

Assessment order dispatched by AO tantamounts to passing of order; SetCom application not maintainable

Summary – The High Court of Gujarat in a recent case of Vallabh Pesticides Ltd., (the Assessee) 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

Facts

- On 27-12-2017, the assessee filed an application for settlement of its proceedings contending that till then, the reassessment proceeding was pending. The department appeared before the Settlement Commission in response to the notice issued and took a stand that the application for settlement was not maintainable since on 26-12-2017, the Assessing Officer had already passed separate orders of assessment. However, the assessee had contended that he had filed a settlement petition before the ITSC on 27-12-2017. On 29-12-2017, the assessee received an envelope containing assessment orders stated to be passed on 26-12-2017. As per the screenshot of the 'ITD' showing the date and time of uploading the demand, it appeared that the reassessment orders had also been passed before that. As per the records available with assessee, the reassessment orders allegedly passed on 26-12-2017 were given to dispatch on 27-12-2017. In view of the above, the assessee was not able to understand as to why the reassessment orders passed on 26-12-2017 were not physically delivered to the assessee on 26-12-2017 and why they were lying idle in the office of the Assessing Officer upto next day evening. Therefore, the assessee suspected that though the demand was uploaded on 26-12-2017, the reassessment orders had not really been made till 27-12-2017. There was no reason as to why the same had not been physically served or not posted on the same day as the demand had been uploaded on 26-12-2017. The above chain of events had given birth to a suspicion that in fact the reassessment orders had not been passed on 26-12-2017. Therefore, the assessee requested the department to make available the digital audit of the computer (ITD Portal) in which the reassessment orders were typed on 26-12-2017. The assessee felt that tax was determined early and the demands were uploaded before passing detailed reassessment orders which was done on 27-12-2017.
- The Settlement Commission, by the impugned order, overruled the department's objection to the maintainability of the settlement application and held that until orders of assessment were served on the assessee, he would have a continued right to apply for settlement. However, with respect to the assessee's contention that no such orders of assessment were passed on 26-12-2017, as asserted by the department, the Commission made no conclusive declaration. The Commission did not enter into the question of the orders of assessment being actually passed on 26-12-2017 or not.
- On revenue's appeal to High Court:

Held

- The Commission committed serious error both in the decision and the decision making process. Firstly, it was the duty of the Commission to resolve the factual controversy raised by the assessee with respect to the passing of the orders of assessment on 26-12-2017, as alleged by the department. Secondly, on the consideration of legal issues also, the Commission committed a serious error. One would elaborate both these aspects hereafter.
- As noted, the assessee had contended before the Commission that the department does not appear to be correct in averring that the assessment was completed on 26-12-2017 when the Assessing Officer passed his orders of assessment. In fact, the assessee suggested that the orders were pre-dated.
- In view of the strong representation of the assessee, it was the duty of the Settlement Commission to first ascertain whether the department had in fact, passed such orders of assessment on 26-12-2017 itself. Had the Commission come to the conclusion that no such orders were passed till the assessee filed the application for settlement on 27-12-2017, the Commissioner was perfectly justified in overruling the department's objection to the maintainability of the application for settlement. However, without doing so, the Settlement Commission held that the settlement application was maintainable which was opposed to the judgment of this Court in case of *Shalibhadra Developers v. Secretary* [\[2016\] 74 taxmann.com 152/\[2017\] 245 Taxman 160](#).
- In *Shalibhadra Developers (supra)*, the Court came to the conclusion that for the purpose of application under section 245C(1), the case would be pending only as long as the order of assessment is not passed. The Court held that once the assessment is made by the Assessing Officer by passing 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. The date of dispatch or service of the order on the assessee would not be material.
- The pronouncement of law by the High Court in the said judgment in case of *Shalibhadra Developers (supra)* was unequivocal and permitted no ambiguity. The final conclusion of the Court on the law point did not rest on its conclusion on facts. In other words, the proposition laid down by the Court did not depend on any of the facts involved in the case. It was the proposition in law to be applied by Courts, Tribunals and Authorities subordinate to the High Court when parallel facts present before them.
- In the present case, in absence of any finding by the Settlement Commission that no order of assessment was passed on 26-12-2017, the Commission was bound by and duty bound to follow the judgment of the High Court. The Commission, therefore, ought to have declared the application of the assessee for settlement as not maintainable since such application was filed on 27-12-2017 and if the department was right, the orders of assessment were passed on 26-12-2017. The knowledge of the order of assessment of the assessee or its service on him were wholly inconsequential. The Settlement Commission committed a grave error in law disregarding the dictum of the High Court and instead, entertaining the application for settlement which was passed on 27-12-2017 *i.e.* after purportedly the order of assessment was made on 26-12-2017.

- This Court in case of *Shalibhadra Developers (supra)* had considered all relevant aspects of the matter before coming to legal conclusion. It was not open for the Settlement Commission to disturb such ratio of the judgment of the High Court. If the Settlement Commission had noticed a judgment of the larger Bench of the same High court or a judgment of the Supreme Court which, under identical situation, laid down law to the contrary, it was open for the Settlement Commission to record that the judgment of the High Court in case of *Shalibhadra Developers (supra)* was rendered per *incuriam*. Except for this proposition, it was simply not open for the Settlement Commission to disturb the conclusions of the High Court on law points reached after detailed consideration.
- One more reason which prompted the Commission to disregard the judgment of the High Court strangely was that the approach of the Settlement Commission should be on a different plank and that the opportunity to approach the Settlement Commission should not be denied on mere technical ground. One fails to understand what the Commission sought to convey by these observations.
- To conclude this issue, one records displeasure about the manner in which, the Settlement Commission has disregarded a binding judgment of the High Court seeking to distinguish when facts simply did not permit any such distinction. As an authority subordinate to the High Court the duty of the Commission would always be to apply the law as is laid down by the High Court. One expects that the Commission in future would bear in mind these words.
- Coming to the factual dispute about the orders of assessment being actually passed on 26-12-2017 itself or not, the Commission has given no finding. One cannot leave the assessee without remedy merely because the Commission chose not to examine such an issue though raised by the assessee. The revenue was not correct in contending that in absence of any challenge to the order of the Commission by the assessee, the Court cannot examine such a grievance. It is the fundamental principle of law that a judgment creditor can support the judgment on all grounds including on the grounds which may have been held against him in the judgment under challenge. In plain terms, the assessee having succeeded before the Settlement Commission he had no occasion to challenge the order. He cannot pick up an issue which may have been decided against him and make an independent challenge when the final order is in his favour. In the present case, such an issue was not even decided against him. In fact, it was not decided at all.
- In the result, the petition is disposed of with following directions: (1) the order of assessment of Settlement Commission accepting application of this assessee is set aside; (2) the proceedings are placed before the Settlement Commission for fresh consideration from the stage of passing of the order under section 245D(2C), and (3) the Settlement Commission shall examine the assessee's contention that contrary to what is suggested by the revenue, the orders of assessment were never passed on 26-12-2017.
- The Settlement Commission shall, after ascertainment of this fact, pass fresh order bearing in mind, the observations and declaration of law by the High Court in case of *Shalibhadra Developers (supra)*. For any reason if it is not possible for the Commission to conclude this issue at this stage, the

Commissioner would be at liberty to keep such an issue open to be judged finally while passing the final order on the application for settlement.