IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5862 OF 2021

...r Senapati Santaji Ghorpade Sugar Factory Ltd., Through its Authorised Signatory having its address at 250, B/51 E Ward, Nagala Park, Off Shahu Blood Bank, Kolhapur – 416 003) ....Petitioner

V/s.

1. Assistant Commissioner of Income Tax, Central Circle 1(1), Room No.607, 6th Floor, Aaykar Sadan, Bodhi Towers, Salisbury Park, Gultekadi, Pune, Maharashtra – 411 037
2. Central Board of Direct Taxes, North Block, Secretariat Building, New Delhi – 110 001
3. Interim Board (Settlement Commission), North Block, Secretariat Building, New Delhi – 110 001
4. Union of India, Through the Secretary, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi – 110 001) ....Respondents

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Mr. J.D. Mistri, Senior Advocate a/w. Mr. Madhur Agrawal and Mr. Atit Soni i/b. Mr. P.B. Gujar for petitioner.
Mr. Suresh Kumar for respondents.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
RESERVED ON : 21st MARCH 2024
PRONOUNCED ON : 2nd APRIL 2024

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

1 Since the pleadings are completed, by consent of the parties, we decided to dispose the petition at the admission stage itself.

2 Therefore, rule. Rule made returnable forthwith.

3 Petitioner is a company engaged in the business of manufacturing and trading in sugar, ethanol, power, etc. Petitioner received

a notice dated 16th September 2021 from Assistant Commissioner of Income Tax, Central Circle 1(1), Pune, who is respondent no.1, stating that a valid application for Assessment Years 2014-15 to 2020-21 has not been filed by petitioner before the Settlement Commission. It is this notice alongwith a condition in a Press Release dated 7th September 2021 in so far as it seeks to make only those assessees eligible to file application before the Settlement Commission who were eligible as on 31st January 2021 which was challenged in the petition. Subsequently, upon leave being granted, the petition was amended to also impugn a notification dated 28th September 2021 in so far as it sought to make only those assessees eligible to file applications before the Interim Board Settlement Commission (IBSC), respondent no.3, who are eligible as on 31st January 2021.

Facts in brief :

4 On 25th July 2019 a search action under Section 132 of the Income Tax Act, 1961 (the Act) was conducted on petitioner and was concluded on 29th August 2019. Thereafter, petitioner received a notice dated 5th February 2021 under Section 153A of the Act for Assessment Years 2014-15 to 2020-21 calling upon petitioner to file return of income within 15 days. On 18th March 2021 petitioner filed before the Settlement Commission an application under Section 245C of the Act for Assessment Years 2014-15 to 2020-21.

5 In the meantime, a Finance Bill, 2021 was laid before the legislature on 1st February 2021. The Finance Bill proposed certain amendments to Chapter XIX-A of the Act including insertion of sub-section (5) to Section 245C of the Act to provide that "*No application shall be made under this section on or after 1st February 2021*".

6 It is stated in the petition that even though it was just the Bill and was not promulgated into the Act, certain benches of the Settlement Commission stopped accepting the applications after 1st February 2021. Later, based on directions given by various Courts, the Settlement Commission accepted and entertained the applications filed by assessees as the Bill gets enacted only after the assent of the Hon'ble President of India and till such time, the Settlement Commission is duty bound to accept applications so filed by assessees. Accordingly, petitioner made application to the Settlement Commission on 18th March 2021, which was accepted by the Settlement Commission.

7 The Hon'ble President of India gave assent to the Finance Bill on 28th March 2021 after which sub-section (5) was inserted in Section 245C of the Act. The other amendments in the Finance Act, 2021, in so far as they are relevant, are as under :

> (i) Interim Board was defined in Section 245A(da) to mean a board as constituted under Section 245AA.
>
> (ii) "pending application" was defined in Section 245A(eb) to mean an application which was filed

under Section 245C and which fulfills the following conditions, viz.:

(a) it was not declared invalid under sub-section (2c) of Section 245D of the Act; and

(b) No order under sub-section (4) of Section 245D was issued on or before 31st January 2021 with respect to such applications.

(iii) Interim Board was constituted as per Section 245AA of the Act.

(iv) A proviso was inserted in Section 245B of the Act to provide that the Settlement Commission shall cease to operate on or after 1st February 2021.

(v) Other provisions were also made in Chapter XIXA to provide for similar powers to the Interim Board settlement for settlement of disputes as were provided earlier to the Settlement Commission.

8 The Interim Board was notified by the Union of India by Notification No.91 of 2021 dated 10th August 2021.

9 Respondent no.3, the IBSC, issued a Press Release dated 7th September 2021 stating that in order to provide relief to the tax payers, who were eligible for filing applications as on 31st January 2021 and who could not file the same due to the amendments by the Finance Act, 2021, the applications for settlement can be filed by such tax payers, on or before 30th September 2021 before the Interim Board. The two conditions, which have been notified as necessary for filing application are (i) the assessees were eligible to file applications for settlement on 31st January 2021 for the assessment year, for which application is sought to be filed; and (ii) the

assessment proceedings for the relevant assessment years are pending as on the date of filing applications. This Press Release has been impugned in the petition.

