

(2009) 12 AHC CK 0333**Allahabad High Court****Case No:** None

Smt. Neeru Agarwal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision: Dec. 18, 2009**Acts Referred:**

- Income Tax Act, 1961 - Section 153A, 245D(4)

Citation: (2010) 231 CTR 153 : (2011) 330 ITR 422 : (2010) 187 TAXMAN 198**Hon'ble Judges:** Subhash Chandra Nigam, J; Prakash Krishna, J**Bench:** Division Bench**Final Decision:** Allowed**Judgement**

@JUDGMENTTAG-ORDER

Prakash Krishna, J.

All the above writ petitions were heard together and, as jointly agreed by the learned Counsel for the parties, are being disposed of by a common judgment. Writ Petition No. 1231 of 2008 was considered as a lead case and the arguments were advanced with reference to the facts of the said case. Therefore, the facts from the said writ petition are being taken into consideration.

2. Challenge in this petition is the notice dated 14-5-2008 and the order dated 22-5-2008 passed by the Deputy Commissioner of Income Tax, Central Circle, Agra. The impugned notice dated 14-5-2008 has been issued u/s 142(1) read with Sections 153A and 245D(4) of the Income Tax Act 1961, for the purposes of assessment u/s 153A for the assessment years 1999-2000 to 2005-06. The background facts of the case, which led the issuance of the said notice, may be stated in brief.

3. On 23-7-2004, a search was conducted by the Income Tax Department at the residential and business premises of the petitioner under the provisions of Section 132 of the Income Tax Act (hereinafter referred to as "the Act"). The petitioner is a

partner in the firm M/s. Indian Ceramic House. The said firm is engaged in the business of manufacturing and sale of ceramic colour and lustre. The petitioner filed her return of income on 12-5-2006 for the assessment years 1999-2000 to 2005-06 in response to the notice issued u/s 153A of the Act. The petitioner also filed an application u/s 245C(1) of the Act before the Settlement Commission for settlement of the case arising out of search operation conducted on 23-7-2004. In the said search operation, documents were seized. The matter was ultimately considered by the Settlement Commission and by the order dated 31-3-2008 passed u/s 245D(4) of the Act, the Settlement Commission settled undisclosed income of the petitioner as under:

(1) Indian Ceramic House	Rs. 55,00,000
(2) Aneel Aggarwal	Rs. 19,50,000
(3) O.P. Agarwal	Rs. 10,00,000
(4) Neeru Aggarwal	Rs. 8,50,000

Total	Rs. 93,00,000

4. The Settlement Commission granted immunity from penalty and prosecution under the Income Tax Act, 1961, only as regards issues arising from the application covered by the order. It has been further provided that the immunity granted to the applicant may, at any time, be withdrawn if the Commission is satisfied that the applicant had in the course of the settlement proceedings concealed any particular material to the settlement or had given false evidence and thereupon the applicant may be tried for the offence with respect to the immunity granted. The order further provides that it shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts. The said order has attained finality as it has not been subject-matter of challenge by either party.

5. In the impugned notice it is mentioned that on examination of records and seized materials, it is found that during search, cash of Rs. 3,23,000 was found in possession of the petitioner and no explanation was offered regarding the cash either during the course of search proceedings or even in the statement of facts filed before the Settlement Commission and that from perusal of the document No. 40 seized from the premises of M/s. Chemi Colour, Delhi it was found that the petitioner made certain investments in bonds and units which were not disclosed before the department nor the petitioner has explained the source of investments therein either before the department or even in the statement of facts filed before the Settlement Commission and that during the search it was found that the petitioner and her family members were maintaining luxurious life style and the details of the withdrawal for household expenses were not given.

6. In response to the said notice, objections were filed by the petitioner and one of the objections was that once the order is passed by the Settlement Commission u/s 245D(4) of the Act, the order of Settlement Commission is conclusive as to the matters stated therein as provided u/s 245I of the Act. The matters covered by the order of the Settlement Commission cannot be reopened in any proceeding under the Act or under any law for the time being in force.

