# An Interplay - Income Tax Search and Seizure and Income Tax Settlement Commission

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## Introduction:

Chapter XIX-A of the Act pertains to settlement of cases. Under sub-section (1) of section 245C of the Act, an assessee at any stage of a case relating to him can make an application for settlement in the prescribed manner.

The term 'case' has been defined in clause(b) of section 245A as to mean any proceedings of assessment under the Act of a 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 of the Act is made. Finance Act 2010 w.e.f. 01-06-2010 inserted Explanation clause (iiia) to Section 245A(b) which as under :

> " 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 the issue of conclusion of an assessment as mandated in Explanation clause (iiia) to Section 245A(b) is of wide import as an assessee can only file an application for settlement at any stage of a case relating to him though during pendency of such case. Thus, if the case is concluded, the pendency of the case ends and the doors of the Settlement Commission are closed for an assessee. In other words, if a case as defined in clause (b) of section 245A has concluded, application for settlement would not be maintainable. As per explanation (iiia) above, the definition of term 'case', the assessment under section 153A would be deemed to conclude on the date on which the assessment is made.

**Issue under consideration:**

**Whether merely "the passage" or "only service" of an assessment order shall oust the pendency of a case thereby closing the doors of Income Tax Settlement Commission**

Now a very vital question arises, as to whether merely the passage of the assessment order shall oust the pendency of such a case

**or**

Only service of assessment order shall oust the pendency of such a case.

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This is a very controversial issue owing to conflicting judgments of the courts.

Let us understand the moot issue with help of an illustration. Lets us assume that in pursuance of a search in case of Mr. X on 20-02-2018, notices were issued for A.Y.'s 12-13 to 18-19. The assessments for abovementioned years have to be framed on or before 31-12-2019 u/s 153A r.w.s 153B. Now, Mr. X being desirous to approach the ITSC, informed the AO on 01-12-2019 to keep the assessment proceedings in abeyance as he is desirous to approach the ITSC for prompt settlement of its cases. Owing to the time limitation of the assessment orders which has to be passed before 31-12-2019, the AO has passed the assessment orders on 22-12-2019, however the copy of the order was received by the assessee only on 29-12-2019. The assessee meanwhile on 26-12-2019 had filed an application to the ITSC and intimated the AO.

Now considering the factual matrix of this illustration, a question arises as to whether the pendency in the cases of Mr. X has ousted since the orders have been passed before the date of filing the application. **Or** to the contrary, since the assessment orders have not been yet received by Mr.X on the date of filing of application before ITSC, therefore can it be said that pendency very much exists and have not been ousted.

The illustration laid down above can be said to be a classic example as to what sometimes happens in the central circles. This is more likely due to the fact that as to whether to approach ITSC or not is a long drawn decision process as far as an assessee is concerned. He has to weigh both pros and cons, arrange funds for the pre payment of taxes which runs against the time limitation in which the assessment orders has to be framed u/s 153A r.w.s. 153B of the act. The AO on the other hand cannot keep the assessment proceedings in abeyance unless and until the assessee

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files an intimation before him on prescribed Form 34BA on having made an Application to ITSC u/s 245C.

The issue has been a subject matter of debate and litigation for a long time.

Having said so, on the plain reading of clause (b) of section 245A in conjunction with its explanation (iiia), it appears that as per the language used, the assessment proceedings shall conclude on the date on which the assessment is made which will oust the pendency and thereby close the doors of settlement. It is worthwhile to mention that the legislation doesn't specifically and unambiguously states that the date of conclusion is related to the date on which the assessment order is served nor to the date on which it is dispatched for service. If one therefore, were to give the plain meaning interpretation to this expression, the assessment would be deemed to be concluded on the date on which such order of assessment is passed.

It is further pertinent to mention here is that under sub section (1) of section 245C of the Act, an assessee can file an application for settlement at any stage of a case relating to him. A case means any proceeding for assessment or reassessment which may be pending before the Assessing Officer on the date of making an application for settlement. Thus pendency of assessment proceeding is of vital importance for maintaining an application under sub section (1) of section 245C of the Act. Upon an application for settlement being filed, the same would pass through various stages envisaged in section 245D of the Act. Under sub section (2) of section 245F, where an application made under section 245C has been allowed to be proceeded with under section 245D, the Settlement Commission shall, until an order is passed under subsection (4) of section 245D, have exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Ac in relation to the cases. Proviso to sub

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section (2) of Section 245F provides that where an application has been made under section 245C on or after the 1st day of June, 2007, the Settlement Commission shall have such exclusive jurisdiction from the date on which the application was made. Thus, upon making of an application before the Settlement Commission, the Assessing Officer would be, divested of his jurisdiction over the case which would vest exclusively in the Settlement Commission. Sub section (7) of section 245D however provides that where a settlement becomes void, proceedings with respect to the matters covered by the settlement shall be deemed to have been received from the stage where the application was allowed to be proceeded with by the Settlement Commission and the income-tax authority concerned, any notwithstanding anything contained in the provisions of the Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement become void.