10 Thereafter, respondent no.1 issued notices dated 30th August 2021 and 13th September 2021 under Section 142(1) of the Act calling for certain information with respect to the assessment proceedings for Assessment Years 2014-15 to 2020-21. In response, petitioner filed submissions dated 2nd September 2021 stating that petitioner has filed, before amendment of the Act, an application before the Settlement Commission on 18th March 2021 which is deemed to have been allowed to be proceeded with in terms of Section 245D(1) of the Act and, therefore, the assessment proceedings be kept in abeyance till the disposal of the application filed by petitioner before the Settlement Commission. Petitioner filed further submissions dated 15th September 2021.

11 Respondent no.1 thereafter issued a notice dated 16th September 2021 under Section 142(1) of the Act, which is also impugned in the petition, stating that : (a) in the Press Release dated 7th September 2021 it has specifically been mentioned that assessee should be eligible to file application for settlement on 31st January 2021; (b) in petitioner's case notices under Section 153A of the Act were issued on 5th February 2021. As the assessment proceedings for the relevant assessment years were not pending as on 31st January 2021, petitioner was

not an eligible assessee as on that date. Accordingly, petitioner does not fulfill the conditions as laid down in the Press Release; and (c) it cannot be said that any valid application is pending before the Settlement Commission. Petitioner was called upon to furnish details immediately.

12 Subsequently, respondent no.3 issued a notification dated 28th September 2021, which is also impugned in the petition, stating that the tax payers, who were eligible to file applications before Settlement Commission as on 31st January 2021, but could not file the same in view of the amendments made by the Finance Act, 2021, are now permitted to file the applications before respondent no.2 for settlement of disputes by 30th September 2021.

13 Petitioner is aggrieved by the impugned notice dated 16th September 2021 by which respondent no.1 has proposed to proceed with the assessment for Assessment Years 2014-15 to 2020-21; the Press Release dated 7th September 2021 issued by respondent no.3 only permitting assessees who are eligible to file applications as on 31st January 2021 to make fresh applications upto 30th September 2021; the impugned notification dated 28th September 2021 issued by respondent no.3 in terms of the impugned Press Release dated 7th September 2021 and retrospective applicability of sub-section (5) in Section 245C of the Act inserted by the Finance Act, 2021 with retrospective effect from 1st February 2021.

In short, petitioner is challenging the order of Department of Revenue in its circular dated 28th September 2021 in as much as it restricted filing of application before the Interim Board for settlement only by those assessees who are eligible to file the application for settlement on 31st January 2021.

14 Mr. Mistri submitted as under :

(a) the Settlement Commission having accepted petitioner's application dated 18th March 2021, in view of proviso to Section 245D(1) of the Act, the said application is deemed to have been proceeded with. No order has been passed by the Settlement Commission and/or respondent no.2 treating petitioner's application as invalid or dismissing/rejecting petitioner's application. Since petitioner's application is still pending before the Settlement Commission, the finding of respondent no.1 in the impugned notice to treat such application as not a valid application is bad in law;

(b) the statutory remedy of approaching the Interim Board cannot be taken away retrospectively. Retrospective legislation cannot affect the vested rights. When the Department has extended the last date from 1st February 2021 to 30th September 2021, it can only extend the deadline but cannot introduce a new concept of "eligibility as on 1st February 2021" which is not there in the Act itself;

(c) in petitioner's case the search was conducted between 25th July 2019 and 29th August 2019 but for the reasons best known to them, the authorities issued the notice of reopening only on 5th February 2021, i.e., 5 days after 31st January 2021 and thus, the very right of approaching the Interim Board now in the scheme of things stood dependent on the vagaries of action being taken by the authorities as per their convenience;

(d) under Section 245M of the Act, the Settlement Commission had to transfer all the pending applications to the Interim Board. Nowhere any date of eligibility or a cut-off date is mentioned. Therefore, the circular while extending the time for making the applications upto 30th September 2021 ought not to have introduced a new condition of eligibility.

(e) As held in ***Tata Iron and Steel Co. Ltd. vs. N.C. Upadhyay***[1], the binding nature of circular issued by the CBDT must be confined to tax laws and that also for the purpose of giving administrative relief to the taxpayer and not for the purpose of imposing a burden on him.

(f) In ***UCO Bank vs. Commissioner of Income Tax***[2], the Hon'ble Apex Court held that the question is not whether a circular can override or detract from the provisions of the act. The question is whether this circular seeks to mitigate the rigour of particular section for the benefit of the assessee in certain specified circumstances. So long as such a circular is in force, it would be binding on the departmental authorities in view of the

1 1974 (96) ITR 1
2 1999 (104) taxman 547

provisions of Section 119 to ensure a uniform and proper administration and application of the Act.

(g) As held in ***Godrej and Boyce Manufacturing vs. State of Maharashtra & Ors.***[3], additional condition of eligibility cannot be brought in by the circular. It is of course open to the legislature to add to the conditions provided for in the statute or for that matter to do away with certain conditions that might be in existence. But it certainly cannot be left in the hands of the executive to impose conditions in addition to those in the statutes;

(h) when the application of petitioner has been treated as pending application, the circular is without application of mind and as such is arbitrary. The legislature while doing away with the Settlement Commission cannot take away vested rights.

