursuant to a search conducted in his premises. He filed an application for settlement by claiming to have received the amount by way of loans from several persons. The Settlement Commission accepted his statement and made an order. The CBI, however, conducted enquiry at the instance of the Revenue regarding the claimed amount of loans and opined that the alleged lenders had no means or financial capacity to advance such huge loans to Mr. Sunder and were mere name lenders only. The Commissioner filed an application under section 245D(6) praying for the order to be declared void and for withdrawal of benefit granted. Mr. Sunder, however, contended that the order of the Settlement Commission was final and any fresh analysis would amount to sitting in judgement over an earlier decision, for which the Settlement Commission was not empowered. Discuss the correctness of Mr. Sunder's contention.

Answer

The Apex Court, in *CIT vs. Om Prakash Mittal* (2005) 273 ITR 326, observed that a plain reading of section 245D(6) shows that every order passed under sub-section (4) has to provide for:-

- (i) the terms of settlement; and
- (ii) that the settlement would become void, if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

The decision that the order has been obtained by fraud or misrepresentation is that of the Settlement Commission. However, there is no requirement that the action be initiated by the Settlement Commission, *suo moto*. The Revenue can move the Settlement Commission for decision on an issue if it has material to show that the order was obtained by fraud or misrepresentation of facts.

The Supreme Court observed that the foundation for settlement is an application which an assessee can file at any stage of a case relating to him in such form and manner as may be prescribed. The fundamental requirement of the application under section 245C is that there must be full and true disclosure of the income along with the manner in which it has been derived. If an order is obtained by fraud or misrepresentation of facts, it cannot be said that there is a full and true disclosure and therefore, the Legislature has prescribed the condition relating to declaration of the order void when it is obtained by fraud or misrepresentation of facts.

The Supreme Court held that merely because section 245-I provides that the order of settlement is conclusive, it does not take away the power of the Settlement Commission to decide whether the settlement order has been obtained by fraud or misrepresentation of facts. If the Commissioner is able to establish that the earlier decision was void because of misrepresentation of facts, then it is open for the Settlement Commission to decide the issue. It cannot be called by any stretch of imagination to be a review of the earlier judgment or the subsequent Bench sitting in appeal over the earlier Bench's decision.

Mr. Sunder's contention is, therefore, not correct.

Question 3

Does the Settlement Commission have the power to reduce or waive interest levied under sections 234A, 234B and 234C of the Income-tax Act? Discuss.

Answer

The matter concerning the power of the Settlement Commission to reduce or waive interest chargeable under section 234A, 234B or 234C has been settled by the Supreme Court in *CIT v. Anjum M.H.Ghaswala* reported in 252 ITR 1.

According to the judgment, sub-section (6) of section 245D is only procedural in nature providing for fixing the term by which the amounts settled under sub-section (4) will have to be paid. It does not empower the Commission either to reduce or waive the interest. Any settlement made by the Commission must be in accordance with the provisions of the Act.

The Settlement Commission does not have the power to reduce or waive the interest levied under sections 234A, 234B and 234C. It does not authorize the waiver or deduction of tax. The levy of interest under sections 234A, 234B or 234C is mandatory in nature and therefore any settlement made must include the interest under these sections. However, as per provisions of section 245F, the Settlement Commission shall have all the powers which are vested in an income-tax authority. Therefore, Settlement Commission can grant relief from the aforesaid interest to the extent of the powers given vide the circulars issued by CBDT under section 119.

Question 4

- (a) *Does the Settlement Commission have jurisdiction to entertain an application made under section 245C(1) in respect of a case covered by Chapter XIV-B (Search and seizure case).*
- (b) *Power of the Settlement commission to grant immunity from prosecution and penalty is limitless.*

Answer

- (a) Clause (b) of section 245A has restricted the cases eligible to appear before the Settlement Commission. The term 'case' would mean any proceeding for assessment under the Act of any person in respect of any assessment year or years which is pending before the Assessing Officer and which alone shall be eligible for settlement by the settlement commission.

The following shall not be a proceeding for the purpose of filing an application under section 245C.

- (i) a proceeding for assessment or reassessment or re-computation under section 147;
- (ii) a proceeding for making fresh assessment in pursuance of an order under section 254 or section 263 or section 264 setting aside or cancelling an assessment.

Therefore, search cases are eligible for settlement through the Settlement Commission. However, a proceeding shall be deemed to have been commenced on the date of issue of notice initiating assessment under section 153A or section 153C and would get concluded on the date on which the assessment is made. During this period, application for settlement of the case could be filed by the assessee. The monetary limit prescribed in respect of additional amount of income-tax payable is also to be kept in mind in view of proviso to section 245C(1).

- (b) The power of Settlement Commission to grant immunity from prosecution is provided for in section 245H.

It also has the power to grant immunity in whole or in part from the imposition of any penalty under the Income-tax Act, 1961 with respect to the case covered by the settlement, if any, only if the person who has made the application has co-operated with the Commission and has made a full and true disclosure of his income and the manner in which it was derived.

Further, if any proceeding for the prosecution for any such offence has been instituted before the date of receipt of application for settlement under section 245C of Income-tax Act, 1961, the Settlement Commission cannot grant immunity.

The Settlement Commission, however, shall not grant immunity from prosecution for any offence under the Indian Penal Code or under any Central Act other than this Act (Income-tax Act, 1961) and Wealth-tax Act, 1957 to a person who makes an application under section 245C on or after 01.06.2007.

Self-examination Questions

1. Define the term "Case" for the purpose of settlement of cases.
2. Discuss the jurisdiction and powers of the Settlement Commission.
3. What is the binding nature of the orders of the Settlement Commission?