Therefore, the statutory provisions noted above manifest intention of the legislature to vest the jurisdiction to process a case of the assessee either in the Settlement Commission or in the Assessing Officer. No sooner an application for settlement is filed under sub section (1) of section 245C of the Act, the Assessing Officer would be divested of his jurisdiction to assess the return further. The jurisdiction would vest solely and exclusively in the Settlement Commission. If for some reason as envisaged under section 245D of the Act, proceeding for settlement becomes void, under subsection (7) thereof, the proceedings before the Assessing Officer would be deemed to have revived upon which he would complete the assessment within the extended time frame provided therein. The overwhelming intention of the legislature thus is that there can be only one order concerning an assessment, be it by the Assessing Officer termed as order of assessment or by the Settlement Commission termed as settlement order. There cannot be order of assessment by Assessing Officer for the same period

for which the Commission would also pass the order of settlement.

Now, keeping in view the aforementioned legislative intent, if it is construed though only for the sake of academic purposes and arguments that the date of assessment be construed as the date on which the order is served and till such time such order is served to the assessee the pendency continues thereby enabling the assessee to approach the ITSC based on such pendency, it could lead to a conflicting situation. In such a case, as far as the department is concerned they would have already framed a valid assessment. On the other hand, the ITSC shall also take cognizance of the application so filed before it. In my considered opinion there is no provision under which the order of assessment already passed by the Assessing Officer under such a situation would be obliterated. Surely, the legislature would never bring about a situation where an order of assessment would remain on record in respect of same period for which the Settlement Commission would pass a settlement order.The statutory provisions noted above manifest intention of the legislature to vest the jurisdiction to process a case of the assessee either in the Settlement Commission or in the Assessing Officer. No sooner an application for settlement is filed under sub section (1) of section 245C of the Act, the Assessing Officer would be divested of his jurisdiction to assess the return further. The jurisdiction would vest solely and exclusively in the Settlement Commission. If for some reason as envisaged under section 245D of the Act, proceeding for settlement becomes void, under subsection (7) thereof, the proceedings before the Assessing Officer would be deemed to have revived upon which he would complete the assessment within the extended time frame provided therein. The overwhelming intention of the legislature thus is that there can be only one order concerning an assessment, be it by the Assessing Officer termed as order of assessment or by the Settlement Commission termed as settlement order. There cannot be order of assessment by Assessing Officer for the same period for which the Commission

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would also pass the order of settlement.

It further pertinent to mention that the provisions contained in "Chapter XIX-A- Settlement of Cases" were amended by Finance Act, 2007 and a Revised Settlement Scheme was put in place. The CBDT issued **CIRCULAR NO. 3/2008**, **DATED 12-3-2008** [FINANCE ACT, 2007 - EXPLANATORY NOTES ON PROVISIONS RELATING TO DIRECT TAXES].

***Explanatory Circular No. 3/2008 dated 12.03.2008 issued by CBDT*** vide para 61 (comprising sub paras 61.1 to 61.17) deals with Revised Settlement Scheme.Para 61.2 of Circular No.3 of 2008 reads:—

> *"61.2 under the existing provisions, an assessee may make an application to the Commission at any stage of the proceedings in his case pending before any Income-tax Authorities. After 31st May, 2007, an assessee can make an application to the Commission only during the pendency of the proceedings before the Assessing Officer. It is further clarified that (a) since intimation under section 143(1) is not an assessment order, there will be no bar in filing an application for settlement subsequent to receipt of an intimation under section 143(1). It is not material whether time-limit for issue of notice under section 143(2) has expired or not; (b)* ***the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant****".*

It may carefully be seen that CIRCULAR NO. 3/2008, DATED 12-3-2008 that the CBDT clarified that **the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant**.

However, thereafter the CBDT thereafter vide ***CIRCULAR NO. 16/2014 [F.NO.142/14/2007-TPL(PART)], DATED 17-11-***

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***2014,*** amended para 61.2 to state that the assessment shall be deemed to have been completed on the date on which the assessment order is passed.