(i) As held in ***Commissioner of Income Tax vs. Shah Sadiq & Sons***[4], a right which had become vested, continued to be capable of being enforced, notwithstanding the repeal of the statute under which the right accrued unless the repealing statute took away the right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act.

(j) In ***Punjab State Co-operative Agriculture Development Bank Limited vs. The Registrar of Co-operative Society and Ors.***[5] the Court held

3 2009 (5) SCC 24
4 1987 (166) ITR 102
5 Civil Appeal Nos.297-298 of 2022 dated 11.01.2022

that an amendment having retrospective operation, which has the effect of taking away the benefit already available to the employee under the existing rule, indeed divest the employee from his vested or accrued rights and that being so, it would be held to be violative of the rights guaranteed under Article 14 and 16 of the Constitution.

(k) As held in ***Union of India & Ors. vs. Tushar Ranjan Mohanty and Ors.***[6], though the legislature has the power to make laws with retrospective effect, that power cannot be used to deprive a person of an accrued right vested in him under a statute or under the Constitution;

(l) it was open to respondent no.3 to relax the rigours of the provisions of the Act for the benefit of assessees by issuing any direction or Press Release but it is not open to respondent no.3 to put in new rigours or impediments to the rights of an assessee in a Press Release or a notification which is contrary to the provisions of the Act. If petitioner was entitled to file a fresh application on 18th March 2021 irrespective of whether petitioner was eligibile on 31st January 2021 or not, putting such a further condition in the Press Release of assessee being eligible for making application only if assessee was eligible on 31st January 2021 is clearly invalid;

(m) respondent no.1 cannot be permitted to take benefit of his own action by delaying the issue of notice under Section 153A of the Act. The search of petitioner had already been completed on 29th August 2019

6 1994 (5) SCC 220

and as per the provisions of Section 153A of the Act, it was mandatory for respondent no.1 to issue the notices in respect of each of the six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted. There was no justification for respondent no.1 to delay the issue of notice under Section 153A of the Act to 5th February 2021. If respondent no.1 had issued the notices within a reasonable time after completion of the search or after the centralization of the case, petitioner would have been eligible to make the application as on 31st January 2021. Therefore, by delaying the issue of the notices, respondent no.1 is trying to get the advantage of his own delay/of his own wrong and denying petitioner the benefit of approaching the Settlement Commission;

(n) sub-section (5) of Section 245C of the Act, even though inserted with retrospective effect from 1st February 2021, can be given effect to only after the date when the assent of the Hon'ble President of India was received to promulgate the Finance Act, 2021. Sub-section (5) of Section 245C of the Act provides that no application shall be made under this section on and after 1st February 2021. Petitioner had already made the application on 18th March 2021 when sub-section (5) was not in the statute and hence, petitioner had made the valid application as per the provisions of the Act. The purport of sub-section (5) is not to make an application already filed after 1st February 2021 as invalid but it should be read as no application shall be made after 1st February 2021 once the assent of the

Hon'ble President of India has been received. But before receipt of the assent any application made by an assessee will not be hit by sub-section (5) of Section 245C of the Act.

15 Mr. Suresh Kumar submitted as under :

(a) The very purpose of the Finance Act, 2021 impugned legislation itself is to do away with the Settlement Commission and to set up an Interim Board to deal with the pending applications. The Finance Act received the assent of the Hon'ble President of India on 28th March 2021 and was published in the gazette and notified on 1st April 2021. It was expressly given retrospective effect from 1st February 2021. Petitioner does not have any vested right for settlement and the settlement itself is a concession;

(b) the very concept of settlement is only for the benefit of Revenue to ease and expedite the collection;

(c) the Circular merely extended the time for submitting the applications and nothing beyond. As per the Act itself, petitioners were eligible to file applications only if their case was pending as on 1st February 2021 and the pending applications ought to be transferred to the Interim Board. Therefore, it is clear that only the applications which are eligible and filed before 1st February 2021 alone have to be dealt with by the Interim Board;

(d) the introduction of the abolition of settlement scheme or resolution scheme is the legislative policy and the same cannot be challenged and the scope of judicial review in respect of the same is very limited. In ***Howrah Municipal Corporation and Ors. V/s. Ganges Rope Co. Ltd. and Ors.***[7] the Hon'ble Apex Court has described what is vested right. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. As held in *Howrah Municipal Corporation* (Supra) in the case of petitioner, no vested right had been created. Moreover, the settlement itself was a concession, there was no vested right of settlement even prior to the amendment and thus it cannot be deemed to be preserved by the provisions of Section 6 of the General Clauses Act and assessees have other remedies of appeal etc;

(e) even assuming that there was a right to approach the Settlement Commission, the parliament which conferred the right has the power to take away the same. The parliament has the power to amend, repeal or supersede and such powers can be exercised retrospectively also. Unless the retrospective operation of its statute is found to be unduly oppressive and confiscatory, it can be held to be unreasonable as to violate the constitutional norms. As held by the Hon'ble Apex Court in ***Chhotabhai Jethabhai Patel and Co. vs. Union of India***[8], the legislature was within its powers to legislate, prospective or retrospective, including legislation with regard to taxation and the Finance Bill, 2021 would take effect from the