7. The said objection did not find favour with the Assessing Officer, who vide impugned order dated 22-5-2008, rejected them by making clarification that the notice has been issued to make assessment after considering only those matters which were not placed before the Settlement Commission. Challenging the aforesated notice and the order dated 22-5-2008, the present writ petition has been filed.

8. A counter affidavit has been filed on the pleas inter alia that the Settlement Commission, while passing the order, remanded the matter back to the authority concerned to take appropriate action on the issues not placed before the Commission and on that basis the impugned notice was issued and impugned order was passed. It has been stated that the proceedings are not barred by time as the notice was issued in a pending matter and secondly the Settlement Commission had granted liberty to the concerned officer to take action on the issues not placed before the Commission to compute the quantum. The impugned notice has been sought to be justified on the pleas inter alia that in the seizure operation u/s 132 of the Act substantial amount of jewellery weighing around 1422.1110 gms. was found from the residence of the petitioner, besides silver items. The petitioner has also made investments of around Rs. 35 lakhs in bonds and units and that by order dated 31-3-2008, the Settlement Commission has given direction and liberty to the concerned officer to take action on issues not decided by the Settlement Commission and that the investments in bonds and units were not disclosed by the petitioner before the Settlement Commission, therefore, the notice was issued.

9. In rejoinder affidavit, besides reiterating the pleas already set out in the writ petition, it has been brought on record that after the issuance of the impugned notice and passing of the impugned order, a miscellaneous application was filed by the petitioner before the Settlement Commission for clarification of its earlier order dated 31-3-2008. The said application was filed on the pleas inter alia that the Assessing Officer is proceeding to re-determine the income of the petitioner on the ground that the petitioner did not disclose the particulars of undisclosed income truly and correctly. The said application has been disposed of by the Settlement Commission by the order dated 11-7-2008, a copy whereof has been filed as Annexure RA 1. It has been held by it that the facts of search were placed before the Settlement Commission, hence the issues cannot be matter of inquiry relating to giving effect to the settlement order.

10. Heard the learned Counsel for the parties and perused the record.

11. Sri Ravi Kant, learned Senior Counsel for the petitioner did not argue the point of limitation which was initially pressed at the time of obtaining the interim order. The only point urged by the learned Senior Counsel is that the very issuance of the impugned notice is without jurisdiction in view of statutory scheme of the Act. The order of the Settlement Commission is final and binding on all the parties and the assessing authority has no jurisdiction to reopen the matter under any circumstances except in the case of fraud or misrepresentation of facts, which is not so here. The facts were truly and correctly disclosed and were in the knowledge of the department as a result of search operation. The petitioner has not misrepresented the matter in any manner.

12. On the other hand, Sri D. Awasthi, learned Standing Counsel for the department submits that in view of the order dated 31-3-2008 passed by the Settlement Commission, the matter has been remanded back to the Assessing Officer who is required to frame the assessment order in respect of the matters not covered by the order of the Settlement Commission. He tried to justify the action of the department on the strength of the order of the Settlement Commission.

13. Considered the respective submissions of the learned Counsel for the parties and perused the record.

14. The question which falls for consideration in the present petition is - what is the ambit, scope and purport of the order dated 31-3-2008 passed by the Settlement Commission, on the facts of the present case.

15. But before doing it, it is necessary for us to examine various provisions of the Act which are germane to the controversy on hand. The provisions relating to the settlement of the cases can be find out in Chapter XIX of the Income Tax Act which provides for constitution of Settlement Commission by the Central Government for the settlement of cases under that Chapter. Section 245B provides that the Chairman, Vice Chairman and other members of the Settlement Commission shall be appointed by the Central Government from amongst persons of integrity and outstanding ability, having special knowledge of, and, experience in, problems relating to direct taxes and business accounts. Under the provisions of Chapter XIX-A, on such application being made, the Commission is empowered to dispose of the same in the manner provided thereunder. The Commission after receiving the application may by order allow the application to be proceeded with or reject the same. If an application is allowed, then under Sub-section (3) of Section 245B it can call for relevant record from the Commissioner and if it forms an opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make order or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case. In the present case, Sub-sections (4) and (6) of Section 245D, which were referred by the respective Counsel, are relevant and, therefore, are reproduced below:

(4) After examination of the records and the report of the Commissioner, received under Sub-section (1), and the report, if any, of the Commissioner received under Sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under Sub-section (1) or Sub-section (3).