The ***Circular No. 16/2014*** is reproduced herein under:-

***"****FINANCE ACT, 2007 - EXPLANATORY NOTES ON PROVISIONS RELATING TO DIRECT TAXES - AMENDMENT OF PARA 61.2 OF CIRCULAR NO.3 OF 2008, DATED 12-3-2008 RELATING TO REVISED SETTLEMENT SCHEME*

*CIRCULAR NO. 16/2014 [F.NO.142/14/2007-TPL(PART)], DATED 17-11-2014*

*Chapter XIX-A of the Income-tax Act, 1961 contains provisions relating to settlement of cases by the Income-tax Settlement Commission (ITSC). The provisions contained in the said chapter were amended by Finance Act, 2007 and a Revised Settlement Scheme was put in place. Explanatory Circular No. 3/2008 dated 12.03.2008 issued by CBDT vide para 61 (comprising sub paras 61.1 to 61.17) deals with Revised Settlement Scheme.*

*2. Para 61.2 of Circular No.3 of 2008 reads:—*

> *"61.2 under the existing provisions, an assessee may make an application to the Commission at any stage of the proceedings in his case pending before any Income-tax Authorities. After 31st May, 2007, an assessee can make an application to the Commission only during the pendency of the proceedings before the Assessing Officer. It is further clarified that (a) since intimation under section 143(1) is not an assessment order, there will be no bar in filing an application for settlement subsequent to receipt of an intimation under section 143(1). It is not material whether time-limit for issue of notice under section 143(2) has expired or not; (b) the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant".*

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*3. It has been inadvertently stated in para 61.2 of Circular No.3 of 2008 that the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant. This statement is not in consonance with the provisions contained in Explanation to clause (b) of section 245A of the Income-tax Act which, inter alia, provides that a proceeding for assessment of any assessment year shall be deemed to have concluded on the date on which the assessment is made.*

*4. In view of the above, para 61.2 of Circular No.3 of 2008 is replaced with the following with effect from the 1st day of June, 2007:—*

> *"61.2 Under the existing provisions, an assessee may make an application to the Commission at any stage of the proceedings in his case pending before any Income-tax Authorities. After 31st May, 2007, an assessee can make an application to the Commission only during the pendency of the proceedings before the Assessing Officer. It is further clarified that (a) since intimation under section 143(1) is not an assessment order, there will be no bar in filing an application for settlement subsequent to receipt of an intimation under section 143(1). It is not material whether time-limit for issue of notice under section 143(2) has expired or not;* ***(b) the assessment shall be deemed to have been completed on the date on which the assessment order is passed.****"*

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Therefore after the CBDT Circular No. 16/2014,the stand of the department is very clear so far as that the assessment shall be deemed to have been completed on the date on which the assessment is passed and not on the date when the assessment order is served. Thus, when the assessment is passed, the pendency of assessment proceedings shall be ousted which shall close the door for approaching the Income Tax Settlement Commission.

This view gathers strength from the following judicial precedents.

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- The Hon'ble Gujarat High Court in case of ***Shalibhadra Developers V Secretary [2016] 74 taxmann.com 152 (Gujarat)*** has held that for the purpose of application under section 245C(1) of the Act, a case would be pending only as long as the order of assessment is not passed. Once the assessment is made by the Assessing Officer by passing the order of assessment, the case can no longer be stated to be pending. Application for settlement would be maintainable only if filed before the said date. Date of dispatch of service of the order on the assessee would not be material for such purpose.

The brief facts of the case were as under:-

- On 7-1-2014, the assessee was subjected to search operations. Notice under section 153A came to be issued on 2-7-2014. The assessee filed the return of income in response to such notice on 27-11-2014.

- The Assessing Officer passed the assessment orders for five assessment years in question on 15-3-2016 and the orders were also sought to be served on the assessee through hand delivery on 15-3-2016. The partners of the assessee firm however, refused to accept such orders, upon which, the Inspector who had visited the office of the assessee personally, placed before the Deputy Commissioner *i.e.* the Assessing Officer his report on 16-3-2016.

- On 16-3-2016, the assessee filed application for settlement before the Settlement Commission. Before the settlement bare facts were that the order of assessment dated 15-3-2016 was served on the assessee on 21-3-2016. Thus, according to the assessee, the application for settlement having already been filed on 16-3-2016 even before the orders of assessment were passed, such application before the Settlement Commission would be maintainable. Even if such orders were passed on 15-

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3-2016, as contended by the department, since the same were not served on the assessee, the assessment proceedings would be deemed to be pending and, therefore, application for settlement would be maintainable.

- However, according to the department, as soon as the orders of assessment were passed. Irrespective of dispatch of the orders of assessment or service thereof on the assessee, application for settlement would not be maintainable.