7 (2004) 1 SCC 663
8 1961 SCC Online SC 12

date of the Finance Bill, i.e., 1st February 2021. Even ***Colonial Sugar Refining Company Ltd. vs. Irving***[9] provides that the parliament has power to make retrospective legislation;

(f) in ***Authorised Officer, Central Bank of India vs. Shanmugavelu***[10], the Hon'ble Apex Court dealt with the law on the principle of reading down of a provision. The rationale behind the principle of reading down is to avoid striking down an entire legislation. Courts generally prefer to preserve the intent of the legislature and the overall validity of a law by adopting an interpretation that addresses the specific constitutional concerns without invalidating the entire statute. It is only for the limited purpose of making a provision workable and its objective achievable. A Single Judge of the Hon'ble Calcutta High Court in ***Pradeep Kumar Naredi vs. Union of India***[11] had rejected the petition challenging the very same Press Release and the CBDT order dated 28th September 2021.

FINDINGS :

16 At the outset, the question of the validity of the applications filed before the Settlement Commission by various assessees similarly placed as petitioner has been decided by the Hon'ble Madras High Court in ***Jain Metal Rolling Mills vs. UOI***[12] wherein the Hon'ble High Court has held that the eligibility condition in the impugned Notification issued under

9 1906 AC 360
10 2024 SCC Online SC 92
11 (2022) 138 taxmann.com 378 (Calcutta)
12 156 taxmann.com 513

Section 119(2) of the Act should be read as 31st March 2021 and not 31st January 2021 as the Finance Act, 2021 was notified, w.e.f. 1st April 2021, and, therefore, the eligibility of an assessee is to be considered from the immediately preceding date. In view of the decision of the Madras High Court, the impugned notice/order dated 16th September 2021, passed by respondent no.1 holding petitioner's application as invalid and bad in law is clearly not sustainable as the decision of the Hon'ble Madras High Court, reading down the eligibility condition would be applicable pan India as held by this Court in ***New India Assurance Company Limited vs. ACIT***[13] and ***Group M. Media India (P.) Ltd. vs. Union of India***[14].

17 Be that as it may, let us consider whether petitioner having made a valid application under Section 254C of the Act had a vested right of adjudication on the said application?

The provisions of the Act for deciding this petition are : Sections 245A(b) with explanation (iiia), (eb); 245AA; 245C(1), (3), (4), (5); 245D(1), (2C), (4) (9); and 245M(2). The same read as under :

> ***245A.*** *In this Chapter, unless the context otherwise requires, -*
>
> *(a) ************************
>
> *(b) "case" means any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of section 245C is made.*
>
> *Explanation.—For the purposes of this clause—*
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> ****************

13 158 taxmann.com367
14 77 taxmann.com 106

(iiia) a proceeding for assessment or reassessment for any of the assessment years, referred to in clause (b) of sub-section (1) of section 153A in case of a person referred to in section 153A or section 153C, shall be deemed to have commenced on the date of issue of notice initiating such proceeding and concluded on the date on which the assessment is made;

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(eb) "pending application" means an application which was filed under section 245C and which fulfils the following conditions, namely: —

(i) it was not declared invalid under sub-section (2C) of section 245D; and
(ii) no order under sub-section (4) of section 245D was issued on or before the 31st day of January, 2021 with respect to such application;]

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Interim Boards for Settlement

245AA. *(1) The Central Government shall constitute one or more Interim Boards for Settlement, as may be necessary, for the settlement of pending applications.*

(2) Every Interim Board shall consist of three members, each being an officer of the rank of Chief Commissioner, as may be nominated by the Board.

(3) If the Members of the Interim Board differ in opinion on any point, the point shall be decided according to the opinion of the majority.

Application for settlement cases.

245C. *(1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided: **************************

*(2) *******************

3) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

(4) An assessee shall, on the date on which he makes an application under sub-section (1) to the Settlement Commission, also intimate the Assessing Officer in the prescribed manner of having made such application to the said Commission.

(5) No application shall be made under this section on or after the 1st day of February, 2021.

Procedure on receipt of an application under section 245C.

245D. *(1) On receipt of an application under section 245C, the Settlement Commission shall, within seven days from the date of receipt of the application, issue a notice to the applicant requiring him to explain as to why the application made by him be allowed to be proceeded with, and on hearing the applicant, the Settlement Commission shall, within a period of fourteen days from the date of the application, by an order in writing, reject the application or allow the application to be proceeded with:*

Provided that where no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

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(2C) Where a report of the Principal Commissioner or Commissioner called for under sub-section (2B) has been furnished within the period specified therein, the Settlement Commission may, on the basis of the report and within a period of fifteen days of the receipt of the report, by an order in writing, declare the application in question as invalid, and shall send the copy of such order to the applicant and the Principal Commissioner or Commissioner:

Provided that an application shall not be declared invalid unless an opportunity has been given to the applicant of being heard:

Provided further that where the Principal Commissioner or Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner or Commissioner:

[Provided also that where in respect of an application, an order, which was required to be passed under this sub-section on or before the 31st day of January, 2021, has not been passed on or before the 31st day of January, 2021, such application shall deemed to be valid.]