**

**

(6) Every order passed under Sub-section (4) shall provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

[Emphasis supplied]

16. The aforesated provisions came up for consideration before the Apex Court, though in a slightly different context, were interpreted in [Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others](#), In this case the Apex Court was considering the ambit and scope of power of Settlement Commission to order waiver of statutory interest. In that connection, the Apex Court interpreted Sub-sections (4) and (6) of Section 245D. Emphasis was laid by it on the phrases "in accordance with the provisions of the Act" used in Sub-section (4) of Section 245D and "terms of settlement" used in Sub-section (6) thereof. On examination of scheme as provided u/s 245D of the Act, the Apex Court has held that the Settlement Commission has to settle the dispute in accordance with the provisions of Income Tax Act and the expression "terms" used in Sub-section (6) does not refer to the power of the Commission to waive or reduce the tax, penalty etc. Following observation made with reference to the word "term" is apposite:

...Therefore, all that the expression "term" in Section 245D(6) means is that the Commission can stipulate the conditions of payment like instalments, last date for payment, etc. Beyond that, in our opinion, Sub-section (6) does not authorise the waiver or reduction of tax, penalty or interest settled under Sub-section (4) of Section 245D.

[Emphasis supplied] (p. 10)

Having noticed the above, now we may proceed to examine the scope, extent and purport of Settlement Commission's order dated 31-3-2008. The relevant portion of

the order is paragraph-7 which is the basis of the impugned notice and the order. For the sake of convenience, the same is reproduced below:

7. The CIT/Assessing Officer may take such action as appropriate in respect of the matters, not placed before the Commission by the applicant, as per the provisions of Section 245F(4) of Income Tax Act, 1961.

The said portion of the order is being construed by the department as authorisation to take appropriate action in respect of the matters not placed before the Commission by the applicant as provided u/s 245F(4) of the Act.

17. The argument of the learned Senior Counsel for the petitioner, on the other hand, is that finality has been attached to the order of Settlement Commission by Section 245I of the Act. The said Section provides that every order of settlement passed under Sub-section (4) of Section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this chapter, be reopened in any proceeding under the Act. In other words, the Income Tax authorities have no jurisdiction either to issue the impugned notice or to pass the impugned order, notwithstanding para 7 of the order of the Settlement Commission. Assuming for the sake of argument that the ground on which the notice was given was not covered by the application, even then it cannot be a ground to issue the impugned notice in view of plain language of Sub-section (4) of Section 245D.

18. Section 245F(4), reference of which has been made in the order of Settlement Commission, provides that in the absence of any express direction by the Settlement Commission to the contrary, nothing in Chapter XIX-A shall affect the operation of the provisions of this Act insofar as they relate to any matters other than those before the Settlement Commission. The notice has been issued in purported exercise of power u/s 245D(4), already reproduced above. Under Sub-section (4) of Section 245D power has been conferred on the Settlement Commission to pass such order as it thinks fit on the matters covered by the application as also any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under Sub-section (1) or Sub-section (3) of Section 245D. Secondly, it is not the case of the department that the ground on which the notice has been issued to the petitioner was a matter which was not referred in the report of the Commissioner under Sub-section (1) or Sub-section (3) of Section 245D.