The Hon'ble Gujarat High Court held as under:-

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- *Chapter XIXA pertains to settlement of cases. Under sub-section (1) of section 245C, an assessee at any stage of a case relating to him can make an application for settlement in the prescribed manner. The term 'case' has been defined in clause (b) of section 245A as to mean any proceedings of assessment under the Act of a 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 clause (iiia) which is relevant in this context states that a proceeding for assessment or reassessment under section 153A or 153C shall be deemed to have commenced from the date of issue of notice initiating such proceeding and concluded on the date on which assessment is made. [Para 24]*

- *In other words, if a case as defined in clause (b) of section 245A has concluded, application for settlement would not be maintainable. As per Explanation (iiia) below the definition of term 'case', the assessment under section 153A would be deemed to conclude on the date on which the assessment is made. In plain terms, the language used is the date on which the assessment is made. The date of conclusion thus is related neither to the date on which the assessment order is served nor to the date on which it is dispatched for service. If one therefore, were to give the plain meaning interpretation to this*

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*expression, the assessment would be deemed to be concluded on the date on which such order of assessment is passed. [Para 25]*

- *As is well known, all assessments under the Act come with time frame beyond which the assessments would become time-barred. Such time limit is laid down under section 153. For example under sub-section (1) of section 153, it is provided that no order of assessment shall be made under section 143 or section 144 at any time after the expiry of twenty one months from the end of the assessment year in which the income was first assessable. Under sub-section (2) of section 153, it is provided that no order of assessment, reassessment or recomputation shall be made under section 147 after the expiry of nine months from the end of the financial year in which the notice under section 148 was served. These provisions are thus framed in negative covenant providing that no order of assessment shall be made beyond a certain date. Nevertheless, these provisions use the expression 'assessment shall be made', an expression similar to one used in Explanation (iiia). In context of such time limit provisions, the issue of when an assessment can be said to have been made, has come up before various Courts. [Para 26]*

- *In context of the limitation for passing the assessment or penalty orders, the Courts have consistently taken a view that it would be sufficient for the assessing authority to pass the order of assessment or penalty. Neither its dispatch nor service would be needed to save the order from being treated as time-barred. The Courts have emphasized on the expression 'assessment made' and equated with the order of assessment being passed. In context of the settlement proceedings, identical expression has been used. An assessment would be deemed to be concluded on the date on which the assessment is made. There is no reason to interprete this expression any differently. It is true that both the expressions are used in different context. Nevertheless, there are other reasons why even otherwise, no departure can be made from what has been*

*adopted by the Courts in the context of time limit provisions for assessment contained in the Act. As noted under sub-section (1) of section 245C, an assessee can file an application for settlement at any stage of a case relating to him. A case means any proceeding for assessment or reassessment which may be pending before the Assessing Officer on the date of making an application for settlement. Thus pendency of assessment proceeding is of vital importance for maintaining an application under sub-section (1) of section 245C. Upon an application for settlement being filed, the same would pass through various stages envisaged in section 245D. Under sub-section (2) of section 245F, where an application made under section 245C has been allowed to be proceeded with under section 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of section 245D, have exclusive jurisdiction to exercise the powers and perform the functions of an Income-tax authority under the Act in relation to the cases. Proviso to sub-section (2) provides that where an application has been made under section 245C on or after the 1-6-2007, the Settlement Commission shall have such exclusive jurisdiction from the date on which the application was made. Thus, upon making of an application before the Settlement Commission, the Assessing Officer would be, divested of his jurisdiction over the case which would vest exclusively in the Settlement Commission. Sub-section (7) of section 245D however, provides that where a settlement becomes void, proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage where the application was allowed to be proceeded with by the Settlement Commission and the Income-tax authority concerned, may, notwithstanding anything contained in the provisions of the Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void. [Para 31]*

- *The statutory provisions noted above manifest intention of the legislature to vest the jurisdiction to process a case of the assessee either in the Settlement Commission or in the*

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*Assessing Officer. No sooner an application for settlement is filed under sub-section (1) of section 245C, the Assessing Officer would be divested of his jurisdiction to assess the return further. The jurisdiction would vest solely and exclusively in the Settlement Commission. If for some reason as envisaged under section 245D, proceeding for settlement becomes void, under sub-section (7) thereof, the proceedings before the Assessing Officer would be deemed to have revived upon which he would complete the assessment within the extended time frame provided therein. Thus, there can be only one order concerning an assessment, be it by the Assessing Officer termed as order of assessment or by the Settlement Commission termed as settlement order. There cannot be one order of assessment by Assessing Officer for the same period for which the Commission would also pass the order of settlement. Accepting the contention of the assessee that even if the order of assessment has been passed by the Assessing Officer, his case may still be deemed to be pending since such order was not dispatched or served, would lead to a conflicting situation. For the purpose of settlement, assessment would be deemed to be pending. For the purpose of section 143 or section 147 as the case may be, the order of assessment would be deemed to have been passed. The Settlement Commission thereafter, would be authorised to proceed and process the application for settlement and as a natural consequence, pass an order of settlement. There is no provision, under which the order of assessment already passed by the Assessing Officer under such a situation would be obliterated. Surely, the legislature would never bring about a situation where an order of assessment would remain on record in respect of same period for which the Settlement Commission would pass a settlement order. [Para 32]*