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(4) After examination of the records and the report of the Principal Commissioner or Commissioner, if any, received under—

(i) sub-section (2B) or sub-section (3), or

(ii) the provisions of sub-section (1) as they stood immediately before their amendment by the Finance Act, 2007, and after giving an opportunity to the applicant and to the Principal Commissioner or 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 Principal Commissioner or Commissioner.

(4A) The Settlement Commission shall pass an order under sub-section (4),—

(i) in respect of an application referred to in sub-section (2A) or sub-section (2D), on or before the 31st day of March, 2008;

(ii) in respect of an application made on or after the 1st day of June, 2007 but before the 1st day of June, 2010, within twelve months from the end of the month in which the application was made;

(iii) in respect of an application made on or after the 1st day of June, 2010, within eighteen months from the end of the month in which the application was made.

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[(9) On and from the 1st day of February, 2021, the provisions of sub-sections (1), (2), (2B), (2C), (3), (4), (4A), (5), (6) and (6B) shall apply to pending applications allotted to Interim Board with the following modifications, namely:—

(i) for the words "Settlement Commission", wherever they occur, the words "Interim Board" shall be substituted;
(ii) for the word "Bench", the words "Interim Board" shall be substituted;

(iii) for the purposes of this section, the date referred to in sub-section (2) of section 245M shall be deemed to be date on which the application was made under section 245C and received by the Interim Board;

[(iv) where the time-limit for amending any order or filing of rectification application under sub-section (6B) expires on or after the 1st day of February, 2021, but before the 1st day of February, 2022, such time-limit shall be extended to the 30th day of September, 2023.]

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Option to withdraw pending application

245M. *(1) *****************

(2) Where the option under sub-section (1) is not exercised by the assessee within the time allowed under that sub-section, the pending application shall be deemed to have been received by the Interim Board on the date on which such application is allotted or transferred to the Interim Board under sub-section (3).

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18 On 18th March 2021, i.e., the date on which petitioner made its application, the law, as it stood then, entitled petitioner to make the application in terms of Section 245C of the Act.

Section 245C of the Act, on 18th March 2021, provided *"An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided:"*

The word 'case' is defined in Section 245A(b) of the Act to mean case *"any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of Section 245C is made."* Explanation (iiia) to Section 245A(b) of the Act, which is applicable to this case at hand provides that *"a proceeding for assessment or reassessment for any of the assessment years, referred to in clause (b) of sub-section (1) of Section 153A in case of a person referred to in Section 153A or Section 153C, shall be deemed to have commenced on the date of issue of notice initiating such proceeding and concluded on the date on which the assessment is made;"*

Therefore, as on 18th March 2021, the proceedings of petitioner for the Assessment Years 2014-15 to 2020-21 fell within the meaning of 'case' and petitioner had made a valid application as per Section 245C(1) of the Act. On 18th March 2021, there was no prohibition on petitioner to make such an application.

19 The fact that the Finance Bill, 2021 had been presented before parliament proposing to insert sub-section (5) to Section 245C of the Act, which was to provide that "*no application shall be made under this section on or after the 1st February 2021"*, could not bar petitioner from making the application on 18th March, 2021. On 18th March, 2021 the Finance Bill, 2021 did not have the force of law and was merely a Bill which may or may

not be enacted or which may be enacted in a different form. Undisputably, the Finance Bill, 2021 till the same was enacted, did not become law. Admittedly, the Finance Act, 2021 was notified with effect from 1st of April, 2021, before which petitioner had already filed a valid application which has also been accepted by the Settlement Commission.

20 The amendments made by the Finance Act, 2021, despite being retrospective in nature by their insertion being with effect from 1st February 2021, would not affect the vested right of petitioner to have the assessment of petitioner being settled as per the procedure prescribed in Chapter XIX-A of the Act. Section 245C(5) of the Act provides that *"No application shall be made under this section on or after 1st February 2021."* The words "shall be made" can only be interpreted as having effect from the date of its notification and cannot apply from an earlier date. The sub-section refers to a prohibition on an assessee from taking action, i.e., prohibition on filing an application under Section 245C of the Act. However, when an action has already been performed, the retrospective amendment cannot set at naught or prohibit the performance of the action, as, admittedly, the action has already been performed and now, cannot be taken back. Petitioner having already made an application on 18th March 2021, at which point of time, the amendment not having been on the statute, cannot by way of a retrospective amendment, be prohibited from making an application. If the legislature wanted to treat the applications, which have been filed between

1st February 2021 and 1st April 2021 as invalid and bad in law, the legislature would have instead provided that *"Any application filed under this section on or after 1st February 2021, shall be treated as null and void."* The provisions, as presently worded, cannot apply to a completed act of an assessee and hence, the application of the assessee cannot be treated as invalid.

