

Bar on Subsequent Application to Income Tax Settlement Commission: Conflict between Legislative Intention and Judicial View



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The scheme of Settlement of cases under the Income Tax Act'1961 is governed by Sections 245A to 245M contained in "Chapter XIX-A: Settlement of Cases".

In the common parlance, it is believed that the settlement of cases is a one time opportunity in the life time of such applicant (now also includes its related person w.e.f. 01-06-2015).

In the quest of academic learning a question arises so far as what is the intention of legislature and the legal position in this regard - as to whether an applicant is debarred from making subsequent application before the Income Tax Settlement Commission or not. Let us have an academic outlook towards it.

Section 245K imposes a bar on subsequent application of cases. For the sake of brevity and understanding, Section 245K is reproduced hereinunder with the amendment notes:-

“

⁶¹[***Bar on subsequent application for settlement.***

⁶² **245K.** (1) Where—

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- (i) *an order of settlement passed under sub-section (4) of section 245D provides for the imposition of a penalty on the person who made the application under section 245C for settlement, on the ground of concealment of particulars of his income; or*
- (ii) *after the passing of an order of settlement under the said sub-section (4) in relation to a case, such person is convicted of any offence under Chapter XXII in relation to that case; or*
- (iii) *the case of such person was sent back to the Assessing Officer by the Settlement Commission on or before the 1st day of June, 2002,*

then, ⁶³[he or any person related to such person (herein referred to as related person) shall not be entitled to apply] for settlement under section 245C in relation to any other matter.

(2) Where a person has made an application under section 245C on or after the 1st day of June, 2007 and if such application has been allowed to be proceeded with under sub-section (1) of section 245D, such person ⁶⁴[or any related person shall not be subsequently entitled] to make an application under section 245C.]

⁶⁵*[Explanation.—For the purposes of this section, "related person" with respect to a person means,—*

- (i) *where such person is an individual, any company in which such person holds more than fifty per cent of the shares or voting rights at any time, or any firm or association of persons or body of individuals in which such person is entitled to more than fifty per cent of the profits at any time, or any Hindu undivided family in which such person is a karta;*
- (ii) *where such person is a company, any individual who held more than fifty per cent of the shares or voting rights in such company at any time before the date of application before the Settlement Commission by such person;*
- (iii) *where such person is a firm or association of persons or body of individuals, any individual who was entitled to more than fifty per cent of the profits in such firm, association of persons*

or body of individuals, at any time before the date of application before the Settlement Commission by such person;

(iv) where such person is a Hindu undivided family, the karta of that Hindu undivided family.]

Amendment Notes

61. Substituted by the Finance Act, 2007, w.e.f. 1-6-2007. Prior to its substitution, section 245K, as amended by the Finance Act, 1987, w.e.f. 1-6-1987 and Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1988.

62. For relevant case laws, see Taxmann's Master Guide to Income-tax Act.

63. Substituted for "he shall not be entitled to apply" by the Finance Act, 2015, w.e.f. 1-6-2015.

64. Substituted for "shall not be subsequently entitled" by the Finance Act, 2015, w.e.f. 1-6-2015.

65. Inserted by the Finance Act, 2015, w.e.f. 1-6-2015.

Thus by perusal of Amendment Note 61 above, it can be seen that Section 245K has been substituted in place of erstwhile Section 245K by the Finance Act, 2007, w.e.f. 1-6-2007. Prior to its substitution, section 245K, as amended by the Finance Act, 1987, w.e.f. 1-6-1987 and Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1988.

Let us also go through the erstwhile Section 245K as was in the Income Tax Act prior to 01-06-2007, the same is reproduced herein under:-

"Bar on subsequent application for settlement in certain cases.

245K. Where,—

(i) an order of settlement passed under sub-section (4) of section 245D provides for the imposition of a penalty on the person who made the application under section 245C for settlement, on the ground of concealment of particulars of his income; or

(ii) after the passing of an order of settlement under the said sub-section (4) in relation to a case, such person is convicted of any offence under Chapter XXII in relation to that case; or

(iii) the case of such person is sent back to the Assessing Officer by the Settlement Commission under section 245HA,

then, he shall not be entitled to apply for settlement under section 245C in relation to any other matter."

At the outset, it is pertinent to note that on comparison of pre substituted Section 245K with the newly substituted Section 245K, the very first striking difference emerges is that the pre substituted Section 245K open up with heading "**Bar on subsequent application for settlement in certain cases**". However, the substituted Section 245K w.e.f. 01-06-2007, open up with a heading "**Bar on subsequent application for settlement**".