19. The aforesaid Section should be read conjointly with Section 245I of the Act which attaches finality and conclusiveness to every order of settlement. Legislative intent is loud and clear. The order passed by the Settlement Commission has been treated to be conclusive. It can be recalled only under the circumstance if it is subsequently found by the Settlement Commission that the order was obtained by fraud or misrepresentation of facts, as per Sub-section (6) of Section 245D of the Act. On a conjoint reading of Sub-sections (4) and (6) of Section 245D and Sections

245F(4) and 245I, it would appear that except in the case of fraud or misrepresentation of facts, the order passed by the Settlement Commission is final and conclusive and binding on all the parties. This appears to be so because the Settlement Commission was constituted to reduce the life span of litigation and to provide speedy remedy to an assessee who voluntarily discloses his/her undisclosed income for hassle free settlement of the case. The very use of the words "settlement of cases" are indicative of the fact that the provision has been made to settle the case in its entirety for ever and leave no issue open for subsequent decision.

20. The facts found and documents seized in search operation were matters which relate to the settlement of undisclosed income of the petitioner and therefore, were subject-matter of consideration of the Settlement Commission. It cannot be said that such matters are matters other than those before the Settlement Commission.

21. Settlement Commission is required to decide the dispute by passing such order as it thinks fit "on the matters covered by the application and any matter relating to the case not covered by the application but referred to in the report of the Commissioner under Sub-section (1) or Sub-section (3)". It follows that the Settlement Commission is empowered to pass such order as it may think fit. The subject-matter of the order is - (1) the matters covered by an application and (2) any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under Sub-section (1) or Sub-section (3). Thus, the contention of the department that the investment in bonds etc. was not subject-matter of the order of Settlement Commission is not correct. Investment in bonds, etc. and paper No. 40, on which the assessment is sought to be completed by the Assessing Officer by giving impugned notice, were before the Settlement Commission by implication of law. The investment in bonds and security, etc. was in the knowledge of the department as also the document No. 40 recovered during the search operation and if they were not pressed in service by the department before the Settlement Commission, the department should thank itself. It is no longer open to the department to urge that it can assess the income of the petitioner on the basis of the investment in bonds, etc. and the document No. 40. It shall be deemed that the Settlement Commission has taken into consideration the above matters also.

22. Our above view also finds corroboration from the subsequent order passed by the Settlement Commission on the miscellaneous application filed by the petitioner. The operative portion of the said order is reproduced below:

8. We have perused the notices issued by the Assessing Officer u/s 142(1)/143(2) read with Section 245D(4). It is evident that the investigations/inquiry sought to be made by the Assessing Officer relate to the seized material. The search assessments were part of the proceedings before the Settlement Commission. In the "Terms of settlement" applications, it was specifically stated that the overall additional income covered fully the monetary effect of the seizure as a whole. We, therefore, hold that

as the facts of the search were placed before the Settlement Commission; hence issues cannot be matters of inquiry relating to giving effect to the settlement orders.

23. There is another aspect of the case. The search operation was carried on by the department and certain documents were seized by it. The department was in possession of the entire material including the investments made by the petitioner in bonds and units. Therefore, it cannot be said that the petitioner has played any fraud or misrepresented the facts. The department was very much a party before the Settlement Commission and it is not the case of the department that the Settlement Commission has passed the order without giving any opportunity of being heard to the department. Moreover, the order of Settlement Commission has been allowed to become final and we are not hearing the present petition against the order of Settlement Commission. Nor we are required to examine the legality and validity of the said order. The Settlement Commission, in its operative portion of the order has not said a word remanding the matter for re-examination regarding the investments, etc. The Settlement Commission by operative portion, has settled the undisclosed income of the petitioner and provided immunity, etc. with the rider that the order shall be void if it is found subsequently that it was obtained by fraud or misrepresentation of facts.