21 In any view of the matter, the application having been validly filed, a vested right has accrued to petitioner and such vested right cannot be taken away by the legislature unless the same is done expressly or by necessary implication. It has not been so done by the amendments introduced by the Finance Act, 2021. The Hon'ble Apex Court in *Shah Sadiq & Sons* (Supra) was concerned with the issue of allowability of carry forward and set off speculation loss. As per the Income Tax Act, 1922, set off of the loss was allowed indefinitely. In the Income Tax Act, 1961, however, a time limit had been prescribed for such set off of carry forward loss. The Hon'ble Apex Court held that assessee had a vested right in the year of loss to carry it forward and set it off against subsequent business profit and such vested right has not been taken away in the subsequent amendment, either by express words or by necessary implication. The Hon'ble Apex Court, accordingly, held that assessee would be entitled to set off of the earlier speculation loss against the profits even after the 1961 Act. In our view, *Shah Sadiq & Sons* (Supra) supports the view that a right

which had accrued to approach the Settlement Commission till the notification of the Finance Act, 2021 on 1st April 2021 stood vested in the eligible assessees and the said rights continued to be capable of being enforced not with standing the amendment of the relevant provisions. In the present case also, assessee (petitioner) having filed a valid application, has a vested right to be entitled to the process of settlement for determination of income of petitioner for the years of which such application has been made. Therefore, the amendment in Chapter XIX would not render the application of petitioner invalid or bad in law. Further it is not the case of petitioner that petitioner has a vested right to be adjudicated by the Settlement Commission as per the erstwhile provisions. Petitioner's case is that as the application of petitioner has been validly filed, petitioner has a vested right to the extent that petitioner's application being treated as a valid and pending application, which should be considered and adjudicated as per the amended law by the Interim Board.

22 The decision of the Hon'ble Apex Court in the case of *Howrah Municipal Corporation & Ors.* (Supra) relied upon by Mr. Suresh Kumar would not be applicable to the facts of the present case. In the said case, respondent-company (*Ganges Rope*) had applied for sanction for construction of a complex for 7 floors. As the sanction was not granted within the prescribed period, *Ganges Rope* approached the High Court. The

High Court ultimately directed the Corporation to grant sanction upto 4th floor. The High Court further held that *Ganges Rope* would be at liberty to apply for further sanction if the same was permissible at a later date. Before *Ganges Rope* could apply for further sanction, the State Government amended the building rules restricting the height of the building to the prescribed level depending upon the width of the street. In view of the amended rules, *Ganges Rope* was not entitled to sanction of the balance floors. Ganges Rope argued before the Hon'ble Apex Court that it (*Ganges Rope*) had a vested right of its further application being considered on the basis of the building rules as they stood prior to the amendment of the building rules. The Hon'ble Apex Court rejected the contention of *Ganges Rope* holding that the order of the High Court did not create a vested right in favour of *Ganges Rope*. The Hon'ble Apex Court held that the word "vest" has acquired a meaning as "an absolute or indivisible right". The Hon'ble Apex Court also noted that the vested right cannot be countenanced against public interests and convenience which are sought to be served by amendment of the building rules and the resolution of the Corporation issued thereupon. Therefore, the issue before the Hon'ble Apex Court was completely different; as firstly, the Hon'ble Apex Court was not concerned with a case of retrospective amendment and, secondly, the Hon'ble Apex Court came to conclusion that the order of the High Court did not result in a vested right to *Ganges Rope*. However, in the present case, petitioner would fulfill the definition of vested right as expressed by the

Hon'ble Apex Court. Petitioner had already filed an application which has been accepted as a valid application on the date of making such application which has given petitioner an absolute and indefeasible right to the process of settlement. Accordingly, the decision relied on by Mr. Suresh Kumar will have no application on the facts of the present case and the enunciation of law supports the case of petitioner.

23 The contention on behalf of State that the settlement itself is concession and therefore, petitioner cannot claim any vested right [as held in *Jain Metal Rolling Mills* (Supra)] cannot be accepted. The orders passed by IBSC or the Settlement Commission may have the trappings of a concession, but the same is exercised by the State through a statutory regime, with the assessees being entitled to approach the authority seeking such a concession. The assessees have a statutory right to approach the Settlement Commission. Therefore, in our view, though the State had the power to bring amendment with retrospective effect, it cannot take away vested right, unless the statute expressly or by necessary intendment took away the right.

24 As regards the notification dated 28th September 2021 issued by the CBDT under Section 192(2)(b) of the Act, the date for making application has been extended by the said notification to 30th September 2021, which is clearly within the scope of the powers of the CBDT under Section 119 of the Act. Section 119 of the Act provides that the Board may

from time to time, issue such orders, instructions and directions to other Income Tax Authorities as it may be deemed fit for proper administration of this Act. The provisions of the section have been interpreted by the Hon'ble Apex Court in *UCO Bank* (Supra) to mean that the Board is entitled to tone down the rigours of law by issuing circulars under Section 119 of the Act and such circulars would be binding on Income Tax Authorities. A circular, however, cannot impose on a taxpayer a burden higher than what the Act itself, on a true interpretation, envisages. Therefore, the Board had power to extend the time limit for making an application to 30th September 2021.

However, to the extent it lays down an additional condition, i.e., assessee should be eligible to file an application for settlement on 31st January 2021 in paragraphs 2 and 4(i) of the impugned notification, in our view, is beyond the scope of the power of CBDT as per Section 119 of the Act. There is no provision in the Act providing a cut off date with respect to an assessee being eligible to make an application under Section 245C of the Act. Hence, such a condition in the impugned notification is clearly invalid and bad in law.