Therefore, the word "in certain cases" have been omitted in the heading of Section 245K w.e.f. 01-06-2007.

Further Section 245K(2) was introduced for the first time w.e.f. 01-06-2007, which mandates that where a person who has made an application under section 245C on or after the 1st day of June, 2007 and if such application has been allowed to be proceeded

with under sub-section (1) of section 245D, such person (now also any related person, inserted w.e.f.01-06-2015) shall not be subsequently entitled to make an application under section 245C.

At this juncture, it is pertinent to go through the Memorandum explaining the provisions of Finance Bill by virtue of which Section 245K was substituted w.e.f. 01-06-2007. The relevant extract of the memorandum is reproduced hereinunder:-

"

REVISED SETTLEMENT SCHEME

Chapter XIX-A of the Income-tax Act contains provisions relating to settlement of cases by the Settlement Commission. With a view to avoid delay in determining the tax liability of an assessee which is caused because of factors like duplication of proceedings, absence of statutory time frame for settling the case, and also with a view to streamline the proceedings before the Settlement Commission, it is proposed to amend the provisions of said Chapter XIX-A of the Income-tax Act. The important changes proposed to be made are—

.....

(xii) It is also proposed to provide that after 1.6.2007, an assessee can apply for settlement only once during his lifetime. For this purpose, an application which was not admitted shall not be deemed to be an application;

.....

"

Therefore, the legislative intent is clear that w.e.f. 01-06-2007 so far as an assessee can apply for settlement only once during his lifetime.

Reliance can also be placed on the FAQ No.1 placed in Chapter 5 of the Handbook on Effective Handling of cases before the Income

Tax Settlement Commission released by the Central Board of Direct Taxes. The FAQ No. 1 is reproduced herein under:-

“

1. How many times can a person file settlement application?

A person can file application only once in his lifetime. The Finance Act, 2007 has introduced sub-section (2) in section 245K of the Act w.e.f. 1.6.2007, which is reproduced as under:-

“(2) Where a person has made an application under section 245C on or after the 1st day of June, 2007 and if such application has been allowed to be proceeded with under sub-section (1) of section 245D, such person shall not be subsequently entitled to make an application under section 245C.”

The meaning of this section has been elaborated in Para – (xii) under the heading “Revised Settlement Scheme” of Memorandum to Finance Bill, 2007, which reads as under:-

“(xii) It is also proposed to provide that after 1.6.2007, an assessee can apply for settlement only once during his lifetime. For this purpose, an application which was not admitted shall not be deemed to be an application;”

(emphasis supplied)

This implies that for applications made on or after the 1st day of June, 2007 and which have been allowed to be proceeded with under Section 245D(1), the person is debarred from making any further settlement application u/s 245C(1).

”

However in a recent judgement of the Hon’ble Madras High Court in case of **Abdul Rahim V Income Tax Settlement Commission, Chennai [2018] 96 taxmann.com 571 (Madras)**, the Hon’ble Madras High Court have interpreted Section 245K(2) in a different manner altogether contrary to the legislative intent as discussed above. The Hon’ble Court held that the bar provided under section 245K(2) for making subsequent application

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under section 245C is to be construed as a bar in respect of such assessment year, which is already subject matter in earlier application, and not in respect of any future application in respect of any other assessment year/years which was not a subject matter of application already filed under section 245C which was allowed to be proceeded with under sub-section (1) of section 245D. In other words, the court impliedly held that the assessee can file subsequent settlement applications for other assessment years which were not a subject matter in earlier settlement applications which were allowed to be proceeded u/s 245D(1) of the act, **thereby allowing the opportunity of settlement more than once in a lifetime of an assessee.**

In view of the Hon'ble Court, Substituted Section 245K of the act w.e.f. 01-06-2007, contains two categories therein for imposing bar on subsequent application for settlement. Sub-section (1) of Section 245K(1) deals with first category consisting of three types of cases i.e., where an order of settlement passed under Section 245D(4) provides for imposition of penalty on the ground of concealment of particulars of income or if a person who made such application is convicted of any offence under Chapter XXII in relation to that case, after passing of order of settlement under Section 245D(4) or if the case of such person is sent back to the Assessing Officer by the Commission on or before the 1st day of June, 2002. In respect of those three cases which form first category under Section 245K(1), neither the applicant nor any person relating to such person shall be entitled to apply further for settlement under section 245C **in relation to "any other matter"**.