- *Between the views of Bombay High Court and Delhi High Court also there is divergence. Bombay High Court holds, the date of service of assessment order is the crucial date only after which application for settlement could not be filed. According to Delhi High Court the crucial date would be the date of dispatch of the*

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*order and not the date of its service. If such interpretation is accepted, it would lead to grave conflict. As noted, in a situation where an order of assessment is already passed, but neither dispatched nor served to the assessee, application for settlement would be maintainable, upon which, the Settlement Commission would have the exclusive jurisdiction to pass appropriate order in terms of section 245D and other provisions of the Act. At the same time order of assessment which has been passed would survive without any mechanism for either annulling such order or providing for primacy of the order of Settlement Commission. The legislature cannot and has not intended to give rise to two parallel orders pertaining to the same period of assessment by two authorities, both may be competent at the time when they were passing the orders. [Para 37]*

- *The assessee submitted that the CBDT circular cannot alter the correct legal position. However, the present conclusions have not been based on the CBDT circular dated 17-11-2014. Prior to this, earlier circular dated 1-6-2007 provided that the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant. In the circular dated 17-11-2014, it has been provided that the assessment shall be deemed to have been completed on the date on which the assessment order is passed. At best, this circular neutralised the earlier clarification of the Board that assessment shall be deemed to be complete only upon the order of assessment being served on the applicant. [Para 38]*

- *Thus, the conclusions in facts and law can be summarized as follows:*

*(1) The orders of assessment were passed by the Assessing Officer on 15-3-2016.*

*(2) They were also tendered for service to the partners of the assessee firm on the same day who refused to receive them*

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*and thus service was complete.*

*(3) For the purpose of application under section 245C(1), a case would be pending only as long as the order of assessment is not passed. Once the assessment is made by the Assessing Officer by passing the order of assessment, the case can no longer be stated to be pending. Application for settlement would be maintainable only if filed before the said date. Date of dispatch of service of the order on the assessee would not be material for such purpose. [Para 40]*

- *The petitions are dismissed. [Para 41]*

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It is pertinent to mention that the Hon'ble Supreme Court has granted a SLP against the judgement of the Gujarat High Court as above, in ***Shalibhadra Developers v. Secretary, Income-tax Settlement Commission [2018] 91 taxmann.com 272 (SC)*** though the outcome of the SLP is still pending.

The Hon'ble Gujarat High Court in case of ***PCIT V Vallabh Pesticides Ltd. [2018] 94 taxmann.com 434 (Gujarat)*** followed its earlier verdict delivered in case of *Shalibhadra Developers (supra)* and held that for purpose of maintainability of a settlement application, a case would be pending only as long as order of assessment is not passed and date of dispatch of service of order on assessee would not be material for such purposes.

However, in some recent judgments of Hon'ble Bombay and Punjab & Haryana Court, a contrary view was has also been taken and it was held that merely the passage of the assessment order shall not oust the pendency of such a case and only service of the assessment order shall oust the pendency of such a case. The judgments are laid down herein under:-

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- The Hon'ble Bombay High Court in case of ***Yashovardhan Birla V DCIT [2016] 73 taxmann.com 5 (Bombay)*** held that an assessment order for purposes of chapter XIX-A/settlement of cases can be said to have been made when it is served upon assessee concerned.

The brief facts of the case were as under:-

- On 30-3-2016, the assessee filed an application under section 245C [Chapter XIX-A] with the Settlement Commission for settlement of his cases for the assessment years 1998-99 to 2007-08.

- The revenue objected the application contending that the orders of assessment for the aforesaid assessment years were passed by the Assessing Officer on 30-3-2016 itself and assessments were no longer pending. Therefore, the application for settlement ought not to be entertained, as the jurisdictional requirement of pending assessment was not satisfied on the date when the application for settlement was filed on 30-3-2016.

- However, the orders of assessment were not served upon the assessee till 30-3-2016.

- The Commission *vide* order dated 12-4-2016 passed under section 245D(1) rejected the application for settlement holding that there was no pending assessment before the Assessing Officer on 30-3-2016, when the application for settlement was filed.