The date on which an assessee becomes eligible to make an application and the date on which the assessee makes an application are two different things and the Act only provides a cut off date for the latter and not the former. Section 245C of the Act as amended by the Finance Act, 2021, provides that an application shall not be made after 1st February 2021, i.e., cut off date for making an application. However, there is no

provision in the Act with respect to the cut off date for an assessee to be eligible to make an application. Further, there is no amendment to the definition of "case" in Section 245A(b) read with the Explanation, which would affect the eligibility of petitioner to file an application before the Settlement Commission between the period 1st February 2021 and 31st March 2021. Hence, the impugned notification, to that extent, is invalid and bad in law.

25 As the Board does not have the power to provide an additional condition of date of eligibility for making application for settlement (because no such date is prescribed in the Act), paragraphs 2 and 4(i) of the impugned notification to the extent that it provides that only those assessees, who are eligible to file applications on 31st January 2021 can make an application up to 30th September, 2021 is invalid and bad in law.

26 Sections 245AA, 245D(9) and 245M(2) of the Act as amended by the Finance Act, 2021 make it clear that all pending applications shall be settled by the Interim Board.

27 The eligibility of petitioner was dependent upon the notice being issued by respondent no.1 under Section 153A of the Act. Respondent no.1 is not entitled to take benefit of his own delay in issuing the notice to the assessee so as to take away the right of petitioner to file an application under Section 245C. The search in petitioner's case took place on 25th July 2019 and ended on 29th August 2019. Thereafter, respondent no.1 delayed

issuing the notice under Section 153A of the Act for a period of almost 18 months. Respondent no.1 issued notice under Section 153A only on 5th February 2021. Hence, as respondent no.1 has delayed issuing the notice under Section 153A of the Act which entitled petitioner to approach the Settlement Commission, such right of petitioner to approach the Settlement Commission cannot be taken away by respondents by issuing a circular under Section 119 of the Act. If the notice under Section 153A of the Act would have been issued on or before 31st of January 2021, petitioner would have been eligible to make an application. Therefore, when the eligibility is dependent on the action of respondent no.1 to issue a notice and when respondent no.1 issues a notice after inordinate delay from the search, respondent no.1 should not be entitled to claim that petitioner has lost its right to approach the Settlement Commission on account of such delayed action of respondent no.1 itself. Hence, even otherwise, on the facts of the present case, respondent no.1 should be estopped from contesting/ contending that petitioner is not eligible for approaching the interim board for having its application settled by the appropriate authority.

28 As regards the authorities relied upon by Mr. Suresh Kumar, *Chhotabhai Jethabhai Patel & Co.* (Supra), this decision is not applicable on the facts of the present case. In this regard, as submitted by Mr. Mistri, there was in force a Provisional Collection of Tax Act, 1931 (which has since been repealed and replaced by subsequent legislation in similar

terms). The said Act provides that when a Bill to be introduced in parliament on behalf of government provides for imposition or increase of duty of custom or excise, the Central Government may cause to be inserted in the Bill a declaration that it is expedient in public interest that any provision of the Bill relating to such imposition or increase shall have immediate effect under this Act. Therefore, when a Bill is introduced in the parliament for change in the duty of custom or excise or fresh levy of duty and declaration is made in the Bill to give it immediate effect, then by virtue of the Provisional Collection of Tax Act, 1931, the Bill would become effective from the date next to the date of the introduction of the Bill. The facts before the Hon'ble Apex Court in *Chhotabhai Jethabhai Patel & Co.* (Supra) was that the Finance Bill provided for change in the levy of excise duty on unmanufactured tobacco and imposition of excise duty on *biris*. A declaration in terms of the Provisional Collection of Tax Act had been made in the Finance Bill and, therefore, the rate provided in the Bill became applicable from the next date of the Finance Bill. However, ultimately when the Act was passed, there was *inter alia* a change in the rate of duty from the rate as provided in the Finance Bill. Hence, the issue before the Hon'ble Apex Court was with respect to the validity of the collection of the additional duty, in the period between the date of the Finance Bill and the promulgation of the Finance Act and whether the assessees would be liable to pay such additional duty. Therefore, the argument of Mr. Suresh Kumar in the present case that the Finance Bill, 2021 would take effect from the

date of the Finance Bill, i.e., 1st February 2021, relying on the decision of the Hon'ble Apex Court is not justified. In the present case, the issue is with respect to the provisions of the Income Tax Act and, the effect of the Provisional Collection of Tax does not arise. Further, the questions before the Hon'ble Supreme Court were - (a) legislative competence under Entry 84 of the Union list to impose an excise duty retrospectively in the facts of the case; (b) contravention of Articles 19(1)(f), 31(1) & 31(2) of the Constitution of India; and (c) Rule 10(a) re: recovery of duty. None of the issues arise in the instant case. Hence, this decision has no bearing on the department's contention/question of the Finance Bill, 2021 becoming applicable on 1st February 2021.

29 In *Colonial Sugar* (Supra) the said decision is not applicable to the facts of the present case. In the said decision, the House of Lords has held that the parliament has power to make retrospective legislation. Further, the challenge in the said case was to the competence of the Commonwealth Parliament to impose such tax, and such tax was imposed in such a manner that it discriminated between the states. None of the aforesaid issues is the subject matter of the present petition. Therefore, the said decision is of no relevance to the present case.