24. It is not the case of the department that the order was obtained from the Settlement Commission either by fraud or by misrepresenting the facts. The assessing authority therefore, has no jurisdiction to issue the impugned notice for making further enquiry in the matter in view of Sections 245D(6) and 245I of the Act. There cannot possibly be piecemeal determination of the income of an assessee for relevant period, one by the Settlement Commission and another by the Assessing Officer, otherwise the very purpose of filing application before the Settlement Commission would be frustrated. It is obligatory on the Settlement Commission to pass an appropriate order after taking into consideration the entire material brought before it by the parties including the department. Learned Standing Counsel could not point out any statutory provision which may empower the Settlement Commission to restore back the matter in respect of certain items to the Assessing Officer and also finally settle income of the applicant. The scheme of Chapter XIX-A does not envisage vesting of any such power in the Settlement Commission, as interpreted by the Apex Court in the case of Anjum M.H. Ghaswala (*supra*) that a Settlement Commission shall pass an order in accordance with law means - that it can stipulate the conditions of payment like instalments, last date for payment, etc., and not beyond that.

The following passage from the aforeslated judgment is also relevant:

It is no doubt true that the terminology "settlement" has a very wide dictionary meaning and in the absence of a statutory definition generally the word "settlement" in Sub-section (4) of Section 245D would give the Commission sufficient power to arrive at a settlement which it deems fit, but when the statute qualifies

such expression like "settlement", with mandatory words like "in accordance with the provisions of this Act" the width of the term "settlement" becomes subject to the mandate found in that section, which would mean that while a Commission has sufficient elbow-room in assessing the income of the applicant u/s 245D(4) it cannot make any order with a term of the settlement which would be in conflict with the mandatory provisions of the Section like in the quantum and payment of tax and/or interest. In this view of the matter, we are of the opinion that assuming that there is any room for interpretation of the provisions of Part F of Chapter XVII and Chapter XIX-A, we would hold that it would not in any manner empower the Commission to either waive or reduce interest which is statutorily payable under the provisions of Part F of Chapter XVII.

[Emphasis supplied] (p. 14)

25. While preparing the judgment, we could lay our hands on a decision in CIT v. Om Prakash Mittal [2005] 143 Taxman 373. In this case, the Apex Court has interpreted Section 245D(6) as also other provisions of Chapter XIX-A of the Act and has held that the Commission's power of settlement has to be exercised in accordance with the provisions of the Act. Though the Commission has sufficient elbow-room in assessing the income of the applicant and it cannot make any order with a term of settlement which would be in conflict with the mandatory provisions of the Act like in the quantum and payment of tax and the interest. The object of the Legislature, in introducing Section 245C is to see that protracted proceedings before the authorities or in Courts are avoided by resorting to settlement of cases. In this process an assessee cannot expect any reduction in amounts statutorily payable under the Act. Further it has been held that the Income Tax Department, if so advised, may move to the Settlement Commission if it has material to establish that the order was obtained by fraud or misrepresentation of facts. Emphasis is that power has been given to the Commission and not to the assessing authority. Relevant portion from paragraph 15 is reproduced below:

15. ...If an order is obtained by fraud or misrepresentation of facts, it cannot be said that there was true and fair disclosure. It was noted here that unlike Section 139 of the Act which provides for filing of revised return, there is no provision for revision of an application made in terms of Section 245C. That shows clear legislative intent that the applicant for settlement has to make a true and fair declaration from the threshold. It is on the basis of the application received that the Commissioner calls for report to decide whether the application is to be rejected or permitted to be continued. The declaration contemplated in Section 245C is in the nature of voluntary disclosure of concealed income, but as noted above it must be true and fair disclosure. Voluntary disclosure and making a full and true disclosure of the income are necessary pre-conditions for invoking the Commission's jurisdiction. (p. 386)

26. In view of the above, we are of the considered opinion that after passing of the order dated 31-3-2008 by the Settlement Commission, no power vests in the assessing authority or any other authority to issue impugned notice in respect of the period and income covered under the order of the Settlement Commission. In case of fraud or misrepresentation of facts, remedy is to approach the Settlement Commission. The Settlement Commission, by para 7 of its order, has not and could not have empowered the Income Tax authorities to frame another assessment order, while settling the undisclosed income of the petitioner for the period covered by its order, in respect of investment in bonds etc.

27. We find sufficient force in the writ petition. All the writ petitions succeed and are allowed.

No order as to costs.