The Hon'ble Court held as under:-

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- *The core dispute raised before the Court, viz., what is the date on which the assessment is said to be made for the purpose of ousting the jurisdiction of the Commission under Chapter XIX-A to entertain an application for settlement, was a subject of consideration by the Bombay High Court in the case of CIT v. Income Tax Settlement Commission [2015] 375 ITR 483/232 Taxman 368/88 taxmann.com 264. [Para 8]*

- *In the case of Income Tax Settlement Commission (supra), the assessment order was passed on 18-3-2013 and sent by Speed Post on 18-3-2013 and necessary entry was also made on the computerized system of the department on 18-3-2013. In the meanwhile the assessee filed application for settlement before the Commission on 18-3-2013, i.e., before the assessment order was served upon it on 19-3-2013. In the above facts, the Court held that the date of service and not the date of issuance of the order would be considered to be the date on which the order of assessment was made. This was so held in the context of pending case before the Assessing Officer for the Commission to entertain the application. The said decision was also cited before the Commission. However, the Commission distinguishes it on the ground that in the aforesaid decision the Court has specifically stated that it was not required to consider any larger controversy on the effect of any amendment, which was made to the definition of word 'case'. One is not able to understand the distinction sought to be made in the context of the dispute before the Commission in the present application for settlement. The revenue very fairly stated that the amendment to the word 'case' which has been relied upon by the Commission to distinguish the above decision has no relevance to the present controversy. Thus the principle laid down by the Court in the case of Income Tax Settlement Commission (supra), viz., that assessment order is made when it is served for purposes of considering the jurisdiction of the Commission to entertain such an application is binding upon the Commission and upon the revenue. [Para 9]*

- *However, the revenue persisted in submitting that decision in the case of Income Tax Settlement Commission (supra) would not*

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*apply. This for the reason that the Court therein had only to consider whether or not service of the order passed by the Assessing Officer was complete, before the assessee therein had filed its application for settlement with the Commission. It did not have occasion to deal with the submission now being urged that Explanation (iiia) of section 245A(b), when strictly construed, would not mean service of the assessment order but would only mean making of the order. This submission in turn is supported by the Parliament making use of different words herein then that of 'service', 'issue' or 'communicated' as used in the other provisions of the Act. Therefore, this difference in language must be given a meaning and it cannot mean 'service'. These distinctions now being raised are of no avail, as the revenue had raised this very issue, viz., the assessment was not pending on the date the application of settlement was filed with the Commission in the case of Income Tax Settlement Commission (supra). [Para 10]*

- *In any event, the Rule of Law requires like cases to be decided alike. Therefore, the law of precedents. The Court in the case of Income Tax Settlement Commission (supra) has declared that for purposes of making an application for settlement, a case, i.e., an assessment would be pending till such time as the assessment order is served upon the assessee. The declaration of law by the Court is binding on all authorities within the State including the Commission. The assessee was entitled to proceed on the basis that till the service of the assessment order, the case continues to be pending with the Assessing Officer. Therefore, it was open to him to invoke the provisions of Chapter XIX-A on 30-3-2016 as till that date the assessment order was not served upon him. [Para 12]*

- *Moreover the assessee brought to the notice of the Court that even the Commission had on its website represented that an application for settlement could be filed with it till such time the assessment order is served upon the assessee. By this representation under caption 'Frequently Asked Questions' [F.A.Q.],the Commission admittedly held out that an application for settlement would be accepted till service of the assessment order. Admittedly this representation was made till the impugned order was passed on 12-*

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*4-2016. In the present facts, the assessee was entitled to act upon the above representation. It is not fair for the revenue to now take up the stand that on the proper interpretation of the provisions of law, the representation made by it is not in accordance with law. [Para 13]*

- *The revenue also sought to support the impugned order of the Commission on the basis that CBDT Circular No. 16 of 2014 which clarifies that for the purpose of Chapter XIX-A, an assessment would cease to be pending case, when an assessment order is passed. This is in substitution of the earlier Circular No. 3 of 2008, which provided that an assessment order would be said to have been made only on it being served upon the assessee for the purpose of Chapter XIX-A. There is no merit in the submission. Firstly, a CBDT Circular cannot overrule a decision of a Court of law. Secondly, this Circular was available when the Court rendered the decision in the case of Income Tax Settlement Commission (supra) and yet it does not seem to have relied upon. This possibly for the reason that a CBDT Circular interpreting a statutory provision is binding upon the Officers of the revenue only when it is beneficial to the assessee and not otherwise. [Para 14]*

- *In view of the aforesaid as the controversy involved in the instant case stands concluded by a binding decision of a co-ordinate Bench of the Court in the case of Income Tax Settlement Commission (supra) which holds that the assessment order for purposes of Chapter XIX-A can be said to have been made when it is served upon assessee concerned. This considered view of a co-ordinate Bench was rendered keeping in view the object and purpose of introducing Chapter XIX-A into the Act, i.e., Settlement provisions. [Para 16]*

- *Therefore, the impugned order of the Commission was liable to be quashed and set aside. The application for settlement required to be restored to the file of the Commission at the stage of section 245D(1). [Para 17]*

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- The Hon'ble Bombay High Court in case of ***CIT V. Income Tax Settlement Commission [2015] 58 taxmann.com 264 (Bombay).***