30 In *Shanmugavelu* (Supra) the issue before the Hon'ble Apex Court was that whether the provisions of rule 9 sub-rule (5) of the SARFAESI Rules which provided that the bank can forfeit the earnest money

deposited by the successful bidder, if the successful bidder does not comply to the terms of the auction, was required to be “read down” in view of Sections 73 and 74 of the Indian Contract Act, 1872. The Hon’ble Apex Court concluded that Sections 73 and 74 of the Indian Contract Act, 1872 will have no application whatsoever, when it comes to forfeiture of the earnest money deposited under rule 9 sub-rule (5) of the SARFAESI Rules. With respect to the principle of “reading down” of a provision, the Hon’ble Apex Court held that when a provision is interpreted according to its plain and literal meaning, if it leads to constitutional or legal issues, the court may opt to read down the provision. Reading down involves construing the language of the provision in a manner that limits its scope or application making it consistent with constitutional or legal principles. The Court further held that rule of reading down is only for limited purpose of making a provision workable and its objective achievable. With respect to the applicability of the decision of the Hon’ble Apex Court to the present case, it is not clear what is the contention of the Revenue. The question of reading down of Section 245C(5) of the Act does not arise in the present case, as the original time limit provided to file the application of 1st February 2021 as per the section has already been extended to 30th September 2021 by the impugned Notification issued by the Board. Therefore, there is no question of reading down the provision of Section 245C(5) of the Act.

31 Further and in any case, Section 245C(5) of the Act purports to stop/deem as never having taken place the act of petitioner of filing an application, from retrospective date, when petitioner has already performed the act, (i.e., filed the application on 18th March, 2021 before the statute was amended). Hence, the literal interpretation of Section 245C (5) of the Act leads to the provision being rendered arbitrary and unreasonable and, hence, violative of Article 14 of the Constitution of India. Hence, the provision of Section 245C(5) of the Act is required to be made applicable only with effect from the notification of the Finance Act, 2021, i.e., 1st of April 2021.

32 When the Board itself feels that the date as prescribed in Section 245C(5) of the Act is required to be extended, there is no doubt that the provisions of Section 245C(5) of the Act are required to be read down. With respect to the impugned notification, the question in the present case is not of reading down of the notification, but the question is whether the notification goes beyond the provisions of the Act. If the notification goes beyond the provisions of the Act, then to that extent, the notification is clearly invalid and liable to be quashed. If, however, it is held that the notification does not impose a further condition de-hors the provisions of the Act, then the date of eligibility in the said notification is required to be read down to save it from being quashed. Therefore, the principles laid down by the Hon'ble Apex Court in *Shanmugavelu* (Supra),

in our view, clearly support the case of petitioner.

33 As regards *Pradeep Kumar Naredi* (Supra) the decision of the Single Judge of the Hon'ble Calcutta High Court upholding the validity of the impugned notification, the Division Bench of the High Court, has held that the writ petition should not have been dismissed at the admission stage and should have been heard after calling for affidavits as pure questions of law are needed to be first answered before proceeding into factual matrix. The Division Bench has also granted stay on the notices issued by the Assessing Officers in the said matter. The Hon'ble Madras High Court in the case of *Jain Metal Rolling Mills* (Supra) has also considered the decision of the Hon'ble Single Judge of the Hon'ble Calcutta High Court.

The Single Judge of the Hon'ble Calcutta High Court has merely considered the validity of the impugned notification only on the limited ground of the alleged discrimination in exercise of power under Section 119(2)(b) of the Act and not on all the issued raised in the present petition and, hence, the decision is not a precedent on the said issue.

34 Retrospective legislation cannot affect the vested rights. When the Department has extended the last date from 1st February 2021 to 30th September 2021, it can only extend the deadline but cannot introduce a new concept of eligibility as on 1st February 2021 which is not there in the Act itself. Though the CBDT relaxed the rigours of the provisions of the Act for the benefit of assessees, it is not open to the CBDT to put in new rigours

or impediments to the rights of an assessee in a Press Release or a notification which is contrary to the provisions of the Act. Though the legislature has the power to make laws with retrospective effect, that power cannot be used to deprive a person of an accrued right vested in him under a statute or under the Constitution. Sub-section (5) of Section 245C of the Act, even though inserted with retrospective effect from 1st February 2021, can be given effect to only after the date when the assent of the Hon'ble President of India was received to promulgate the Finance Act, 2021. Sub-section (5) of Section 245C of the Act provides that no application shall be made under this section on and after 1st February 2021. Petitioner had already made the application on 18th March 2021 when sub-section (5) was not in the statute and hence, petitioner had made the valid application as per the provisions of the Act. The purport of sub-section (5) is not to make an application already filed after 1st February 2021 as invalid but it should be read as no application shall be made after 1st February 2021 once the assent of the Hon'ble President of India has been received. But before receipt of the assent any application made by an assessee will not be hit by sub-section (5) of Section 245C of the Act.

35 In the circumstances, (a) the notice dated 16th September 2021 is hereby quashed and set aside; (b) the impugned notification dated 28th September 2021 in so far as it seeks to make only those assessees eligible to file application before the Settlement Commission who were

eligible as on 31st January 2021 is held invalid; and (c) the application filed by petitioner before respondent no.3 to be considered and disposed in accordance with law.

(DR. NEELA GOKHALE, J.) (K. R. SHRIRAM, J.)