Therefore, on falling under any of the clauses of Section 245K(1), it is evident that a total bar or prohibition is imposed against the said person or any person related to such person in making any application in future for settlement under section 245C not only in

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relation to the subject matter case but also in respect of any other matter.

Further, the Hon'ble Court held that the bar imposed under sub-Section (2) of Section 245K stands on a different footing. Under this category, a person or related person is barred from making an application under Section 245C, if his earlier application filed under the said provision has been allowed to be proceeded with under section 245D(1). **Here, the phrase "any other matter" as contemplated under section 245K(1) is conspicuously absent or omitted {Emphasis Supplied}**. The court held that the bar stipulated under section 245K(2) is to be read along with Section 245C in order to find out whether such bar is against another application under section 245C in respect of that particular assessment year, which is the subject matter in the application filed already, by such person under section 245C or in respect of any application in relation to any other matter, as specifically provided under section 245K(1). Section 245C deals with an application for settlement of cases. Sub-section (1) of Section 245C permits an assessee to make an application before the Settlement Commission containing a full and true disclosure of his income etc., "at any stage of a case relating to him". In view of the court, the phrase "at any stage of a case relating to him" used under section 245C is significant, which would only indicate that the case relating to the assessee in respect of a particular assessment year, in which, a full and true disclosure of income has not been disclosed before the Assessing Officer etc.

The court interpreted that the bar provided under section 245K(2) for making subsequent application under section 245C is to be construed as a bar in respect of such assessment year, which is already the subject matter in the earlier application, and not in respect of any future application in respect of any other assessment year/years, being not the subject matter of the application already filed

under section 245C, which was allowed to be proceeded with under sub-section (1) of Section 245D.

The Hon'ble Madras High Court, also relied upon the observation made by the Apex Court in ***CIT v. Express Newspaper Ltd. [1994] 206 ITR 443/72 Taxman 438*** as follows:

Once the application is allowed to be proceeded by the Commission, the proceedings pending before any authority under the Act relating to that assessment year have to be transferred to the Commission and the entire case for that assessment year will be dealt with by the Commission itself. The words "at any stage of a case relating to him" only make it clear that the pendency of proceedings relating to that assessment year, whether before the Assessing Officer or before the appellate or revisional authority, is no bar to the filing of an application under section 245C so long as the application complies with the requirement of section 245C. (emphasis supplied)

Based on the above observations, **the Hon'ble High Court held that Section 245K(2) is not imposing total bar on subsequent application, such total bar is applicable only in respect of cases falling under Section 245K(1). The bar under Section 245K(2) is against an application in respect of the same assessment year and not on other assessment years so long as the applicant has not suffered any such disqualifications as stated under section 245K(1).**

Thus a clear conflict has arisen for times to come due to a divergent interpretation of Section 245K by the Hon'ble Madras Court as compared to the intention of the legislature. The necessary corollary of the judgement of the Hon'ble Madras court at future times to come shall be that an assessee will be permissible to opt for settlement of his cases pertaining to other assessment years which were never subjected to Settlement proceedings wherein an order u/s 245D(1) of the act has been

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passed. Therefore in view of the judgment of court as discussed above, an assessee can approach settlement commission for any number of times though for different assessment years **as against** only once in his life time as intended by the legislature.

In my considered opinion though with due respect to the judgment of the Hon'ble Madras Court, the view taken by the court does not coincide with the intent of very scheme of Settlement which was framed under Chapter XIX-A of the Income Tax Act'1961 on the recommendation of Direct Tax Enquiry Committee headed by former Chief Justice of India, Shri K. N. Wanchoo. The recommendation of the enquiry committee was to give settlement mechanism to a onetime tax evader and not to a habitual offender so that he can come up with a full and true disclosure of Income not disclosed earlier so that he can have a clean slate of all past affairs. This obviously doesn't mean such an assessee can again take the route of dishonestly for future tax disclosures while filing his tax returns. Owing to this very reason, the judgment of the Hon'ble High Court is in clash with the very intention of the Settlement Scheme as envisaged by the legislature. Therefore, it is strongly advisable that before the judgement is relied upon by such habitual tax offenders and the matter is litigated widely, the legislature should plug this loophole by suitably amending Section 245K(2) of the Income Tax Act'1961.

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