- The Hon'ble Punjab and Haryana High Court in case of ***M3M India Holdings (P.) Ltd. V Income Tax Settlement Commission (IT/WT) [2020] 114 taxmann.com 92 (Punjab & Haryana)*** held that assessment order for purpose of chapter XIX-A, could be said to have been made when it was served upon assessee concerned, not when it was passed and dispatched through post. The relevant part of the judgment is reproduced herein under:-

"

> *2. Brief facts are that while the assessment proceedings were pending the petitioner sent a mail to the Assessing Officer on 26.12.2018 indicating that assessment proceedings should be deferred because the petitioner intended to move the Settlement Commission. On 27.12.2018 the Assessing Officer finalized the assessment, passed the order and despatched it through post. Admittedly, before it was received or even delivered by the postal authorities the petitioner moved the application before the Settlement Commission on 28.12.2018. The Commission by the impugned order accepted the stand of the revenue that on the date of the application the assessment proceedings having been concluded, the application did not lie. These facts are undisputed.*
>
> *3. The precise contention of the counsel for the petitioner is that the assessment proceedings could not have been said to be concluded till such time as the assessment order was not served upon the Assessee. In this connection, he has relied upon CIT v. ITSC [2015] 58 taxmann.com 264/232 Taxman 368/375 ITR 483 (Bom.) followed by Yashovardhan Birla v. Dy. CIT [2016] 73 taxmann.com 5 (Bom.).*

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*In both these cases, (where also the issue was similar as in the present case), the Bombay High Court had held that the proceedings could not be said to have been concluded merely because an order had been passed or even despatched, but could be said to be concluded only when the order was served. He has further argued that the revenue has accepted this proposition of law in these cases and has allowed these judgments to become final.*

*4. Counsel for the revenue has also relied upon a decision of this Court in V.R.A. Cotton Mills (P.) Ltd. v. Union of India [2013] 33 taxmann.com 675/359 ITR 495 (Punj. & Har.) wherein the petitioner had filed its income tax return on 29.09.2009 for the assessment year 2009-2010 for the year ending 31.03.2009. Earlier a notice under section 142(1) of the Income Tax Act, 1961 (for short the Act) was issued seeking certain information. Subsequently, notice under section 143(2) was issued on 30.09.2010 and the limitation to serve that notice in that case was upto 30.09.2010. The issue before this Court was whether the date of the notice would be taken as per its service or as per its issuance. It was in those circumstances that the Court had held that for the purposes of computing the limitation of 30 days for service of notice under section 143(2) of the Act the determinative date could be the date of issue and not the date of service. In our view, this judgment is not applicable. Because there the question which had to be determined was whether the Assessing Officer had acted with due despatch within the period of limitation and this Court had held that since he had despatched the notice within the date of limitation the service thereof would be redundant. In the present case, the matter has to be viewed from the perspective of the Assessee i.e. to say when the Assessee is bound to act. It cannot be said that before the notice was even sought to be served upon the Assessee the proceedings qua him could not be said to have concluded.*

*5. Counsel for the revenue at the very outset states that he has no knowledge whether the Bombay High Court cases have been allowed to become final but he has relied upon the Gujrat High*

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*Court judgment titled as Shlibhadra Developers v. Secretary 2017 (347) ELT 25 where it was held to the contrary.*

*6. Counsel for the petitioner has refuted this argument by asserting that one of the factors which weighed with the Gujrat High Court in the case of Shlibhadra Developers (supra) was that the order was sought to be personally served upon the Assessee but the Assessee refused to accept the order, and apart therefrom, in an appeal filed by that Assessee to the Supreme Court leave has been granted.*

*7. In our considered opinion, the petition must succeed. Apart from the fact that the judgment passed in Shlibhadra Developers (supra) could be distinguished (since in that case the Assessee had refused service), what we find in the present case is that the petitioner had communicated to the Assessing Officer on 26.12.2018 itself that it was intending to move an application before the Settlement Commission.*

*8. Counsel for the revenue asserts that the Assessing Officer was working against a time constraint since limitation was to expire on 31.12.2018.*

*9. Be that as it may, in the totality of circumstances, we are inclined to follow the view of the Bombay High Court passed in Yashovardhan Birla (supra) wherein it was held as follows :—*

> *"12. In any event, the Rule of Law requires like cases to be decided alike. Therefore, the law of precedents. This Court in Income Tax Settlement Commission (supra) has declared that for purposes of making an application for settlement, a case i.e. An assessment would be pending till such time as the assessment order is served upon the assessee. The declaration of law by this Court is binding on all authorities within the State including the Commission. The petitioner was entitled to proceed on the basis that till the service of the assessment order, the case continues to be pending with the Assessing Officer. Therefore, it was open to him to invoke the provisions of Chapter XIXA of the Act on 30th March, 2016 as till that date the assessment order was not served upon him.*

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*16. However, we need not dilate on the above two decisions cited at the Bar as the controversy before this Court stands concluded by a binding decision of a co-ordinate bench of this Court in Income Tax Settlement Commission (supra) which holds that the assessment order for purposes of Chapter XIX A of the Act can be said to have been made when it is served upon assessee concerned. This considered view of a co-ordinate bench was rendered keeping in view the object and purpose of introducing Chapter XIX A into the Act i.e. Settlement provisions. We see no reason to differ from the above view.*

*17. Therefore, the impugned order dated 12th April, 2016 of the Commission being Exh.G. to the petition is quashed and set aside. The application for settlement is restored to the file of the Commission at the stage of 245D(1) of the Act. The period of 14 days as provided in section 245D(1) of the Act, will run from the date this order is first communicated by either of the parties to the Commission.*

*10. Consequently, order dated 14.02.2019 is set aside. Petition stands disposed of."*

## **Conclusion:**

Having discussed both sides of the issue and the conflicting judgments of the court with regard to the controversy viz. as to whether merely the passage of the assessment order shall oust the pendency of such a case or only service of assessment order shall oust the pendency of such a case, the matter is still open to debate with both sides of arguments. To avoid further unwarranted litigation and confusion, clarity in this regard is also required by way of a necessary specific piece of legislation or otherwise. Hopefully even otherwise the matter shall attain certain finality on the outcome of the pending SLP before the Hon'ble Supreme Court in case of *Shalibhadra Developers v. Secretary, Income-tax*

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*Settlement Commission [2018] 91 taxmann.com 272 (SC)* . Having said so, it is always advisable that the assessee's who are desirous of approaching the ITSC during the pendency of assessment proceedings should do so at earliest possible and not drag the filing of application till the very fag end which may entangle them in net of the aforementioned controversy and gamut. It has to be also kept in mind that in such late filings of the Settlement applications, the time runs against the assessing officer who is mandated to frame the assessments within limitation period as envisaged under the law.

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## ABOUT CA. MOHIT GUPTA

Mr. Mohit Gupta is a Fellow Member of the Institute of Chartered Accountants of India, a commerce graduate from prestigious Ramjas College, Delhi University and an alumni of St. Xavier's School, New Delhi. He is practicing as a Chartered Accountant for more than 15 years and managing the Direct Tax Advisory and Litigation practice of M/s. Dhanesh Gupta & Co., Chartered Accountants, New Delhi a renowned Chartered Accountancy firm in the core domain of direct taxation established in 1978.

His forte is handing Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission and other direct tax litigation matters. As on today, he has wide experience of handling Income Tax Search and Seizure Cases, representing matters before the Income Tax Settlement Commission, ITAT and other appellate tribunals. He has been contributing articles in various professional magazines/journals and addressing various seminars on topics relating to Income Tax Search and Seizure, Income Tax Settlement Commission and other allied tax matters. He has to his credit plethora of well researched articles out of which many have appeared in leading journals. In Addition to the above, Mr. Mohit Gupta is a Special Auditor of the Income Tax Department and has carried out numerous Special Audits across the country on being appointed by the Income Tax Department which have plugged tax evasions, tax base erosion and other tax manipulative practices and in turn facilitated the Income Tax Department to collect huge tax revenues. Mr. Mohit Gupta has also been appointed as Special Auditor under other tax statutes and by other Investigation Agencies of the Government of India.Mr. Mohit Gupta, authored the periodical Newsletter on Income Tax Search and Seizure. The said newsletter contained well researched write ups / articles and judicial developments on the matters of Direct Taxation. The newsletter was circulated both electronically and otherwise.

Recently, in the year 2016, Mr. Mohit Gupta have authored two comprehensive books on the Income Declaration Scheme'2016, titled as "Law Relating to Income Declaration Scheme'2016". His books provided at one place the entire gamut of the Law relating the Income Declaration Scheme '2016 and set to rest all the queries that arose before, during and after the course of making the declaration under the Income Declaration Scheme'2016. The books received an extremely overwhelming response from the readers including the proposed tax payers, tax administration, tax professionals, corporate houses and academicians. The said books were released by erstwhile Hon'ble Union Finance Minister, Shri. Arun Jaitley, Shri.Arjun Ram Meghwal, Minister of State for Finance and the Chairman of Central Board of Direct Taxes and many other dignitaries. He is about to release two comprehensive books on Income Tax Search and Seizure in few months time depending upon the normalization of the COVID situation. The release of the books have been kept on hold due to current COVID position. The first book is an in depth commentary on the Law relating to Income Tax Search and Seizure , while the second book is relating to addressal of controversial issues arising during search and seizure action, assessment and settlement commission thereupon as the case may be.

Due to his continuous desire to always rise on the learning curve, he always have a quest and quench to read more, learn more and perform even more.

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